

**The Civil Rights Implications
of
Tennessee's
Civil Asset Forfeiture
Laws and Practices**



A Report of the Tennessee Advisory
Committee to the U.S. Commission on
Civil Rights

February 2018

Letter of Transmittal

Tennessee Advisory Committee to the U.S. Commission on Civil Rights

The Tennessee Advisory Committee issues this briefing report on civil asset forfeiture in Tennessee as part of its responsibility to study and report on civil rights issues in Tennessee. This report was adopted by a vote of 11 yes to 0 no at a meeting of the Committee on February 14, 2018.

Tennessee's civil asset forfeiture law was enacted twenty years ago with laudable goals. Specifically, it aimed to deter professional criminals and combat organized crime by permitting law enforcement officials to seize and retain the assets, profits, and proceeds of criminal activity. The enacting legislation made clear that the tools provided to law enforcement through civil asset forfeiture were meant to be consistent with due process of law, protect innocent owners of property, and avoid interfering with commercially protected interests. The Committee found, however, that Tennessee's current civil asset forfeiture law, as written and applied by State officials, falls short of these goals in several respects and raises significant civil rights concerns regarding the fair and equitable administration of justice.

Tennessee's civil asset forfeiture law lacks many procedural safeguards that are commonplace in other states. Tennessee is one of only three states in the nation that require a property owner to post a cash bond before being permitted to contest the legality of a forfeiture. In addition, Tennessee law provides for limited judicial oversight and no right to legal counsel.

The Committee also found that in practice, Tennessee's civil forfeiture law raises important concerns about the disparate impact that forfeitures can have on low-income individuals and communities of color. The Committee also identified the very real potential for perverse financial incentives under Tennessee's civil forfeiture law, as law enforcement agencies are permitted to retain for their own use 100 percent of the cash, private property, and proceeds forfeited with minimal oversight as to how forfeited assets are used or spent. Recently reported incidents of actual misuse of forfeited funds by law enforcement agencies in Tennessee raise additional concerns about the need for immediate reform.

Finally, although the Tennessee General Assembly has made beneficial changes to Tennessee's civil forfeiture law in recent years—including requiring law enforcement agencies to collect and report certain specified data regarding seizures and forfeitures—the Committee finds that these recent reforms are insufficient to provide full transparency about how cash and other private property is seized and spent by law enforcement. Accordingly, the Committee recommends that more data collection, including mandatory reporting of demographic data and locations of seizures, is necessary to give the citizens of Tennessee an informed view of how civil asset forfeiture is being conducted in our State.

In light of the concerns raised through its investigation, the Committee recommends that the Tennessee General Assembly and the Governor consider the experiences of other states that have reformed their civil asset forfeiture laws to ensure due process. To that end, the Committee includes in this report recommendations for short-term, mid-term, and long-term reforms to Tennessee's civil forfeiture law. Such reforms would further the law's stated goals of protecting due process of law and the rights of innocent property owners, while ensuring the fair and equitable administration of justice within the State of Tennessee.

Respectfully submitted,
Diane Di Ianni,
Chair, Tennessee Advisory Committee

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By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. These committees are composed of state/district citizens who serve without compensation; they are tasked with advising the Commission of civil rights issues in their state/district that are within the Commission's jurisdiction. Committees are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's/district's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their state/district.

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Executive Summary

Civil asset forfeiture is a legal process used by law enforcement to take ownership of private property that is suspected of being related to criminal activity. In recent years, many jurisdictions have reformed their civil forfeiture laws to address high-profile abuses by law enforcement officials. Such reforms have frequently been aimed at reducing law enforcement's monetary incentives to forfeit property, adopting mandatory reporting requirements to improve transparency, and bolstering procedural protections to safeguard innocent owners.

The use of civil forfeiture in Tennessee has been the subject of recent and well-documented misconduct, including substantial unauthorized spending of forfeited funds by the Tennessee Department of Safety and Homeland Security. Testimony from current and former law enforcement officials also reflects that forfeitures have not been focused on “punish[ing] and deter[ring] the criminal activities of professional criminals and organized crime,” as Tennessee's forfeiture statute contemplates. Instead, civil forfeiture has been used in many instances as a means of financing new hires and to pay for additional law enforcement expenditures without having to seek funding through the standard budgetary process. Due to the absence of comprehensive data, however, a great deal remains unknown about how civil forfeiture operates in practice, even to those who are tasked with approving and overseeing its use.

A review and cross-jurisdictional comparison of Tennessee's civil forfeiture law reveals that it is among the least protective of property owners in the nation. Tennessee is one of only three states that require property owners to post a cash bond in order to begin the process of contesting a forfeiture. Given the absence of a right to counsel in civil forfeiture proceedings, and due to the narrowly restricted circumstances in which an innocent owner can obtain compensation for successfully challenging a forfeiture in Tennessee, civil forfeiture is also especially prone to abuse when the value of seized assets is low. The likelihood that civil forfeiture will be used improperly is also exacerbated significantly by the fact that law enforcement agencies are permitted to keep 100 percent of forfeited assets without meaningful independent oversight. Based on its review of the use of civil forfeiture in Tennessee, the Committee recommends that the following eight reforms be considered:

1. Require all law enforcement agencies to collect and report specified civil forfeiture data.
2. Eliminate the bonding requirement for contesting a property seizure.
3. Require that all property owners be afforded the right to court-appointed counsel in civil forfeiture cases where basic needs are at risk, such as shelter, sustenance, safety, health, transportation, or child custody.
4. Institute increased mandatory training of all law enforcement agencies utilizing civil asset forfeiture to ensure consistent application across jurisdictions and within/across departments.

5. Require that all law enforcement agencies in Tennessee deposit forfeited proceeds in the state's general fund.
6. Prohibit state and local law enforcement agencies that do not comply with minimum state standards from participating in equitable sharing of asset forfeitures with federal law enforcement.
7. Ensure meaningful judicial review of civil forfeiture proceedings, and enact a fee-shifting statute to allow innocent property owners to recover reasonable legal costs, including attorney's fees, in civil forfeiture cases if a court rules in their favor.
8. Abolish the practice of civil forfeiture for seizures valued at less than \$100,000.00, and instead utilize criminal forfeiture for these proceedings, thereby allowing traditional constitutional protections to attach.

INTRODUCTION

Ensuring the fair administration of justice and equal access to justice for every American have been priorities of the U.S. Commission on Civil Rights (“the Commission”) and its state advisory committees (SACs) since the Commission’s establishment in 1957. In recent years, the practice of civil asset forfeiture has raised important concerns about the fair and equal administration of justice for the Commission.¹

Criminal asset forfeiture refers to the formal legal process by which law enforcement agencies seize—and then keep—property that was involved in criminal activity after a defendant has been convicted of a crime.² In contrast, civil asset forfeiture enables law enforcement to seize property that is merely suspected of having been involved in criminal activity, regardless of whether or not the owner of the property has been convicted of—or even charged with—committing a crime.³ U.S. Supreme Court Justice Clarence Thomas recently noted that “[t]his system – where police can seize property with limited judicial oversight and retain it for their own use – has led to egregious and well-chronicled abuses.”⁴ According to the Commission, at the federal level, there is also bipartisan support to limit the practice.

State civil asset forfeiture laws—and local law enforcement’s use of such laws—have also been the subject of significant public concern and growing criticism in recent years.⁵ In 2016, for example, the Michigan Advisory Committee to the U.S. Commission on Civil Rights issued a report on civil asset forfeiture in the State of Michigan.⁶ In examining the use of civil forfeiture in Michigan, the Committee heard testimony from elected officials, law enforcement personnel, academic and legal professionals, community advocates, and other impacted individuals. Through this testimony, the Michigan Advisory Committee identified “a number of concerns involving the potential for disparate impact, including restrictions on due process, limited judicial oversight, a lack of right to counsel, and financial incentive for law enforcement to utilize a wide range of discretion in targeting property forfeitures.”⁷

Tennessee’s civil asset forfeiture law lacks many procedural safeguards that are commonplace in other states. It also is one of just three states that require property owners to post a cash bond before being permitted to contest the legality of a seizure and attempt to have their property

¹ U.S. Commission on Civil Rights, *The U.S. Commission on Civil Rights Disapproves of the Department of Justice’s Civil Asset Forfeiture Policy*, August 18, 2017, https://www.usccr.gov/press/2017/Statement_08-18-2017_Forfeiture.pdf.

² U.S. Department of Justice, “Types of Federal Forfeiture,” February 1, 2017, available at <https://www.justice.gov/afp/types-federal-forfeiture>.

³ *Ibid.*

⁴ *Ibid* (citing *Leonard v. Texas*, 580 U.S. _____ (2017) (Thomas, J. dissenting from denial of certiorari.)

⁵ See, e.g., U.S. Commission on Civil Rights, *Michigan Advisory Committee to the U. S. Commission on Civil Rights Releases Report: Civil Rights and Civil Asset Forfeiture in Michigan*, Oct. 5, 2016, http://www.usccr.gov/press/2016/MI_Civil%20Forfeiture%20News%20Release.pdf.

⁶ *Id.*

⁷ Michigan Advisory Committee to the U.S. Commission on Civil Rights, *Civil Rights and Civil Asset Forfeiture in Michigan*, October 2016, http://www.usccr.gov/pubs/Michigan%20Civil%20Forfeiture%20_2016.pdf.

returned.⁸ The types of property that may be seized under Tennessee’s civil forfeiture law include, without limitation, cash (no minimum amount), gift cards, lumber and tools, camping and fishing equipment, mobile phones, wallets, clothes, radios, cameras, DVDs, computer software, firearm accessories, farm equipment, jewelry, boats, office equipment, motorcycles, ATVs, cars, trucks, and other vehicles.⁹ In some instances, real property—including a person’s home—may be subject to civil forfeiture as well.¹⁰

In 2016, the Tennessee Advisory Committee to the U.S. Commission on Civil Rights (“the Committee”) voted to examine the civil rights implications of Tennessee’s civil asset forfeiture laws. Title VI of the Civil Rights Act of 1964, as amended, prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance. Additionally, Title I of the Civil Rights Act of 1964, as amended, enables individuals to seek redress for deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, including the Fourth Amendment’s prohibition against unreasonable seizures; the Fifth Amendment’s prohibition against takings of property for public use without just compensation; the Fourteenth Amendment’s guarantee of due process of law; and the Fourteenth Amendment’s mandate that states afford persons within their jurisdictions equal protection of the laws. As civil asset forfeiture necessarily includes seizures and takings of personal property,¹¹ affords citizens reduced procedural protections compared with criminal proceedings,¹² and disproportionately impacts people of color,¹³ the Committee specifically sought to examine issues regarding the fair and equal administration of justice implicated by the use of civil asset forfeiture in Tennessee.

On July 24, 2017, the Committee convened a public hearing in Nashville to take testimony regarding the civil rights implications of asset forfeiture in the State of Tennessee. The Committee heard testimony from invited panelists, including Tennessee law enforcement officials, state legislators, legal professionals, academic experts, community advocates, and individuals with experience related to civil forfeiture. Interested individuals were also invited to

⁸Lee U. McGrath, Senior Legislative Counsel, Institute for Justice, Written Statement to the Tennessee Advisory Committee to the U.S. Commission on Civil Right, July 24, 2017, pp. 1, 10 (stating that the three states are Hawaii, Rhode Island and Tennessee.)

⁹ Tenn. Code Ann. § 40-33-201.

¹⁰ Tenn. Code Ann. § 39-17-1008.

¹¹ Christopher Ingraham, *Law enforcement took more stuff from people than burglars did last year*, Washington Post (Nov. 23, 2016), https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/?utm_term=.d0c1f41ee31c (“In the United States, in 2014, more cash and property transferred hands via civil asset forfeiture than via burglary.”); Alok Ahuja, *Civil Forfeiture, Warrantless Property Seizures, and the Fourth Amendment*, 5 Yale L. & Pol’y Rev 428, 433 (1987).

¹² “Forfeiture without due process,” *Wash. Post*, Jan. 2, 2012, https://www.washingtonpost.com/opinions/forfeiture-without-due-process/2011/12/22/gIQAckn3WP_story.html?utm_term=.1f3704d71e87 (“there is something very wrong when a law enforcement officer can simply take someone’s money while providing no evidence of illicit activity”).

¹³ Rebecca Vallas, *et al.*, “Forfeiting the American Dream: How Civil Asset Forfeiture Exacerbates Hardship for Low-Income Communities and Communities of Color,” *Center for American Progress*, Apr. 1, 2016, <https://www.americanprogress.org/issues/criminal-justice/reports/2016/04/01/134495/forfeiting-the-american-dream/> (“Although civil asset forfeiture affects people of every economic status and race, a growing array of studies indicates that low-income individuals and communities of color are hit hardest. The seizing of cash, vehicles, and homes from low-income individuals and people of color not only calls law enforcement practices into question, but also exacerbates the economic struggles that already plague those communities.”)

submit written testimony regarding their experiences and viewpoints regarding Tennessee’s civil asset forfeiture laws.

In connection with its investigation, the Committee also examined new data on civil asset forfeiture in Tennessee that is now publicly available due to reforms enacted by the Tennessee General Assembly in 2016 and 2017. These recent changes require the Tennessee Department of Safety (DOS)—the state agency that oversees forfeiture proceedings in the state—to provide an annual report on the use of civil asset forfeiture in Tennessee.¹⁴ Using this newly available data, and after considering the testimony of a wide variety of stakeholders, the Committee reviewed and analyzed both the laws and administrative practices governing civil forfeiture in Tennessee and the operation of civil forfeiture in the state. The Committee also conducted additional research and a cross-jurisdictional comparison of Tennessee’s civil forfeiture practices. Based on this analysis, the Committee now submits the following findings and recommendations for statewide reform.

II. BACKGROUND

A. Tennessee’s Civil Asset Forfeiture Laws and Procedures

Civil asset forfeiture is a legal process that permits law enforcement officials to seize and retain private property if they suspect that the property is related to criminal activity. Although civil forfeiture is contingent upon suspected criminal conduct, civil forfeiture proceedings are considered civil actions against property itself, rather than criminal actions against a property owner. Consequently, the constitutional protections that traditionally apply in criminal proceedings—such as the right to an attorney, the right to a jury, and the requirement that the government establish proof of guilt beyond a reasonable doubt—do not attach.¹⁵

Civil forfeiture initially gained prominence in the 1970s and 1980s as a means of targeting drug dealers by enabling law enforcement to seize both their criminal proceeds and the property that they used to further illegal activity. At that time, the federal Comprehensive Drug Abuse and Prevention Control Act of 1970 permitted law enforcement to seize illegal narcotics and the equipment that suspected criminals used to manufacture or transport them.¹⁶ Since then, however, law enforcement’s use of civil forfeiture has expanded dramatically at both the federal and state levels to enable the use of civil forfeiture in virtually all cases of suspected criminal activity. Significantly, Congress also enacted a law permitting “equitable sharing” with state and local law enforcement, incentivizing local law enforcement agencies to participate in federal

¹⁴ Tenn. Code Ann. § 40-33-216.

¹⁵ See, e.g., *In re Tennessee Walking Horse Forfeiture Litig.*, No. W2013-02804-COA-R3CV, 2015 WL 1636704, at *3 (Tenn. Ct. App. Apr. 8, 2015 (“In Tennessee, a forfeiture procedure is considered a civil, in rem proceeding. According to the Tennessee Supreme Court: “[F]orfeiture under Tennessee law is an action in rem. This Court has regarded forfeiture under the Tennessee statutes as an action in rem for a considerable length of time.... [I]t is the property itself which is targeted, not the owner of the property. In contrast to the in personam nature of criminal actions, in rem actions are traditionally viewed as civil proceedings, with jurisdiction dependent on the seizure of a physical object.”) (quoting *Stuart v. State Department of Safety*, 963 S.W.2d 28, 33 (Tenn.1998)).

¹⁶ 21 U.S.C. §881, at: <http://www.deadiversion.usdoj.gov/21cfr/21usc/881.htm> (last accessed September 20, 2016).

forfeiture cases by permitting local law enforcement to retain a substantial portion of federally forfeited proceeds.¹⁷

Critically, states also began enacting their own forfeiture statutes to permit property to be forfeited in non-federal cases. In 1998, Tennessee adopted the first version of its current civil asset forfeiture law,¹⁸ which provides generally that any property “acquired by,” “received in violation of,” or “traceable to the proceeds from” a crime can be seized by law enforcement and is subject to forfeiture.¹⁹ The law’s expressly stated purpose, set forth at Tenn. Code Ann. § 39-11-701, is as follows:

(a) The general assembly finds and declares that an effective means of deterring criminal acts committed for financial gain is through the forfeiture of profits and proceeds acquired and accumulated as a result of such criminal activities.

(b) It is the intent of the general assembly to provide the necessary tools to law enforcement agencies and district attorneys general to punish and deter the criminal activities of professional criminals and organized crime through the unitary enforcement of effective forfeiture and penal laws. It is the intent of the general assembly, consistent with due process of law, that all property acquired and accumulated as a result of criminal offenses be forfeited to the state, and that the proceeds be used to fund further law enforcement efforts in this state.

(c) It is further the intent of the general assembly to protect bona fide interest holders and innocent owners of property under this part. It is the intent of the general assembly to provide for the forfeiture of illegal profits without unduly interfering with commercially protected interests.²⁰

A. Summary of Current Procedures of Tennessee's Civil Asset Forfeiture Law

Tennessee’s civil asset forfeiture law assigns responsibility over forfeiture proceedings to Tennessee’s Department of Safety and Homeland Security. Under Tennessee’s forfeiture law, law enforcement agents may seize a person’s property if they have probable cause to believe that the property was involved in illegal activity.²¹ Thereafter, if a forfeiture is not contested, law enforcement may keep the property that was seized.²² If a forfeiture is contested, however, law enforcement may keep the property if the state proves by a preponderance of the evidence that

¹⁷ The Comprehensive Crime Control Act, Pub. L. No. 98–473, 98 Stat. 1837 §301, et seq. (1984). *See also* U.S. Department of Justice; (“The Fund”), available at: <http://www.justice.gov/afp/fund> (last accessed September 20, 2016).

¹⁸ Public Chapter 0979 (SB1469 / HB 1621), 100th Session of the General Assembly (Tenn. 1998), available at <http://sharetn.gov.tnsosfiles.com/sos/acts/100/pub/PUBC0979.htm>.

¹⁹ Tenn. Code Ann. § 39-11-703(a).

²⁰ Tenn. Code Ann. § 39-11-701(a)-(c).

²¹ Tenn. Code Ann. § 40-33-204(3); Tenn. Code Ann. § 40-33-204(6)(c)(1).

²² Tenn. Code Ann. § 40-33-206(c).

“[t]he seized property was of a nature making its possession illegal or was used in a manner making it subject to forfeiture.”²³

Property subject to forfeiture includes, without limitation, cash of any amount, gift cards, lumber and tools, camping and fishing equipment, mobile phones, wallets, clothes, radios, cameras, DVDs, computer software, firearm accessories, farm equipment, jewelry, boats, office equipment, motorcycles, ATVs, cars, trucks, and other vehicles, and other forms of personal property.²⁴ In some instances, real property—including a person’s home—may be civilly forfeited as well.²⁵

Property may be seized without arresting or charging the owner with a crime.²⁶ Additionally, although the original purpose of Tennessee’s civil forfeiture law was to deter “professional criminals and organized crime,”²⁷ property may be seized if a person is suspected of committing even minor crimes that few would associate with professional criminality. For example, Tennessee law provides that “a vehicle is subject to seizure and forfeiture upon the arrest or citation of a person for driving while the person's driving privileges are cancelled, suspended or revoked”²⁸—a penalty that can be and frequently is triggered solely by outstanding debt.²⁹ Further, in order to forfeit a person’s vehicle under such circumstances, Tennessee law emphasizes that “[a] conviction for the criminal offense of driving while the person's driving privileges are cancelled, suspended or revoked is not required.”³⁰

Tennessee’s civil forfeiture law provides that, upon seizing a person’s property, law enforcement must provide the person in possession of the property with a receipt entitled a “Notice of Seizure.”³¹ The Notice of Seizure must contain the following:

- (1) A general description of the property seized and, if the property is money, the amount seized;
- (2) The date the property was seized and the date the notice of seizure was given to the person in possession of the seized property;
- (3) The vehicle identification number (VIN) if the property seized is a motor vehicle;

²³ Tenn. Code Ann. § 40-33-210(a)(1).

²⁴ Tenn. Code Ann. § 40-33-201.

²⁵ Tenn. Code Ann. § 39-17-1008.

²⁶ Tenn. Code Ann. § 40-33-204(3).

²⁷ Tenn. Code Ann. § 39-11-701(b).

²⁸ Tenn. Code Ann. § 55-50-504(g)(2).

²⁹ Tenn. Code Ann. § 40-24-105(b)(1) (“A license issued under title 55 for any operator or chauffeur shall be revoked by the commissioner of safety if the licensee has not paid all litigation taxes, court costs, and fines assessed as a result of disposition of any offense under the criminal laws of this state within one (1) year of the date of disposition of the offense. The license shall remain revoked until such time as the person whose license has been revoked provides proof to the commissioner of safety that all litigation taxes, court costs, and fines have been paid.”).

³⁰ Tenn. Code Ann. § 55-50-504(g)(2).

³¹ Tenn. Code Ann. § 40-33-203(c).

(4) The reason the seizing officer believes the property is subject to seizure and forfeiture;

(5) The procedure by which recovery of the property may be sought, including any time periods during which a claim for recovery must be submitted; and

(6) The consequences that will attach if no claim for recovery is filed within the applicable time period.³²

If the property seized is a vehicle or conveyance--such as an automobile or commercial or contract vehicle, the officer, by law, is required to make “reasonable efforts” to determine the owner of the property through public records.³³ The officer must also provide the person from whom the property is taken—“if known”—with an additional “Notice of Forfeiture Warrant Hearing.” This notice must state:

(1) The date, time, and court in which the seizing officer will be seeking a forfeiture warrant against the property pursuant to § 40-33-204;

(2) A statement that the person in possession is entitled to appear in court at the stated date and time to contest the issuance of a forfeiture warrant against the seized property and that this hearing shall be civil in nature pursuant to § 40-33-204(b); and,

(3) A statement that if the person in possession does not appear in court, a forfeiture warrant may be issued and the property subject to . . . forfeiture.³⁴

The seizing officer is then responsible for taking the Notice of Seizure and a Forfeiture Warrant to a local judge in order to establish probable cause for a warrant to issue. If an arrest was made at the time of the seizure, the officer making the seizure must apply for a Forfeiture Warrant by filing a sworn affidavit within five working days of the property seizure.³⁵ However, if no arrest was made at the time of the seizure, the law does not require the officer to proceed within any specific time frame.³⁶

Upon review, if the judge finds probable cause for a forfeiture, the judge signs and issues the Forfeiture Warrant.³⁷ The seizing officer then sends the paperwork to the Tennessee Department of Safety and Homeland Security (“DOS”) to commence forfeiture proceedings.³⁸ According to the DOS, “the law enforcement agency that seized the property has two (2) weeks to send the

³² *Id.*

³³ Tenn. Code Ann. § 40-33-203(b)(1)-(4).

³⁴ Tenn. Code Ann. § 40-33-203(d).

³⁵ Tenn. Code Ann. § 40-33-204(b)(2).

³⁶ Tenn. Code Ann. § 40-33-204(b)(3).

³⁷ Tenn. Code. Ann. §40-33-204(c)(1).

³⁸ Tenn. Code. Ann. §40-33-204(g).

paperwork to the Department of Safety and Homeland Security,” and “[t]he Department may not have any information on [a property owner’s] case until after that time.”³⁹

If a person with an interest in the property seeks to have the property returned, the person is required to file a petition requesting a hearing within 30 days of being notified by the applicable agency that a forfeiture warrant has issued and post a \$350.00 bond payable to the state of Tennessee.⁴⁰ In some cases—including many driving-related offenses—the DOS requires that multiple bonds be posted. If the petition is not filed in a timely manner, the property will be permanently forfeited and become the property of the seizing agency.

If a petition is filed by a person seeking to have their property returned, the case is set for a hearing by the Department of Safety before an Administrative Law Judge who is also employed by the Department of Safety. Within 30 days of receiving the petition, a Notice of Hearing must be sent to all parties who have filed a petition to inform them of the date that the case will be heard. There is, however, no specified timeframe in which the DOS must hold the hearing.

The State provides prosecuting attorneys for forfeiture hearings. Claimants may hire their own defense attorney, at their own expense, or they may choose to represent themselves. At the hearing, the State will have the burden of proving its case for forfeiture by a preponderance of the evidence.⁴¹

On the hearing date, the State’s prosecuting attorney or a representative of the law enforcement agency that seized the property may seek to negotiate a settlement of the case. Settlements typically call for a claimant to agree to forfeit a portion of the property or cash seized in exchange for the immediate return of the remainder.⁴² If a settlement is reached, the State’s Attorney prepares a Proposed Civil Settlement Agreement and Release of Liability form.⁴³ The claimant may also be required to pay the administrative costs of the proceeding, storage costs, or towing costs as part of the settlement.

According to the DOS’s standard settlement form, claimants are also required to waive future constitutional rights in order to resolve a case and have any seized property returned to them. Specifically, along with waiving all legal claims that a claimant might otherwise have as a result of any acts related to the forfeiture proceedings, the form calls for the following waiver:

CLAIMANT UNDERSTANDS THAT BY ENTERING INTO THIS SETTLEMENT AGREEMENT, AND SIGNING BELOW, HE/SHE:

* * * *

³⁹ Tennessee Department of Safety and Homeland Security, “Frequently Asked Questions,” <https://www.tn.gov/content/tn/safety/tnhp/forfeit/forfeitfaq.html#chart> (stating that the three legal offices that handle seizures are located in Memphis, Nashville, and Knoxville).

⁴⁰ Tenn. Code Ann. § 40-33-206(b)(1); Tennessee DOS, Division of Legal Services form “Petition for Hearing.”

⁴¹ Tenn. Code Ann. § 40-33-210(a).

⁴² See Tennessee Department of Safety and Homeland Security, Proposed Civil Settlement Agreement, available at https://www.tn.gov/content/dam/tn/safety/documents/Civil_Settlement_Form-East.pdf.

⁴³ *Id.*

Voluntarily waives his/her constitutional right to be free from excessive fines or cruel and unusual punishment under the federal and state constitutions as it may apply to any future criminal prosecution for those acts giving rise to this forfeiture action, or to this forfeiture proceeding;

If the complainant agrees to forfeit the settlement amount in order to have some of the property returned, a proposed Order of Compromise and Settlement is prepared by the State's Attorney. If no settlement can be reached, the case will proceed to a hearing before a DOS Administrative Law Judge. DOS Administrative Law Judges are members of the Executive Branch of Tennessee's government, rather than independent members of the judiciary. If there is a hearing, the DOS Administrative Law Judge has up to 90 days to render a decision.⁴⁴

Following a hearing, the DOS Administrative Law Judge will determine the final disposition of the property, typically by ordering that the property be sold at public auction, put into service, or returned to the claimant. The DOS Administrative Law Judge's ruling may be appealed to a court by either party within sixty days after the entry of the final order.⁴⁵ Irrespective of where the seizure occurred, appeals are perfected by filing a petition for review in the circuit or chancery court of Davidson County.⁴⁶ The appeal is subject to the narrow standard of review applicable to administrative appeals under Tennessee's Uniform Administrative Procedures Act,⁴⁷ which provides, among other things, that "the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact."⁴⁸

Public auctions of seized property are the responsibility of the law enforcement agency that seized the property. Under current Tennessee law, all proceeds from seizures and confiscations and sales made by a state agency shall be deposited in the state treasury.⁴⁹ However, all proceeds from seizures and confiscations and sales made by a county and local law enforcement agencies shall be kept at the county or municipal government, respectively and shall be used exclusively for the benefit of the seizing county or municipality law enforcement or drug education purposes.⁵⁰ Similarly, all like proceeds from activities of a judicial district drug task force shall be used exclusively for such purposes in that district.⁵¹

C. Tennessee CAF Laws as Compared to Other States

How Tennessee Compares. The nonprofit Institute for Justice analyzes state-level civil forfeiture laws and provides a letter grade for each state. According to the Institute for Justice analysis,

⁴⁴ Tennessee Department of Safety and Homeland Security, "Frequently Asked Questions," <https://www.tn.gov/content/tn/safety/tnhp/forfeit/forfeitfaq.html#chart>

⁴⁵ Tenn. Code Ann. §§ 40-33-213(b), 4-5-322(b)(1)(A).

⁴⁶ Tenn. Code Ann. § 40-33-213(c).

⁴⁷ Tenn. Code Ann. § 4-5-322(g)-(i).

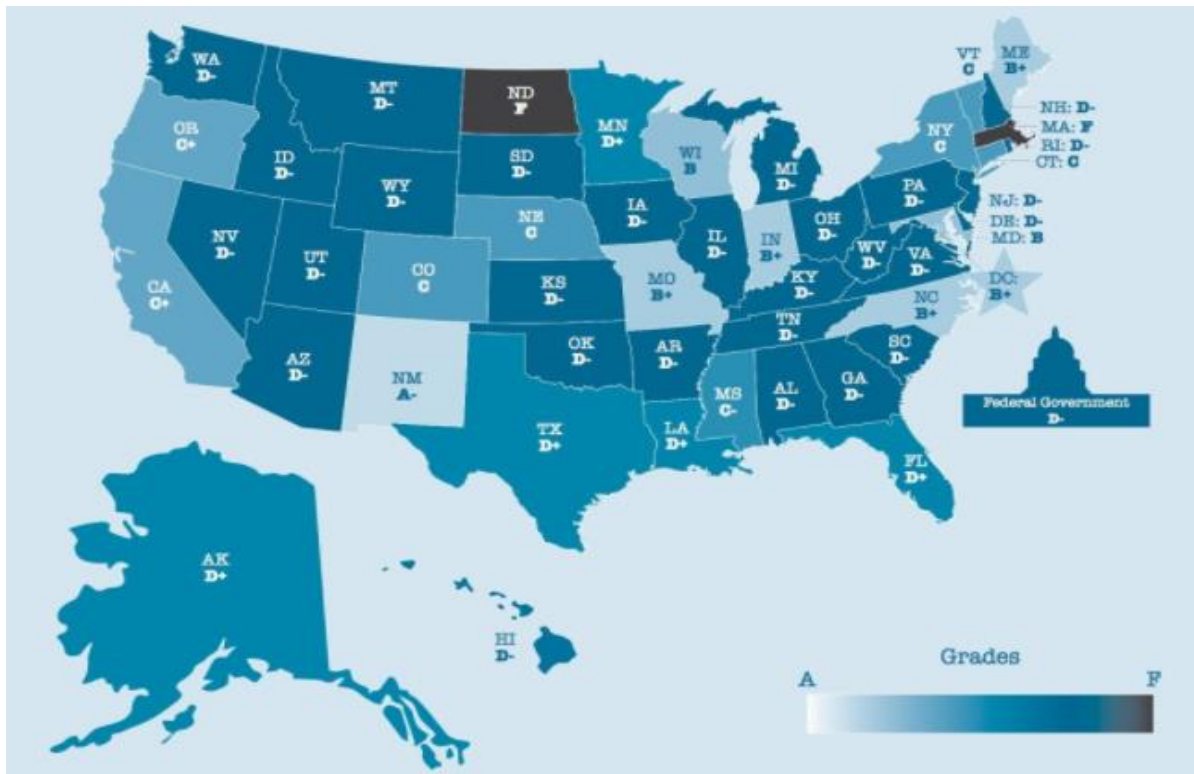
⁴⁸ Tenn. Code Ann. § 4-5-322(h)(5)(B).

⁴⁹ Tenn. Code Ann. § 40-33-211(a).

⁵⁰ *Id.*

⁵¹ *Id.*

Tennessee scores a “D-” for its laws, trailing 21 other states.⁵² Similarly, according to a recent report by the Mercatus Center, a university-based research center, Tennessee ranks as the 24th worst state in the country for its civil forfeiture laws.⁵³ Reasons for Tennessee’s low score include the facts that Tennessee law makes it easy for law enforcement to forfeit property without convicting the property owner of a crime, that Tennessee law includes few protections for innocent property owners, and that Tennessee law allows 100 percent of forfeited proceeds to be retained by law enforcement.



SOURCE: Institute for Justice Online Report, “Policing for Profit” (reprinted with permission)

Tennessee law also requires the second-lowest burden of proof of any state for law enforcement to forfeit property--proof by “a preponderance of the evidence.” Two states—Massachusetts and North Dakota—permit the government to forfeit property based on the lesser evidentiary standard of “probable cause.”⁵⁴ By contrast, a growing number of states now require a criminal conviction to forfeit property, which requires the government to prove criminality “beyond a reasonable doubt.”⁵⁵

When it comes to innocent owners—those whose property was seized when another person allegedly used it to commit a crime, “35 states place the burden of proof on owners, meaning that owners must prove they had nothing to do with the alleged crime.”⁵⁶ Five states, including

⁵² D.Carpenter, *et al.*, “Policing For Profit, The Abuse of Civil Asset Forfeiture Laws, 2d Edition” (online report), Institute for Justice, available at <http://ij.org/report/policing-for-profit/grading-state-federal-civil-forfeiture-laws/>

⁵³ See “Civil Asset Forfeiture in Tennessee 2017,” a PowerPoint presented by Tenn. State Representative Martin Daniel, District 18.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

Tennessee, only sometimes place the burden on the innocent owner, depending on the type of property involved.⁵⁷ Eleven states always place the burden of disproving innocent ownership on the government.⁵⁸

The vast majority of states allow all forfeiture proceeds to remain with law enforcement. Seven states do not allow any proceeds to go to law enforcement.⁵⁹ Other states stake out a position between these two extremes, allowing 45 percent or more of funds to be diverted back to law enforcement budgets.⁶⁰

Recent Changes in Other States. In light of widespread concerns about civil asset forfeiture and growing bipartisan consensus regarding the need for reform, in recent years, several states have made critical changes to their forfeiture laws. In their most recent legislative sessions, for example, Michigan and Illinois both repealed their requirements that property owners post a cost bond.⁶¹ Seven states and the District of Columbia modified their equitable sharing program with the federal Department of Justice (DOJ) by establishing a minimum dollar amount seized before a seizure can be sent to the DOJ for forfeiture litigation.⁶² Two states—Nebraska and New Mexico—abolished civil forfeiture altogether.⁶³ According to the Institute for Justice, 24 states have passed reforms restricting their forfeiture laws since 2014.⁶⁴

In 2015, New Mexico abolished civil forfeiture outright. While forfeiture is still permitted in the state, forfeiture proceedings are entirely criminal in nature. Thus, a criminal conviction and proof beyond a reasonable doubt are required for all forfeitures. Further, after securing a conviction, the government must prove that the property to be forfeited is connected to the crime by clear and convincing evidence. Thereafter, if property is forfeited, all proceeds are placed in the state’s general fund.⁶⁵ The following year, Nebraska joined New Mexico in abolishing civil forfeiture, opting instead for criminal forfeiture when dealing with personal property.⁶⁶

Other states have focused on strengthening procedural protections in forfeiture proceedings by providing a right to counsel. For example, West Virginia and South Dakota recently enacted reforms to their civil asset forfeiture laws to provide property owners with a right to counsel under circumstances where a seizure puts basic needs at risk.⁶⁷ In 2017, forfeiture reforms with similar right-to-counsel provisions were also introduced in Arizona, Delaware, Illinois, Massachusetts, and at the federal level.⁶⁸

⁵⁷ Carpenter, Institute for Justice, “Grading State & Federal Civil Forfeiture Laws,” available at <http://ij.org/report/policing-for-profit/grading-state-federal-civil-forfeiture-laws/>.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ IJ Written Testimony, at 1.

⁶² *Id.* at 2.

⁶³ C. Towns, “How to End Civil Forfeiture,” *Slate*, July 27, 2017, available at

http://www.slate.com/articles/news_and_politics/trials_and_error/2017/07/how_nebraska_and_new_mexico_banned_civil_forfeiture.html

⁶⁴ IJ Written Testimony, at 2.

⁶⁵ IJ Written Testimony, at 2 and 3.

⁶⁶ IJ Written Testimony, at 2 (citing Nebraska LB1106 (2016)).

⁶⁷ John Pollock, Coordinator, National Coalition for a Civil Right to Counsel, Written Statement for the Tennessee Advisory Committee to the U.S. Commission on Civil Rights, August 17, 2017, at 1.

⁶⁸ *Ibid.*

D. Recent Amendments to Tennessee’s Civil Asset Forfeiture Laws (2016 and 2017)

Tennessee has made modest changes to its civil forfeiture laws in recent years.⁶⁹ A bill passed in 2013 improves notice requirements for property owners whose property has been seized. Additional improvements regarding data collection and reporting were enacted in 2016 and 2017.⁷⁰

Data collection and reporting.

In 2016, Tennessee enacted legislation requiring the Department of Safety to provide an annual report on the use of civil asset forfeiture in the state. In 2017, the General Assembly passed further amendments to the reporting requirements for civil asset forfeiture. Specifically, the 2017 amendments expanded the categories of data to be included in the annual report, and they further required that data be provided for each law enforcement agency that opened a forfeiture proceeding during the previous calendar year.⁷¹ Accordingly, the DOS report on civil asset forfeiture—which is due by law on March 1st of each year—now provides information regarding all the following:

- (1) the total number of seizures effected under Tennessee’s forfeiture laws;
- (2) whether an arrest was made related to the seizure;
- (3) whether the property was ultimately forfeited or returned; and
- (4) the types of property seized.

Going forward, the DOS must publicly report the following additional data as well:

- The total number of seizure cases opened by the department;
- The number of seizure cases where an arrest was made;
- The total number of cases resulting in forfeiture;
- The types of property seized under this part and the totals of each type;
- The amount of currency seized;
- The amount of currency forfeited;
- The total number of cases which resulted in a default by the property owner;
- The total amount of currency forfeited as a result of default;
- The total number of cases which resulted in a settlement;
- The total amount of currency forfeited as a result of settlement;
- The total amount of currency returned to the property owners as a result of settlement;
- The total number of cases resulting in a hearing;
- The total number of hearings resulting in forfeiture of assets;

⁶⁹ See Public Chapter 784 (SB2029 /HB1772), 109th Session of the General Assembly (Tenn. 2016), available at <http://publications.tnsosfiles.com/acts/109/pub/pc0784.pdf> ; Public Chapter 382 (SB891 /HB1078), 108th Session of the General Assembly (Tenn. 2013), available at <http://publications.tnsosfiles.com/acts/108/pub/pc0382.pdf>; Public Chapter 861 (SB2144 /HB2176), 109th Session of the General Assembly (Tenn. 2016), available at <http://publications.tnsosfiles.com/acts/109/pub/pc0861.pdf>; Public Chapter 441 (SB0644 /HB0813), 110th Session of the General Assembly (Tenn. 2017), available at <http://publications.tnsosfiles.com/acts/110/pub/pc0441.pdf>.

⁷⁰ *Id.*

⁷¹ Tenn. Code Ann. § 40-33-216.

- The total amount of currency forfeited as a result of disposition by hearing; and
- The total amount of currency returned to the property owners as a result of a disposition by hearing.

Increased opportunity to appeal issuance of Forfeiture Warrant under certain limited circumstances.

In 2017, the General Assembly further amended the law to provide an opportunity to appeal the issuance of a Forfeiture Warrant by a person in possession, a secured party, or the owner of the property seized under certain specific conditions.⁷² First, the amendment provides for an appeal to a general sessions court where, and only where, the Forfeiture Warrant was signed by a magistrate or judicial commissioner. There is no appeal right, however, if the warrant was issued by an elected judge. Further, if an appeal is permitted, any such appeal would have to be filed within 10 days of the issuance of a Forfeiture Warrant. If no appeal is filed within the 10 days, or if the warrant was signed by an elected judge, the Notice of Seizure and the signed Forfeiture Warrant are submitted to the Legal Division for processing.

Broader geographic opportunity for appeal of final administrative ruling.

In 2017, the Tennessee legislature broadened the number of counties in which a claimant could seek judicial review of the final order of an Administrative Law Judge in a forfeiture case.⁷³ Specifically, the amendment deleted the requirement that any and all appeals of a final forfeiture ruling be appealed to the chancery or circuit courts in Davidson County, no matter where the seizure occurred throughout the state. In its place, the law now provides that, effective January 1, 2019, the appeal by an aggrieved party may be to the circuit or chancery court in one of nine specified counties.⁷⁴

E. Record-keeping and seizure statistics in Tennessee

Given the recent nature of Tennessee’s aforementioned reporting requirements, Tennessee lacks statewide data for most years. In the first required report for Fiscal Year 2014-2015, the DOS reported the following:

- There were 6,972 total seizures of property.

⁷² Tenn. Code Ann. § 40-33-204(j); Public Chapter 441 (SB0644 /HB0813), 110th Session of the General Assembly (Tenn. 2017).

⁷³ See Public Chapter 352 (SB 1001/HB 1190, 110th Session of the General Assembly (Tenn. 2017) (amending T.C.A. 40-33-213).

⁷⁴ These counties are Davidson, Washington, Knox, Hamilton, Putnam, Madison, Dyer, Lawrence, and Shelby. Public Chapter 352 (SB 1001/HB 1190, 110th Session of the General Assembly (Tenn. 2017) (amending T.C.A. 40-33-213, subsection c).

- Of the seizures, 5,750 items (approximately 83 percent) were ultimately forfeited.
- Motor vehicles—cars, trucks, motorcycles, boats, RVs, and vans—accounted for the most forfeitures and seizures, representing 88 percent of total seizures and 85 percent of total forfeitures, respectively.
- The second largest category of seizures was non-itemized miscellaneous property, representing 12 percent of seizures and 14 percent of forfeitures, respectively.
- Total cash seized during the fiscal year was \$13.5 million. Slightly more cash was actually forfeited, but this amount included forfeited currency from the previous fiscal year’s seizures.⁷⁵

Following legislative changes in 2016⁷⁶ that required DOS to report additional data on civil asset forfeiture, the first expanded data report was issued on March 1, 2017. The report provided the following information for Calendar Year 2016:⁷⁷

- There were 9,420 total seizure cases opened in the calendar year.
- 7,617 cases resulted in forfeiture, representing 81 percent of total seizures.
- The total currency seized was \$17,138,705.22.
- The total currency forfeited, including money from cases opened in previous years but closed in 2016, was \$17,298,609.72.
- There were 7,853 non-cash properties seized in 2016.
- Of those, 4,987 non-cash properties were forfeited, and 1,635 were returned. The remaining 1,231 non-cash properties seized in 2016 were still being held as of March 1, 2017.
- Vehicles—cars, trucks, motorcycles, boats, RVs/ATVs, campers and vans—accounted for the most non-cash seizures and forfeitures, representing 67 percent of the total non-cash seizures and 72 percent of the total non-cash forfeitures, respectively.
- Some categories of seized property had very low percentage of resolved cases in 2016. For example, there were 316 seizures of tools and building materials (drywall, lumber, etc.) in 2016. Of these, 24 seizures (7 percent) resulted in forfeiture, 31 seizures (9 percent) resulted in property being returned, and as of March 2017, the remaining 82.6 percent of building materials and tools seized in 2016 were still being held by the State.

F. Equitable Sharing Program and Recent Office of Inspector General Audit

Civil asset forfeitures can be effected under either state or federal law. If law enforcement agencies in Tennessee wish to seize and forfeit assets under the state’s civil forfeiture regime, they must comply with all state laws regarding the manner in which the forfeiture takes place,

⁷⁵Tennessee Department of Safety and Homeland Security, *FY 14-15 Annual Report*, p. 14, available at <https://www.tn.gov/content/dam/tn/safety/documents/14-15AnnualReport.pdf>.

⁷⁶ Tenn. Code Ann. sec. 40-33-216 (adding additional categories of information required to be reported by the Department of Safety to the Tennessee General Assembly by March 1 of each year, beginning on March 1, 2017).

⁷⁷ See Tennessee Department of Safety & Homeland Security, Legal Division / Office of General Counsel, *Annual Seizure Report as Required by T.C.A. sec. 40-33-216 for Calendar Year 2016, March 1, 2017*, pp. 2-4, herein, at Appendix 3.

including the standards of evidence required to forfeit property and how the proceeds of forfeitures may be spent.

However, civil asset forfeiture can also proceed under federal law through a program known as “equitable sharing.” Equitable sharing allows state and federal law enforcement authorities to share the proceeds of a forfeiture that results from a federal investigation or prosecution.⁷⁸ State law enforcement agencies that “directly” participate in a federal investigation or prosecution where an asset is forfeited can claim a share of the proceeds from the forfeiture. Asset forfeitures under the equitable sharing program are subject to federal law.⁷⁹

Seizures made as part of federal equitable sharing take place under a civil rather than criminal standard of proof. Authorities do not need to charge or convict an individual of a crime. They must only show by a preponderance of evidence that the property is subject to federal forfeiture.⁸⁰ As with most state laws regarding civil forfeiture, this civil standard is far less rigorous than the criminal standard of proof that requires law enforcement to prove guilt beyond a reasonable doubt.

Equitable sharing takes place along one of two pathways. State officials can seize an asset locally and turn it over to federal agencies for “adoption.” Federal agencies can decide to “adopt” an asset in circumstances “where the conduct giving rise to the seizure is in violation of federal law and where federal law provides for forfeiture.”⁸¹ Alternatively, state law enforcement authorities can seize an asset and claim a part of forfeiture proceeds where they assist the federal government as part of a joint state/federal investigation. For example, state and federal agencies might work together on investigations and asset seizures as part of a joint task force.

According to the Institute for Justice, up to 80 percent of proceeds from asset forfeitures are recouped by state and local law enforcement, leaving the remainder to be claimed by the federal government. The Institute reports that the use of the equitable sharing program has grown rapidly since its introduction in the mid-1980s. Between 2004 and 2014, for example, the equitable sharing program experienced a 17 percent increase in the rate of state and local agency participation, with over 3,000 agencies participating in the program in 2014. From 2000 to 2013,

⁷⁸ Equitable sharing is a part of the Department of Justice’s Asset Forfeiture Program. U.S. Department of Justice, *Guide to Equitable Sharing for State and Local Law Enforcement Agencies*, April 2009, pp. 3, 11, available at <https://www.justice.gov/criminal-afmls/file/794696/download>.

⁷⁹ The Department of Justice’s Asset Forfeiture Program and equitable sharing were authorized through the Comprehensive Crime Control Act 1984 (as amended), Pub. L. No. 98–473; 98 Stat. 1837 §301, et seq. (1984). For further detail on the Asset Forfeiture Fund, see U.S. Department of Justice, *The Fund*, available at <http://www.justice.gov/afp/fund> (last accessed Dec. 2, 2017). Broadly, the goal of this policy lay in seeking to seize the property and profits arising out of drug-related and white-collar criminal conduct. The law could re-distribute the profits of criminal enterprises to the victims of crime and to law enforcement agencies. U.S. Department of Justice, *Guide to Equitable Sharing for State and Local Law Enforcement Agencies* (April 2009), pp. 1-3, <https://www.justice.gov/criminal-afmls/file/794696/download>.

⁸⁰ 18 U.S.C. § 983(c)(1).

⁸¹ U.S. Department of Justice, *Guide to Equitable Sharing for State and Local Law Enforcement Agencies*, April 2009, p. 6; U.S. Department of Justice, *Policy Guidance on the Attorney General’s Order on Federal Adoption and Forfeiture of Property Seized by State and Local Law Enforcement Agencies, Policy Directive 17-1*, Jul. 19, 2017, available at <https://www.justice.gov/opa/press-release/file/982616/download>.

annual payments to state and local law enforcement more than tripled, growing from \$199 million in the year 2000 to \$643 million in 2014.⁸²

On account of these generous disbursements to state and local law enforcement, the equitable sharing program offers compelling financial incentives for state agencies to pursue civil asset seizures under federal law. It can also afford state law enforcement the choice of pursuing forfeiture under either state or under federal law. If state law does not provide a basis for asset forfeiture and federal law does or where the standards of seizure are more relaxed under federal rather than under state law, asset forfeiture under the equitable sharing program holds particular usefulness and appeal for state law enforcement agencies.

G. Equitable Sharing in Tennessee

Tennessee state and local law enforcement agencies are active participants in the equitable sharing program.⁸³ Per the Institute of Justice, Tennessee agencies received around \$69 million from the program between 2000 and 2013, averaging around \$5 million a year.⁸⁴ Over 90 percent of assets seized and forfeited under equitable sharing were through joint actions and investigations with federal agencies, meaning that the adoption process has been used only sporadically.⁸⁵

In 2017, the DOJ scrutinized and critiqued the use of equitable sharing proceeds by the Tennessee Department of Safety (DOS). Under an audit conducted by the DOJ's Office of the Inspector General, DOS was criticized for improperly using equitable sharing proceeds in violation of the rules and standards prescribed by the program.⁸⁶ The equitable sharing program requires that state and local agencies spend forfeiture proceeds on matters relating to law enforcement and also in a manner that is not seen to be extravagant or wasteful.⁸⁷ The audit noted that the Department of Safety used \$112,614 for expenses relating to catering, banquets, luncheon and retail food, rather than for the law enforcement-related purposes prescribed by the equitable sharing program.⁸⁸ It further stated that the DOS lacked "procedures for tracking and reconciling equitable sharing requests to receipts and had no separately designated account for expenditures."⁸⁹ In all, the Inspector General has proposed five recommendations to remedy the

⁸² D. Carpenter, *et al.*, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, 2nd Edition, Institute for Justice, Nov. 2015, pp. 25-30 (hereafter, "Policing for Profit").

⁸³ See Metro Nashville Police Department Lieutenant Carlos Lara, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville Public Library, July 24, 2017, transcript, p. 18; District Attorney Stephen Crump, District Attorney for Tennessee's 10th Judicial District, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville Public Library, July 24, 2017, transcript, p. 33.

⁸⁴ See also Department of Justice, "FY2014 Tennessee," <https://www.justice.gov/afp/reports-congress/fy2014-tennessee>.

⁸⁵ Lee McGrath, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville Public Library, July 24, 2017, transcript, p. 173.

⁸⁶ U.S. Department of Justice Office of the Inspector General, *Audit of the Tennessee Department of Safety and Homeland Security Equitable Sharing Program Activities Nashville*, Tennessee, Audit Division GR-40-17-006, (September 2017), pp. 6 -11, available at <https://oig.justice.gov/reports/2017/g4017006.pdf>.

⁸⁷ *Id.*, at 8.

⁸⁸ *Id.*, at 7-8, 10.

⁸⁹ *Id.*, at 6.

deficiencies identified in the audit to ensure that forfeiture proceeds are better used and accounted for in line with the program's rules and purposes.⁹⁰

⁹⁰ *Id.*, at 10-11.

III. OVERVIEW OF TESTIMONY

A. PUBLIC OFFICIALS AND OTHERS OFFER OPINIONS REGARDING CIVIL ASSET FORFEITURE IN TENNESSEE

Transcript from 7/24/17 hearing

- a. Panel One (law enforcement): pp. 9-70
- b. Panel Two (legislators): pp. 70-126
- c. Panel Three (national/state orgs): 126-178
- d. Panel Four (practitioners/academic): 178-235
- e. Panel Five (advocacy orgs): 235-247

PANEL 1—LAW ENFORCEMENT

Panelists: Glenn R. Funk (District Attorney, Nashville and Davidson County); D. Michael Dunavant (District Attorney, Tennessee’s 25th Judicial District, President Trump’s nominee for U.S. Attorney for the Western District of Tennessee); Stephen D. Crump (District Attorney, Tennessee’s 10th Judicial District); Carlos Lara (Lieutenant, Metro Nashville Police Department)

Lieutenant Carlos Lara Testimony:

Lieutenant Carlos Lara, a lieutenant over the narcotics section of the Metro Nashville Police Department’s Specialized Investigation Division, stated that his department “considers asset seizure and forfeiture as a critical tool in its criminal investigations.”⁹¹ According to Lieutenant Lara, more than 95 percent of seizures are affected by detectives, with the remainder being affected by patrol officers. Officers receive annual training on asset seizure and forfeiture.⁹² Lieutenant Lara stated that property is seized “based on an officer’s specialized training, field experience, and knowledge.”⁹³

Lieutenant Lara explained that “[r]outine traffic stops can and do create opportunities for seizing property.”⁹⁴ He stated that between 2014 and 2016, only 2.7% of seizures occurred without a criminal arrest (32 seizures out of 1170).⁹⁵ Three civilian staff members review seizures for legal compliance, and seizures get rejected if paperwork is not corrected.⁹⁶ Forfeited property is auctioned on eBid, Metro Nashville’s online public auction site.⁹⁷ Staff notify, inform, and assist

⁹¹ Lieutenant Carlos Lara, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 10-11.

⁹² *Id.*, at 12.

⁹³ *Id.*, at 11.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*, at 12.

⁹⁷ *Id.*, at 13.

persons from whom property was seized and help innocent owners retrieve property.⁹⁸ They accomplish this through phone calls, emails, texts, and letters.⁹⁹ Staff use multiple databases to locate owners of property.¹⁰⁰ Lieutenant Lara testified that Metro Nashville participates in equitable sharing with federal law enforcement.¹⁰¹

Glenn Funk Testimony:

Glenn Funk, the elected District Attorney of Nashville, testified on behalf of himself and not the Tennessee District Attorneys Conference. He stated that he has “some issues with civil asset forfeiture in Tennessee,” particularly that “whoever seizes the funds, ends up with those funds.”¹⁰² General Funk expressed concern that “we have a situation where what we’ve created is that if you do a seizure, you keep the money and you don’t have to then justify it to a legislative body, whether that’s a county commission or whether that’s the Tennessee legislature, as far as how you are going to spend it.”¹⁰³ According to General Funk, this means that “you can go out and make some seizures to justify your own salaries, your own budget, your own trips for continuing education, [and] conferences.”¹⁰⁴

General Funk stated that on his first day as Nashville’s District Attorney, he was told that \$1.7 million to \$2 million would be needed to be brought in through seizures in order to keep the drug task force in operation.¹⁰⁵ He also expressed concern that individuals were indicted or subject to forfeiture proceedings who would not otherwise have been if civil asset forfeiture were not a “cash cow.”¹⁰⁶ He stated that officers sometimes target people with high-value cars so they can forfeit them and put the cars into service.¹⁰⁷ General Funk provided these as examples of problems that arise “when we don’t have legislative oversight over the funds and assets . . . that are being seized.”¹⁰⁸ However, General Funk stated that “overall, I agree that asset forfeiture is important.”¹⁰⁹

⁹⁸ *Id.*

⁹⁹ *Id.*, at 13-14.

¹⁰⁰ *Id.*, at 17.

¹⁰¹ *Id.*, at 18.

¹⁰² Glenn Funk, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 21.

¹⁰³ *Id.*, at 21-22.

¹⁰⁴ *Id.*, at 22.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*, at 23.

¹⁰⁷ *Id.*, at 23-24.

¹⁰⁸ *Id.*, at 24.

¹⁰⁹ *Id.*, at 24-25.

Stephen D. Crump Testimony:

General Crump is the elected district attorney in Tennessee’s 10th Judicial District.¹¹⁰ He stated that civil forfeiture “requires the balance of a number of different competing interests,” including personal liberty, public safety, and intergovernmental relationships.¹¹¹

General Crump stated that in his district, his “drug task force went through a period where it was an embarrassment.”¹¹² He stated that “nobody on this panel and nobody in the legislature is going to disagree that there are issues and have been issues with civil asset forfeiture in the past.”¹¹³ Since then, however, he stated that “there has been a very robust training that has gone into law enforcement” and that every drug task force is now required to maintain training.¹¹⁴

General Crump testified that in 2016, his district made a total of 101 seizures, with 55 arrests at the time of the seizure.¹¹⁵ He stated that only five individuals were never charged. General Crump stated that a “bad faith” standard is appropriate to trigger a fee-shifting award.¹¹⁶ He also testified that “we do not believe that it’s appropriate to change the burden of proof higher than it is to actually detain someone and . . . take their liberty.”¹¹⁷ He stated that a conviction requirement would limit investigations, affect plea bargaining, and “be devastating to our attempts to corral the opioid epidemic from a law enforcement perspective.”¹¹⁸

General Crump testified that he opposed placing forfeited funds into a general fund, because “[t]he federal government will not allow any law enforcement assets where it is first taken into a general fund of any kind.”¹¹⁹ As a result, he expressed concern that “if that happens, all of the federally-shared money that goes as a part of equitable sharing with the federal government would go away.”¹²⁰

Michael Dunavant Testimony:

General Dunavant testified that he is the elected district attorney general of Tennessee’s 25th Judicial District and president of the Tennessee District Attorneys General Conference.¹²¹ He testified that he “believe[s] that the current . . . statutory framework of asset forfeiture in Tennessee under T.C.A. 39-11-701 is an adequate safeguard.”¹²² He testified that the existing

¹¹⁰ Stephen D. Crump, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 27.

¹¹¹ *Id.*

¹¹² *Id.*, at 28-29.

¹¹³ *Id.*, at 29.

¹¹⁴ *Id.*

¹¹⁵ *Id.*, at 30.

¹¹⁶ *Id.*, at 30-31.

¹¹⁷ *Id.*, at 31.

¹¹⁸ *Id.*, at 32.

¹¹⁹ *Id.*, at 33.

¹²⁰ *Id.*

¹²¹ D. Michael Dunavant, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 35.

¹²² *Id.*, at 36.

framework provides sufficient procedural and substantive due process, provides proper notice, and adequately addresses claims of innocent owners.¹²³

General Dunavant testified that the “vast majority” of forfeitures in his district have an accompanying criminal charge and that there are appropriate reasons for the minority of cases that do not.¹²⁴ As a result, he testified that he believed “a conviction-only standard would not be workable in the sense of providing true justice for people who are committing crimes for financial gain and reaping the benefits of that.”¹²⁵ He stated that “the District Attorneys Conference believes as a whole that this is an important tool to achieve justice against persons who benefit from criminal activity for financial gain.”¹²⁶

General Dunavant testified that the legislature “has also indicated that it’s fit and proper and just that those assets, when they’re forfeited, be used for law enforcement purposes.”¹²⁷ He stated that his officers need bullet proof vests and K9 units, and that “that funding is best provided not only by cities and counties in their budgets, but also by the assets that are taken from criminals.”¹²⁸

General Dunavant testified that he disagreed that there is insufficient oversight over forfeited assets.¹²⁹ He stated that “the Tennessee Comptroller does have that oversight” and that every department involved in forfeiture is audited annually.¹³⁰

PANEL 2—LEGISLATORS

Panelists: State Representative Mike Carter (R-Ooltewah); State Representative John Ray Clemmons (D-Nashville); State Representative William G. Lamberth (R-Cottontown); State Representative Martin Daniel (R-Knoxville); State Representative Harold M. Love, Jr. (D-Nashville); State Representative G. A. Hardaway (D-Memphis)

Mike Carter Testimony (R-Ooltewah):

Representative Carter testified that he was an attorney for the Hamilton County Sheriff’s Department for 19 years, served as a General Sessions judge for nine years, and then was elected state representative.¹³¹ He stated that the judiciary used to be involved early in forfeiture proceedings, that forfeiture proceedings were records, and that seizures were reviewed for

¹²³ *Id.*

¹²⁴ *Id.*, at 36-37.

¹²⁵ *Id.*, at 37.

¹²⁶ *Id.*

¹²⁷ *Id.*, at 38.

¹²⁸ *Id.*

¹²⁹ *Id.*, at 40.

¹³⁰ *Id.*

¹³¹ Mike Carter, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 71.

validity within five days.¹³² He testified that as a judge, he probably reviewed around 3,000 forfeiture proceedings.

Representative Carter testified that “I believe that there are substantial changes that need to be made to the law to add protections” for innocent owners.¹³³ He stated that with respect to the current process, his “concern with this is once you let people get in the state administrative process, they’re hung.”¹³⁴ He testified that the process is “unfair” for innocent owners, because people “do not have lawyers” and “do not have attorney’s fees to go and force the state to give [their property] back.”¹³⁵ Representative Carter provided an example of an innocent owner being subject to an unfair process.¹³⁶

Representative Carter expressed concerns that initial forfeiture proceedings are conducted “ex parte, meaning you hear only from the police officer.”¹³⁷ He said he “wanted . . . attorney’s fees added” and that he “wanted to increase the burden of proof from the simple scintilla, 51 percent civil, up to clear and convincing in those hearings.”¹³⁸

Representative Carter stated that in a recent example of forfeiture abuse, “our real problem is we had two DAs that needed to be in prison, not in office.”¹³⁹ Since the DAs at issue were thrown out, Representative Carter testified that he has not heard of additional problems.¹⁴⁰

John Ray Clemmons Testimony

(D-Nashville): Representative Clemmons testified that he believes that civil forfeiture “is a very serious issue, a civil rights issue”; one that requires “balancing the rights of law enforcement and the need for law enforcement to protect our society and ensure public safety.”¹⁴¹ However, he stated that “first and foremost, we have to ensure the civil rights and property rights of our citizens.”¹⁴² He stated that “we must focus on the citizens of Tennessee and their constitutional rights and start from there and work backwards to make sure that their rights are protected, first and foremost, before we start looking at the interest of others.”¹⁴³

¹³² *Id.*, at 71-72.

¹³³ *Id.*, at 73.

¹³⁴ *Id.*

¹³⁵ *Id.*, at 74.

¹³⁶ *Id.*, at 74-75.

¹³⁷ *Id.*, at 76.

¹³⁸ *Id.*, at 76-77.

¹³⁹ *Id.*, at 78.

¹⁴⁰ *Id.*

¹⁴¹ John Ray Clemmons, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 80-81.

¹⁴² *Id.*, at 81.

¹⁴³ *Id.*, at 82.

William G. Lamberth Testimony

(R-Cottontown): Representative Lamberth testified that “there’s a number of issues that we’ve really addressed and I think improved in Tennessee” related to forfeiture.¹⁴⁴ He stated that “what we have really done is we’ve tried to improve our procedures and improve our due-process procedures that are available to citizens that come into the system.”¹⁴⁵ Representative Lamberth testified that with respect to the burden of proof, he believes that the standard should be that “someone is innocent until proven guilty that goes through the criminal system.”¹⁴⁶

Representative Lamberth testified that in the past two legislative sessions, nine different bills have dealt with forfeiture.¹⁴⁷ He stated that “in some areas we’ve even expanded seizures, and in others we’ve greatly retracted them.”¹⁴⁸ Representative Lamberth testified that seizures have “a massive deterrent effect” on drug dealing.¹⁴⁹

Martin Daniel Testimony

(R-Knoxville): Representative Daniel testified that he represents the 18th District of Tennessee in West Knoxville.¹⁵⁰ He testified that security of property rights is often overlooked, even though it is one of the reasons for the existence of government in the first place.¹⁵¹ He stated that “with regard to civil asset forfeiture, police and the courts are actually acting to undermine the rights of citizens to own and use private property.”¹⁵²

Representative Daniel testified that he introduced a recent bill that “would have made significant changes to the civil asset forfeiture process.”¹⁵³ He stated that the bill “would have required a criminal conviction before property could be forfeited,” but that there would be “an exception for abandoned property.”¹⁵⁴ He stated that “we need to make sure . . . that the proper incentive for law enforcement agents is to protect us and to protect our property.”¹⁵⁵ However, “civil asset forfeiture is big government business.”¹⁵⁶

Representative Daniel testified that the average size of a seizure in 2016 was \$2,200.¹⁵⁷ He also testified that “over 45 percent of forfeitures are taking place without a criminal charge.”¹⁵⁸

¹⁴⁴ William G. Lamberth, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 83.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*, at 85.

¹⁴⁸ *Id.*, at 86.

¹⁴⁹ *Id.*, at 87.

¹⁵⁰ Martin Daniel, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 89.

¹⁵¹ *Id.*

¹⁵² *Id.*, at 90.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*, at 91.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*, at 92.

¹⁵⁸ *Id.*

Representative Daniel testified that “civil asset forfeiture results in a distortion of priorities in law enforcement agencies” and “disproportionately impacts poor persons because they are more likely to live without traditional banking services and they’re more likely to carry cash.”¹⁵⁹ He also stated that poor people “lack the resources to recover assets wrongfully taken from them.”¹⁶⁰

Representative Daniel also stated that civil forfeiture “operates as a stealth tax on primarily poor persons that funds law enforcement agencies” and that “it is our duty as the legislature to oversee the budgetary process and to oversee agencies.”¹⁶¹ He also testified that “we need to enhance the reporting requirement” and “require payments of attorney’s fees where there’s wrongful seizure of property.”¹⁶²

Harold M. Love, Jr. Testimony

(D-Nashville): Representative Love testified that civil forfeiture is a component of the war on drugs and that “the War on Drugs has never produced a victor in the African-American community.”¹⁶³ He testified that police are more likely to engage with a person who “looks like a drug dealer” based on racial stereotypes.¹⁶⁴ He expressed concern that based on their race, many African-Americans have to worry about having their innocent assets taken.¹⁶⁵ He stated that “we need to address the fact that everybody who’s driving around with cash in a car is not selling drugs.”¹⁶⁶ Representative Love testified that the racial disparities involved in civil forfeiture are very high and very troubling.¹⁶⁷

G. A. Hardaway Testimony

(D-Memphis): Representative Hardaway testified that his “constituents are going to be in that group that are more likely to be profiled and, therefore, more likely to be stopped and, therefore, more likely to be subject to the asset forfeiture laws and policies that we have in place.”¹⁶⁸ He expressed concern about the administrative branch of government blurring the lines between civil and criminal seizures.¹⁶⁹ He stated that there has been an “abrogation of the legislative responsibilities in terms of who appropriates and who sets the budget for the different agencies that we give oversight to.”¹⁷⁰

Representative Hardaway said that civil forfeiture “boils down to a profit motive, which is always the very worst thing in government.”¹⁷¹ He stated that “we need better data and analysis

¹⁵⁹ *Id.*, at 93.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*, at 95.

¹⁶³ Harold M. Love, Jr., testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 96.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*, at 96-97.

¹⁶⁶ *Id.*, at 97.

¹⁶⁷ *Id.*

¹⁶⁸ G. A. Hardaway, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 99.

¹⁶⁹ *Id.*, at 99-100.

¹⁷⁰ *Id.*, at 100.

¹⁷¹ *Id.*

of the data” in order to improve the forfeiture process.¹⁷² He said he has been victimized by racial profiling himself.¹⁷³

Representative Hardaway testified that “we don’t want our state law enforcement agencies to be able to go around us and for the federal government to ‘adopt’ seizures and forfeitures.”¹⁷⁴ He stated that “we’re the duly elected representatives of the people of the great state of Tennessee” and that the state legislature should be able to do its job.¹⁷⁵

PANEL 3—NATIONAL AND STATE ORGANIZATIONS

Panelists: Vikrant Reddy (Senior Research Fellow, Charles Koch Institute); Lee McGrath (Senior Legislative Counsel, Institute for Justice); Hedy Weinberg (Executive Director, ACLU of Tennessee); Julie Warren (State Director, Tennessee/Kentucky Right on Crime)

Vikrant Reddy Testimony

(Senior Research Fellow, Charles Koch Institute): Mr. Reddy testified that he has “spent most of my career as a lawyer working on criminal justice issues and pitching the case for . . . criminal justice reform to conservative audiences, people who identify different parts of themselves as fiscal conservatives, social conservatives, even a bit of a libertarian streak.”¹⁷⁶

Mr. Reddy testified that “[f]iscal conservatism fundamentally is about accountability.”¹⁷⁷ He stated that this should be applied to the criminal justice system as well.¹⁷⁸ He testified that “[c]ivil asset forfeiture unfortunately sort of evades the accountability part of government, because rather than putting our law enforcement officials in a position where they have to go before legislative bodies and make the case for why they need certain materials, why they need certain items in order to protect the public, we open up this kind of escape hatch where they can find that funding, that revenue somewhere else.”¹⁷⁹ He stated that he thinks this is “an evasion of the accountability that any fiscal conservative would want to care about.”¹⁸⁰ Mr. Reddy stated that it makes more sense to scrutinize governmental action exactly in those places “where the state stands to benefit” and that civil forfeiture is such a case.¹⁸¹

Mr. Reddy stated that there are problems with civil forfeiture from a social conservative perspective as well.¹⁸² He explained that in Washington, D.C., half of all the civil forfeitures involved amounts of \$141 or less.¹⁸³ He stated that in these cases, people do not challenge

¹⁷² *Id.*

¹⁷³ *Id.*, at 101.

¹⁷⁴ *Id.*, at 102.

¹⁷⁵ *Id.*, at 102.

¹⁷⁶ Vikrant Reddy, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 127.

¹⁷⁷ *Id.*, at 128.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*, at 129.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*, at 130.

¹⁸³ *Id.*

forfeitures, but they will go back to their families and neighborhoods and say “you just can’t trust the cops. You just can’t trust the law enforcement. You just can’t trust the prosecutors in town.”¹⁸⁴ As a result, he stated that civil forfeiture “leads to an erosion of trust, an erosion of rule of law, and an overall kind of neighborhood breakdown.”¹⁸⁵ As a result, he stated that “if you’re going to identify as a social conservative and say that you care about upholding the dignity of family and neighborhoods and communities that you should care about things like this.”¹⁸⁶

Mr. Reddy testified that from a libertarian perspective, it is only appropriate to violate property rights “if you have a really good reason for doing so, such as if we feel there’s a strong public safety need, a criminal justice need.”¹⁸⁷ He stated that punishment is appropriate to achieve the needs for retribution, deterrence, and to restore victims, “but in the case of civil forfeiture, none of these things really apply, and so they don’t justify infringing upon personal rights in this important way.”¹⁸⁸

Mr. Reddy stated that retribution doesn’t apply; because the individual hasn’t necessarily done anything wrong, and they haven’t been convicted of a crime.¹⁸⁹ He stated that deterrence doesn’t apply, because “if you haven’t done anything wrong and you just happen to have your property seized from you, what are you being deterred from doing?”¹⁹⁰ And he testified that “if the state has not demonstrated that you have done something wrong, because they’ve not convicted you of a crime, there may be no victim.”¹⁹¹

Hedy Weinberg Testimony

(Executive Director, ACLU of Tennessee): Ms. Weinberg testified that in the case of civil forfeiture, “we’re not talking about criminals.”¹⁹² She stated that “property owners bear the burden and the cost of demonstrating that their property is innocent, which in and of itself is an odd thing to think about.”¹⁹³ She stated that this means “we have taken away the right of the individual to be presumed innocent until proven guilty, and we have put the burden on that individual.”¹⁹⁴

Ms. Weinberg testified that civil forfeiture creates “a huge incentive for law enforcement agencies,” because they are allowed to keep or sell the property they seize.¹⁹⁵ She stated that “that clearly incentivizes what we believe is a corrupt practice and an unconstitutional practice.”¹⁹⁶

¹⁸⁴ *Id.*, at 131.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*, at 132.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Hedy Weinberg, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 134.

¹⁹³ *Id.*, at 134-35.

¹⁹⁴ *Id.*, at 135.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

Ms. Weinberg stated that many people who have their property forfeited “don’t have . . . the four-figure retainer fee that they have to give [an] attorney to represent them” and that “even if they did have that four-figure retainer fee, their property isn’t even worth that much.”¹⁹⁷ According to Ms. Weinberg, “the median forfeited amount of money in Tennessee, or seized, is just over \$500.”¹⁹⁸

Ms. Weinberg testified that “I think it’s really important that we recognize that regular people, innocent, ordinary Tennesseans are having their property seized” and that they’re “typically most often not arrested, not charged.”¹⁹⁹ Ms. Weinberg recommended that Tennessee abolish civil asset forfeiture or otherwise require a criminal conviction in order to forfeit property.²⁰⁰

Lee McGrath Testimony

(Senior Legislative Counsel, Institute for Justice): Mr. McGrath testified that “Tennessee should join the majority of other states and leave Rhode Island and Hawaii as one of three states that requires a bond before you can turn the knob to the courthouse door and begin the process of litigating the return of your property.”²⁰¹ He also recommended that Tennessee “improve its reporting requirements and make them publicly available.”²⁰²

Mr. McGrath further stated that “no one on this panel has any sympathy for drug mules on Interstate 40.”²⁰³ He stated that Tennessee “should not change the law for those 10 percent of cases involving drug mules” but that forfeiture processes should be improved for forfeitures less than \$100,000.²⁰⁴ Mr. McGrath recommended that for forfeitures below \$100,000, Tennessee should require a criminal forfeiture and require that the proceeds go into a general fund.²⁰⁵

Julie Warren Testimony

(State Director, Tennessee/Kentucky Right on Crime): Ms. Warren testified that even if Tennessee’s forfeiture system is perfectly executed with complete adherence to protocol, “the system executed perfectly remains constitutionally suspect.”²⁰⁶ She expressed concern that people whose property is forfeited have to “pay a \$350 bond” and then “wait for the Department of Safety to notify you of a date, time, and location for your hearing.”²⁰⁷ Next, “when the claimant finally gets to appear for their hearing, they’re then pitted against a prosecutor with the Department of Safety and the seizing law enforcement officer to negotiate a settlement.”²⁰⁸ She

¹⁹⁷ *Id.*, at 137.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*, at 138.

²⁰⁰ *Id.*, at 141-43.

²⁰¹ McGrath Testimony, Nashville, Tennessee, Hearing Transcript, p. 143.

²⁰² *Id.*

²⁰³ *Id.*, at 144.

²⁰⁴ *Id.*

²⁰⁵ *Id.*, at 146.

²⁰⁶ Julie Warren, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 147-48.

²⁰⁷ *Id.*, at 148.

²⁰⁸ *Id.*, at 149.

expressed concern that for innocent owners, this process is “intimidating and daunting,”²⁰⁹ and that innocent owners must often wait “10 to 11 months to get their property back.”²¹⁰

Ms. Warren testified that in 2015-2016, the Department of Safety “forfeited 5,858 property items,” including “3,980 motor vehicles.”²¹¹ She said the current process “doesn’t take into consideration the costs and the burden incurred by the individual who has gone without a car or without th[eir] cash for over a year.”²¹²

PANEL 4 - PRACTITIONERS / ACADEMICS

Panelists: Attorney John Miles, Union City, West Tennessee; Attorney Ben Raybin, Nashville; Attorney Kyle Mothershead, Nashville; Professor Joy Radice, University of Tennessee, Knoxville; Attorney Elliott Ozment, a Nashville-based immigration lawyer; Attorney Frank Lannom, a Lebanon-based criminal defense attorney.

John Miles Testimony

(Attorney from Union City, West Tennessee): John Miles, a practicing lawyer in Union City, West Tennessee, testified that he is in favor of changing Tennessee’s civil asset forfeiture law due to his particular concerns about the current law’s lack of due process protections, including notice and an opportunity to be heard, under the U.S. Constitution’s 4th, 14th, and 5th Amendments and the Tennessee Constitution (Article I, Sec. 8).²¹³

He described his representation of a young man in Obion County, TN, whose vehicle was seized following a middle-of-the-night traffic stop in which it was discovered that he was in possession of drugs.²¹⁴ The vehicle was owned by his mother, who lived in Houston, Texas, and was unaware of her son’s conduct. Mr. Miles explained that by the time he was engaged in the matter, the Forfeiture Warrant already had been issued and the case was pending in the TN Department of Safety. Despite his efforts, he was unable to reach a DOS attorney to inquire as to how the DOS would prove that the mother knew or should have known of her son’s possession of drugs that night. Mr. Miles expressed concern that due to lack of procedural protections for innocent owners, often the owner is left with the only practical question being whether it would cost less simply to pay a DOS settlement in order to quickly secure the return of their vehicle, rather than contest the seizure and incur the attendant legal expenses and delay.²¹⁵

He also testified that he had represented an owner of a trucking company, whose 18-wheeler, including its trailer, had been seized.²¹⁶ The seizure occurred because the driver was driving through a West Tennessee town without his seatbelt on. He was pulled over, consented to a

²⁰⁹ *Id.*

²¹⁰ *Id.*, at 150.

²¹¹ *Id.*, at 151.

²¹² *Id.*

²¹³ John Miles, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 179.

²¹⁴ *Id.*, at 180-181.

²¹⁵ *Id.*

²¹⁶ *Id.*

search, and the search produced, inside the driver's briefcase in the cab of the truck, a small piece of methamphetamine. The entire truck was seized.²¹⁷ Here again, Mr. Miles testified, the client had the Hobbesian choice of contesting the unwarranted seizure with the attendant legal costs of two hearings (settlement hearing and contested hearing) or simply paying the DOS settlement demand in order to get his truck back on the road as soon as possible.²¹⁸

Mr. Miles told the Committee about a young male from Texas, who was driving a vehicle with Texas plates when he was stopped for speeding in Union City. Although no drugs were found and the drug dog did not alert on his truck, he had about \$30,000 cash on him, and a prior drug conviction. Although the driver said he worked for a ranch and was traveling to acquire hay with the cash given parched Texas conditions; the cash was seized. Here too, said Mr. Miles, because the DOS settlement was an amount roughly equivalent to hiring an attorney to represent him to contest the seizure, the young man did the rational thing: paid the requested settlement funds to the DOS in order to have the seized funds returned to him.²¹⁹

Based on his personal experiences, Mr. Miles told the Committee that he believes the law should be changed to ensure that a property owner, such as the mother in Houston or the Texas owner of the ranch, gets meaningful notice and an opportunity to be heard at the hearing prior to the issuance of the forfeiture warrant. He also emphasized that there should be no bond requirement. He noted that there is no reason to require the party from whom the property was seized to post a bond, particularly where the seizure is of cash. He questioned the rationality of the bond requirement: "Why in the world should you have to post a bond? They're holding cash. I don't understand that. It seems to me the bonding requirement should be done away with."²²⁰

Mr. Miles concluded by proposing that the matter be left in the courts, where judges are elected, and therefore more accountable, and where due process protections are in place for property owners, including regular appellate process, as opposed to the limited appeal process from the DOS hearing, which places extra burdens on residents of the more remote counties of the State, such as Obion County, West Tennessee.²²¹

In terms of costs of hiring counsel to contest a seizure, Mr. Miles emphasized that often the rational decision for a client is rather than paying him \$4000 to \$7000 for legal representation in Obion County, requiring travel to either Dyersburg twice or to Memphis twice, for the DOS hearings, with a potential for a so-called appellate process, with the opportunity for very limited review, most clients simply decide to pay the DOS, say \$3000, to get their property back.²²²

In response to a SAC member question, Mr. Miles explained that in his view civil asset forfeiture should be left in the courts. For instance, he proposed that if the Forfeiture Warrant is in general sessions court, then it may proceed to circuit or if it starts in circuit it could proceed from there, giving everyone, including property owner, notice and an opportunity to be heard. He believes his client, a ranch owner from Texas, should have been able to testify that "Yeah, I gave him [my

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*, at 183.

²²¹ *Id.*

²²² *Id.*, at 232-233.

ranch employee] \$30,000 cash. That's my money. Here's where my ranch is in Texas, we feed so many cattle, we're in a drought."²²³

Ben Raybin Testimony

(Attorney from Nashville): Ben Raybin, an Nashville-based attorney focusing on criminal defense law, testified about his work on 2015 case, *Tennessee v. Sprunger*, the preeminent Tennessee case on civil asset forfeiture, which he successfully argued before the Tennessee Supreme Court.²²⁴ Mr. Sprunger's house was seized based on a Tennessee statute that provided for the taking of property used in the commission of a child pornography offense. Here, after it was reported that Mr. Sprunger had downloaded child pornography, a local sheriff's department initiated an investigation and then sent the case to the local district attorney, who sent it to the U.S. Attorney for federal prosecution. After the election of new district attorney, however, the case was brought back to state court because the new DA wanted to seize Mr. Sprunger's residence. Mr. Raybin noted here that the local sheriff later stated he had never seized a house before, was uncomfortable with the process, and was taking direction as to the paperwork from the local district attorney. He also notes that taking the case back to State court in order to use the Tennessee seizure statute likely affected the penalty as the defendant likely would have been sentenced to more time in the federal system.²²⁵

Notice of the house seizure was provided to defendant only after the property had been taken. Notice has several pre-printed items on it regarding how one could challenge the seizure; however, the box on the form was checked "Other," and with a notation to "See attached," but there was nothing attached.²²⁶ Nor did the sheriff or DA ever send the case to the Department of Safety, so it never triggered his 30 days to file the challenge. Meanwhile, because they put a lien on the house, the defendant could not mortgage or sell the property, and thus could use the equity in his home to hire an attorney to defend him in the criminal indictment. Mr. Raybin here noted that a 2016 U.S. Supreme Court decision, *Luis v. United States*, held that freezing untainted assets could constitute an unlawful due-process violation.²²⁷

In *Sprunger*, when the defendant was criminally convicted and started serving his prison sentence, he stopped paying his mortgage. The house went into foreclosure, and sold at a fire sale, eliminating Mr. Sprunger's \$30,000 in equity.²²⁸ He continued to litigate the seizure case regarding the lost equity value from prison, *pro se*. Mr. Raybin was an appointed pro bono lawyer who argued the case before the Supreme Court, which ultimately held that Mr. Sprunger's constitutional due process rights were violated by the seizure, and that if all of the statutory procedures are not followed, the seizures will be nullified and the property returned.²²⁹ Mr. Raybin testified that he believes that the civil asset forfeiture law needs to be changed as the procedural burdens relating to contesting a seizure and potentially litigating it in court, which can take years to resolve depriving a person of their property even if they ultimately prevail. (Mr.

²²³ *Id.*, at 233.

²²⁴ Ben Raybin, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 186-187.

²²⁵ *Id.*, at 186-188.

²²⁶ *Id.*, at 188.

²²⁷ *Id.*, at 188-189.

²²⁸ *Id.*, at 189.

²²⁹ *Id.*, at 190-191.

Sprunger’s seizure case took seven years from start to finish).²³⁰ Nor does a prevailing person get to have their attorney’s fees covered. Thus, even where a seizure is unlawful or non-compliant, the wronged owner may never be made whole. Mr. Raybin explained that although there is a provision in the Tennessee statute for a “bad-faith claim,” but any relief that could be provided to the wronged party is extremely limited. “All you can get is the rental value of the property for the time it was seized, capped at the total value of the property. So the remedy -- and so it's unclear even with cash what that would mean. I mean, does cash have a rental value? And in this case, well, once the property was foreclosed, what happens then?”²³¹

He added, because the standard to show bad faith is difficult to prove “even if ...the property is clearly wrongfully seized, you may still not even have the chance at getting any sort of damages or recovery to even come out whole from the loss.”²³²

Kyle Mothershead Testimony

(Attorney in Nashville): Kyle Mothershead, a Nashville-based attorney, testified regarding the issue of racial profiling.²³³ Mr. Mothershead, part of a team that conducted the recent “Driving-While-Black” study in Nashville, analyzed traffic-stop databases from the Nashville Police Department. The data review indicated that there is traffic stop discrimination in the form of racial disparities not only in who is being stopped, but also in what happens after the stop, in other words, in who is actually being subjected to a roadside searches. The searches examined were “consent” searches, meaning that the law enforcement officer had not probable cause to search, but rather asks the individual to consent. Consent is almost always given in the face of an officer’s request. The results of the empirical study in Nashville are similar to that of other cities that have conducted such studies.²³⁴

Mr. Mothershead further testified that the research showed that the racial disparities in which individuals are searched held true across virtually every one of the 50 patrol zones in Nashville: it didn’t matter if the zone was a high-crime area, low-crime area or mid-crime area. The police data reviewed also showed that such roadside consent searches almost always fail to turn up any unlawful activity; that is, in about 90 percent of the searches. About 9 percent of the time some kind of drug is found, usually marijuana, and in only about 1 percent of the time a weapon is found.²³⁵

He further reported that the size of the racial disparities are stark: throughout the city’s patrol zone, black people are being subjected to roadside searches about 200-300% more frequently than white people as a proportion of stops. For one patrol zone, that figure was over 1000% disparity.²³⁶ Moreover, Mr. Mothershead reported that the success rate (the “hit rate,” meaning

²³⁰ *Id.*, at 191.

²³¹ *Id.*, at 190-192.

²³² *Id.*

²³³ Kyle Mothershead, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 193-194.

²³⁴ *Id.*

²³⁵ *Id.*, at 195.

²³⁶ *Id.*

some illegal contraband is found by the search) is lower for black drivers than white drivers in almost every patrol zone.²³⁷

Mr. Mothershead then testified as to the relevance of the empirical evidence of racial disparities in road-side searches in the context of civil forfeiture.²³⁸ With this data, he noted, one “start[s] to see civil forfeiture as essentially almost an intentional *de facto* tax on communities of color, . . . where that's who's being targeted by the War on Drugs. Whether that's due to . . . policy or practice or whether it's due to implicit bias or whatever the cause of that is, . . . we . . . saw it in Nashville. Year after year we see it in communities all over the United States, everywhere it's been studied. And you have to recognize that if . . . civil forfeiture is just taking stuff from people after these traffic stops . . . at that point it's really a tax on communities of color.”²³⁹

Mr. Mothershead also spoke about criminology studies that describe the overall negative social consequences when particular communities feel alienated by law enforcement and community members come to believe that they have only themselves to ensure their own safety. He also noted the perverse incentives of civil asset forfeiture law: “plain and simple, it's just a way for the police to get paid to focus on this particular type of law enforcement. It's an incentive to not focus on other types of law enforcement that, you know, would likely be better for community safety.”²⁴⁰ Finally, he raised concerns about the lack of meaningful opportunities for citizens to file complaints against law enforcement officers when, for instance, they believe that they have been subject to an unlawful search and seizure in violation of their constitutional 4th Amendment rights.²⁴¹

Joy Radice Testimony

(University of Tennessee, Knoxville): Joy Radice, an associate professor of law at the University of Tennessee, testified as to the potential for constitutional due process challenges to the Tennessee civil asset forfeiture law as well as the practical problems with the procedure of civil forfeiture.²⁴² She emphasized that civil forfeiture impacts individuals who are never charged with a crime, such that there is punishment even though there is actually no proof or evidence that a crime is even committed. Professor Radice noted that some scholars date the practice of civil forfeiture to Exodus in the Bible; some look at piracy and the attempts of England to take away assets from pirates when they couldn't convict them, and some look to Supreme Court jurisprudence from the early 1800s.²⁴³

She noted that a recent commentator suggested that although many state civil asset laws technically meet the constitutional due process standards (espoused in *Mathews v. Eldridge* requirements), there are often significant practical problems with such laws. For instance, the Sprunger case in 2015 was one example where the forfeiture was invalidated by the Tennessee

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*, at 195-196.

²⁴⁰ *Id.*, at 197-198.

²⁴¹ *Id.*, at 198-199.

²⁴² Joy Radice, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 200.

²⁴³ *Id.*, at 200-201.

Supreme Court because it did not align with procedural and substantive provisions of the Tennessee Code.²⁴⁴

Professor Radice told the Committee about a 2015 case from Pennsylvania Supreme Court that held that an excessive fines could constitute a violation of the 8th Amendment of the U.S. Constitution with respect to the innocent owner situation and that her view was that the Tennessee statute might be most likely subject to such a challenge on those grounds. Here, she cited a 1993 case, *United States v. James Daniel Good Real Property*, in which Justice Thomas wrote that, as the current practice under the law appears to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary, in an appropriate case, to reevaluate the general deferential approach of the Supreme Court to legislative judgments in the area of civil forfeiture.²⁴⁵

She noted that although there are studies about racial impact and disparity, and although the 2016 and 2017 amendments to the Tennessee law require some data collection, the lack of data being collected in Tennessee as to any demographic information with respect to seizures and forfeitures makes it difficult to establish specific evidence of racial bias in civil assets seizures and forfeitures.²⁴⁶

In response to a question from SAC members, Professor Radice noted that there is a federal Sec. 1983 case currently pending in Knoxville regarding disparate impact in civil asset forfeiture.²⁴⁷ She also noted that that most of the individuals whose cash is seized, because it is such small of amounts of money, \$1,000-\$5,000, do not have counsel.²⁴⁸

Elliott Ozment Testimony

(Attorney in Nashville): Elliott Ozment, a Nashville-based immigration law attorney, testified regarding the effect of civil asset forfeiture on the foreign-born and the immigrant population on the State's highways.²⁴⁹ Mr. Ozment said that, according to ACLU reports, in some areas two-thirds of the assets that are seized in these programs are from minorities. In his view, "we're seeing a divestiture from minorities, as little money as they have, over to drug task forces. And the use of the money . . . , in my view, [is] in many ways being squandered. Why? Because there's no oversight. . . at all over the expenditure of this money or in the conduct of the officers that engage in these forfeitures."²⁵⁰

Noting that the issue was non-partisan, Mr. Ozment told the Committee that cash and property seizures under President Obama's administration exceeded \$3 billion, most of that coming from poor people, and minorities. Under President Obama's program, local agencies could still retain up to 80 percent of the proceeds. However, U.S. Attorney General Eric Holder did limit it to illegal firearms, ammunition, explosives, and child pornography. He said U.S. Attorney General

²⁴⁴ *Id.*, at 203-204.

²⁴⁵ *Id.*, at 204.

²⁴⁶ *Id.*

²⁴⁷ *Id.*, at 228.

²⁴⁸ *Id.*, at 231.

²⁴⁹ Elliott Ozment, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 208-209.

²⁵⁰ *Id.*

Jefferson Sessions has reversed those limitations. In his view, that reversal will lead to “an immense problem with due process and with abuse of what would otherwise be a very commendable program, and that is to stop drug trafficking.”²⁵¹

He testified that the Tennessee civil asset forfeiture law provides very few procedural safeguards and that, in his view, the Tennessee legislature “has utterly failed to be a watchdog in this area.”²⁵² He reported that of the 7,616 civil asset forfeiture proceedings (amounting to \$17 million) took place in 2016 in Tennessee, many of the poor people experiencing forfeiture were immigrants. In addition, the State sold or seized 3,636 vehicles. He stated that the most active task force in this area is the 21st Judicial Drug Task Force out of Franklin, Tennessee, along I-40 West from Nashville to Memphis.²⁵³

Mr. Ozment told the Committee that asset forfeiture has particular negative impact immigrants due to language barriers. Many people with limited English on their way to immigration court in Memphis do not know they have a right to refuse to answer law enforcement questions, which are often aggressive in tone. Nor do they know of their right to refuse a search. Without an attorney, such individuals often are intimidated by the circumstances, including the appearance of unmarked SUVs with law enforcement carrying large, visible weapons and holsters. He said this was particularly true for the immigrant population in Tennessee communities other than Nashville. The immigrant population also often carry large amounts of cash because they cannot open a bank account because of such things as lack of Social Security number or driver's license. Mr. Ozment explained that he often is paid for his legal services in cash by his clients who are immigrants.²⁵⁴

He also commented that law enforcement views the appearance of nervousness as an indicator of guilt, but that his immigrant clients generally tend to be nervous when they encounter police. He noted that until recently, someone contesting a forfeiture would have limited court access (with appeals in Chancery Court of Davidson County only).²⁵⁵

Mr. Ozment told the Committee that when money is taken, it is turned into the drug task force, which then treats the funds as if they were the task force’s own funds to be used for its own wish list of items; in other words, as if it were the task force’s “own little kitty” to pay for its “own little pet expenses,” and that a needed reform is that “at the very least turn this money over to the general fund, stop putting it in these drug task forces.”²⁵⁶

Frank Lannom Testimony

(Attorney in Lebanon): Frank Lannom, a criminal defense attorney representing clients seeking to have their seized assets returned, believes that the current civil asset forfeiture laws and procedures are, at base, unfair.²⁵⁷ He explained the current process by comparing it to our

²⁵¹ *Id.*, at 208-209.

²⁵² *Id.*, at 209.

²⁵³ *Id.*, at 209-210.

²⁵⁴ *Id.*

²⁵⁵ *Id.*, at 213.

²⁵⁶ *Id.*, at 234.

²⁵⁷ Frank Lannom, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 214.

criminal justice system, which, Mr. Lannom says, is “pretty good.”²⁵⁸ In the criminal justice process, there is a clerk of the court of every county in the State of Tennessee. The clerk receives and files your papers, and the state legislature tells them what to charge. The matter goes before an independent judge, and then an appellate judge, who are elected or appointed by the process we have, and then we have a prosecutor's office who charges crimes, and prosecutes them.²⁵⁹

This is in contrast to the civil asset forfeiture process. He noted that here when law enforcement “get to your home, they are allowed to take everything you own without a search warrant.”²⁶⁰ He told the Committee of a case he had where law enforcement took from a family’s home, all of its electronics, including the children’s Game Boys and PS4s, all of their cars and money, and even busted one of the children’s piggy bank (containing \$147), all without a warrant. He noted that under the law they also can seize a person’s bank accounts, leaving people with no ability to pay rent or electric bills.²⁶¹

Once the seizure has been completed, he explained, a person is handed “a green piece of paper that says, ‘Here is why we’re taking your property,’” with a check mark in a box, “Narcotics.” He noted the lack of any specificity in the allegations, adding “That’s it. You don’t get ‘You sold narcotics last week, you sold narcotics today, we think you’re moving heroin.’”²⁶²

Mr. Lannom said that it was usually at this point that he is hired to provide legal services to assist in getting the property returned. He said that due to Tennessee’s \$350.00 bond requirement, the family with the green piece of paper who “had the piggy bank busted now have to pay for the privilege of asking the government why the government took their stuff.” He noted that in the DOS seizure cases, there is no independent clerk; rather, his opponent, the prosecutor who represent the state's side, also acts as the clerk of the court, deciding if a filing is timely or not, and how many \$350 bonds a person will have to obtain to contest the seizure. For instance, if three cars were taken from a client at different times, the opponent might say that 3 bonds are required (for a \$1,050 total in bonds). This is without his clients even being informed of the why the government took their property and money.²⁶³

Mr. Lannom then described his concerns with the administrative hearing process. For instance, although an attorney for the party contesting the seizure might be able to take depositions to prepare the case, the Department’s prosecutor, as the opposing party, can object and ultimately appeal to the appellate division within the prosecutor’s own Department, which is the same Department that writes the rules for the proceedings. Moreover, although the statute requires that the contesting party may have a hearing within 30 days, all one actually receives within that time frame is notice of a hearing date, and the hearing itself might be six months later. Finally, even if a contesting party prevails before the administrative law judge after, say, nine months of having their car seized, the opponent Department may appeal, and again that appeal is not to an independent forum but to the appellate division within the prosecutor’s own Department, which, Mr. Lannom explains, is to the prosecuting attorney’s supervisor.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*, at 215.

²⁶¹ *Id.*

²⁶² *Id.*, at 215-216.

²⁶³ *Id.*, at 216-217.

In short, Mr. Lannom views this process as unfair.²⁶⁴

Also concerning to him, as he testified, is that given the financial costs of contesting an unlawful seizure, takings are frequently a few thousand dollars (\$1,000-\$3,000), because nobody fights back at that level due to the costs of contesting.²⁶⁵

In addition, he noted that the Department takes the position that if the commissioner decides a question of law and no one appeals to the Chancery Court of Davidson County, that law is now binding on all of the administrative judges. Moreover, Mr. Lannom told the Committee about the limited scope of any appeal of an adverse finding in a seizure matter. He said that an appeal to the Chancery Court is limited to a review of the administrative decision only. It is not a complete fresh look at the case by an independent court. Rather, all that the Court may decide is whether there was any evidence to support the administrative law judge's decision, even if the chancellor disagrees with the decision.²⁶⁶

Finally, Mr. Lannom reported that he once had a 90-year-old client who asked the government to return his truck. His grandson had been driving it and was found with marijuana. The response Mr. Lannom received was, "Well, tell the 90-year-old man if he [sic] doesn't want to wait for 120 days for his hearing, he'd better pay me my \$500." The grandfather needed his truck. He paid the \$500.²⁶⁷

In response to a question by SAC member, Mr. Lannom described how several years earlier he had represented a truck driver, who had been stopped with \$18,000 in his possession. At the seizure hearing at the Department of Safety, the opponent asked for a continuance. As he was leaving the DOS, Mr. Lannom saw several men from the Obion County Drug Task Force, accompanied by a fourth person who they wanted to hire. The \$18,000 would fund his position. After the individuals from the Task Force spoke to the DOS prosecutor, Mr. Lannom was asked if his client would forego the \$18,000, in exchange for never going to jail. Mr. Lannom stated that he believes that there is a profit motive in civil asset forfeiture; "[t]hey don't carry it home, but they get to buy the cars and their guns and hire their friends and their weight-lifting machines."²⁶⁸

In response to panel question, Mr. Lannom told the Committee about a client of his who had \$15,000 cash from cutting the lawn and other businesses. When the cash was seized, the officers found "some crumbs of marijuana," which would not be grounds for seizing anyone's property. After successfully contesting the seizure, the money was returned to the client via a check from the Wilson County Sheriff's Department. Later, the client was at home, and although once again no drugs were found, his \$15,000 was again seized. Mr. Lannom explained that the DOS Administrative Law Judge made his client prove that it was his money and not drug money. The first exhibit was the check from the Wilson County Sheriff's Department. According to Mr. Lannom, although the administrative law judge ruled in his client's favor, the DOS commissioner later overruled the administrative law judge notwithstanding the fact that there were no drugs

²⁶⁴ *Id.*

²⁶⁵ *Id.*, at 219.

²⁶⁶ *Id.*

²⁶⁷ *Id.*, at 220.

²⁶⁸ *Id.*, at 222 – 224.

found in either case, and in the second case, the noncriminal nature of the funds was demonstrated by presenting the sheriff department's check itself as the source of the funds.²⁶⁹

In terms of costs of hiring counsel to contest a seizure, Mr. Lannom reported that his legal fees were \$7,500 in a case in which he represented two members of the Jehovah's Witnesses church who had never seen a drug, but whose car was seized due to their son's use of the car. The matter involved a three-day hearing that took about 18 months. Mr. Lannom also noted that if it were in criminal court anyway, he could handle a seizure case, likely in the same courtroom, in the same county, and it would not require a separate county and a separate court proceeding altogether.²⁷⁰

PANEL 5 – STATE / LOCAL ADVOCACY ORGANIZATIONS

Panelists: Attorney Christopher M. Bellamy, President of Napier-Looby Bar Association; Jacqueline P. Sims, State Chair for the Criminal Justice Committee for the Tennessee NAACP; Samuel Lester, Open Table Nashville.

Jacqueline P. Sims Testimony

(State Chair for the Criminal Justice Committee for the Tennessee NAACP): Ms. Sims testified as to her 12-plus year career as a victim advocate in the late 1980s in South Carolina, working alongside law enforcement from an investigative division. In this role, Ms. Sims became familiar with civil forfeiture, which was becoming an increasingly used tool in that period.²⁷¹ Ms. Sims told the Committee that civil asset forfeiture had its roots in British maritime law which provided for seizure of ships for any suspicious activity. Forfeitures also were common during prohibition, 1920 to 1933. In modern times, forfeiture again become prevalent during the period of 1985 to 1993, when authorities confiscated \$3 billion of cash and other property based on the federal asset forfeiture program, which included both civil and criminal forfeitures. The methods were supported by the Reagan administration as a crime-fighting strategy.²⁷²

Ms. Sims offered a 1989 quote of then-U.S. Attorney General Richard Thornburgh, "It is now possible for a drug dealer to serve time in a forfeiture-financed prison after being arrested by agents driving a forfeiture-provided automobile while working in a forfeiture-funded sting operation."²⁷³

Ms. Sims testified that in her experience as an organizer and activist working in Davidson County on behalf of poor and low-income people, who often are persons of color, and as a member of this community, these individuals are the ones most heavily impacted by the civil asset forfeiture laws. She noted the disparate treatment during traffic stops, and that a seizure of even as little as \$141 could impact a person's financial circumstance. Providing a personal perspective, Ms. Sims noted that if \$141 were taken from her, she would not be able to pay her

²⁶⁹ *Id.*, at 230 – 232.

²⁷⁰ *Id.*, at 232.

²⁷¹ Jacqueline P. Sims, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 238- 239.

²⁷² *Id.*

²⁷³ *Id.*

cell phone bill and might have to juggle food and utilities. The taking of, for instance, \$500, which is not unusual in forfeiture cases, would have serious impact on the lives of poor and low income people, who, Ms. Sims testified, are the majority of the “victims of civil forfeiture.”²⁷⁴

In response to question, Ms. Sims stated that in her view one effect of the current CAF law is that it negatively impacts community and law enforcement relations. She explained that the law furthers “exacerbates the community's thoughts that law enforcement is not there to protect them, is not really in their corner, that there's no trust, [and], the trust factor is huge.”²⁷⁵

Christopher M. Bellamy Testimony

(Attorney and President of Napier-Looby Bar Association): Mr. Bellamy serves as President of the Napier-Looby Bar Association, which has as a primary objective to serve underrepresented minority communities. He testified in opposition to the current Tennessee CAF law due to the law’s lack of due process protections and its particular impact on poor people and those with limited resources.²⁷⁶ Mr. Bellamy, who prior to entering private practice was a prosecutor in Robertson County and Montgomery County, testified that in his view the practice of seizing money, cars, and property, happens more frequently in rural areas than places such as Nashville. He testified that “[a] lot of these small law enforcement offices grow to depend on . . . [funds seized under Tennessee’s civil asset forfeiture law] as a means to fill their coffers, to buy police cars, to do the things that they think are necessary to enforce the law.”²⁷⁷ He stated his concern that the incentive for law enforcement officers to self-fund their own activities by seizing property raises questions as to, one, the effectiveness of the law, two, whether it is doing what it was intended to do, and three, how it is impacting those Tennesseans with the least means.²⁷⁸

Mr. Bellamy told the Committee that when he was a prosecutor, he “found it disheartening to see someone lose their home . . . lose something that they worked hard for, vehicles, pretty much all that they had, because there was an allegation made and a court of law found reasonable suspicion that that happened. There's no due process. There's no fact-finder. There's no jury. There's nothing that the Constitution gives us protections for, and these folks lose everything.”²⁷⁹ He added that based on his experience as a former prosecutor, “the negative impact of these type of [civil asset forfeiture] laws . . . is felt far greatest in your impoverished communities than it is anywhere else, to the point where you rob someone the ability to defend themselves in court.”²⁸⁰

In response to a question, Mr. Bellamy testified that in his view legislative changes to the law, such as restricting asset forfeiture to criminal matters or adding procedural safeguards for innocent owners, would not significantly impact law enforcement’s ability to fight crime (“I think [such changes would] . . . have a very -- a very small impact.”) He went on to explain that data from across the country could show whether or not these laws are effective, but that “law

²⁷⁴ *Id.*, at 240 – 241.

²⁷⁵ *Id.*, at 252.

²⁷⁶ Christopher M. Bellamy, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 235-236.

²⁷⁷ *Id.*, at 235 – 236.

²⁷⁸ *Id.*, at 236 – 237.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

enforcement . . . don't want to give up that cookie jar. And that's what it is. A lot of the cases that we saw, there was not enough there to try the case. There was not enough evidence. A lot of the times they couldn't even meet probable cause, so we ended up dismissing the case. And unfortunately a lot of law enforcement agencies were fine with that. It was not about seeking justice. It was not about getting the drugs off the street. It was about taking that property.”²⁸¹

Mr. Bellamy illustrated his concern about the potential for perverse incentives by recounting the following: A young black male driving through middle Tennessee was pulled over. He had \$1200 on him in cash. He didn't have any drugs. There was nothing that indicated he had just sold drugs or was going to buy drugs. They seized the money because ten years earlier he had something to the effect of a misdemeanor marijuana charge. “That was it. And they let him go. So they literally took his money and let him go. They got into court, they went before a general sessions judge and the judge allowed them to keep that money.”²⁸²

As a former prosecutor Mr. Bellamy stated that although “civil forfeiture law is supposed to be a tool . . . this tool is not used equitably across the board. . . So if every time, you know, Susan is on her way to Vanderbilt and she gets pulled over in her nice, brand-new Mercedes-Benz that her dad bought her, and they found a simple possession of marijuana in there and they seized that vehicle accordingly, hey, okay, . . . – at least the law is being applied equitably. But you don't see that. What you see is a young man, you know, in a vehicle that looks suspicious, gets pulled over and it smells like marijuana and they seize everything in the vehicle. That's what you see. And that's just the facts.”²⁸³

Samuel Lester Testimony

(Open Table Nashville): Samuel Lester works with Open Table Nashville doing street outreach and advocacy on behalf of people who are experiencing homelessness. He testified on a related matter: that is, the particular circumstances of police removing or taking property of people experiencing homelessness, and the harsh impact on such individuals when their property is taken in this way. A former teacher of history, government, and economics, Mr. Lester spoke of the importance of the values and freedoms of our constitutional rights, including property rights.²⁸⁴

Mr. Lester reported that, based on his experience, most of the people who live on the street are similar to persons of property, except that they have run into a problem in their life, which has dispossessed them of their property: for instance, paying medical bills, losing a truck needed for work, chronic unemployment, discrimination, mental health challenges and addiction. For these individuals, all that they own might be in a backpack, and having that backpack taken, or any amount of cash, would be significant to them.²⁸⁵

Mr. Lester stated, however, that law enforcement routinely removes possessions of people living or sleeping in parks, such as Library Park, in downtown Nashville, when the owner leaves the

²⁸¹ *Id.*, at 248-249.

²⁸² *Id.*, at 249-250.

²⁸³ *Id.*, at 253.

²⁸⁴ Samuel Lester, testimony, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 241-242.

²⁸⁵ *Id.*, at 243-244.

property unattended even for short periods. Moreover, the property owners often are never informed about the status or location of their possessions. Nor would they typically have the resources to travel by car or even public transit to retrieve any such possessions, if stored. Moreover, the property taken sometimes includes such vital possessions as an ID, essential documents or medications. If one's ID is taken, a person cannot rent a hotel room or even bin cans. Not only does such a total loss of one's possessions at the hands of the police increase tensions and disputes on the street, it also reduces respect for property ownership, and for law enforcement and the "law" in general.²⁸⁶

Mr. Lester told the Committee that a 1992 federal court case, *Pottinger v. Miami*, held that this kind of seizure of the possessions of persons experiencing homelessness violated the U.S. constitution's 4th and 5th Amendment protections. He also noted a series of court cases in Los Angeles relating, for the most part, to unauthorized seizures of property. The cases cost the city over \$3 million.²⁸⁷

He stated that people experiencing homelessness time and time again are taken to jail by law enforcement, and that, often, any ready cash they have on hand at the time they arrive at the jail is taken from them ostensibly for "the cost of their jail," even where they have not yet had a court hearing.²⁸⁸ Mr. Lester later argued that because people experiencing homelessness often are brought to jail on frivolous charges, the prosecutor frequently dismisses the case once it gets to court. Meanwhile, however, the person already has had their funds taken by the jail.²⁸⁹

Finally, Mr. Lester noted that when police take away all of the possessions of some of our most vulnerable members of society, and there is no justice for them, the result is that there is an "incredibly corrosive effect" on the attitudes of people experiencing homelessness with respect to the very validity of society's law.²⁹⁰ Mr. Lester, who worked on the report of the study on driving while black in Davidson County, further noted that the experience of being subjected to racially disparate treatment by law enforcement in traffic stops, as in CAF seizures, diminishes trust. He cited the report for its finding that "more blacks in Nashville between 2010 and 2015 were pulled over annually than the population, and most . . . were innocent of any crime."²⁹¹

COMMUNITY COMMENTS

Another concern was voiced by community members David Hairston²⁹² and Matt Walczyk,²⁹³ both of whom testified during the community comment section of the July hearing. Mr. Walczyk

²⁸⁶ *Id.*

²⁸⁷ *Id.*, at 246.

²⁸⁸ *Id.*

²⁸⁹ *Id.*, at 258-259.

²⁹⁰ *Id.*, at 253-254.

²⁹¹ *Id.*, at 254-255.

²⁹² David Hairston, public comments, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 260-265.

²⁹³ Matt Walczyk, public comments, *Hearing Before the Tennessee State Advisory Committee to the U.S. Commission on Civil Rights*, Nashville, Tennessee, July 24, 2017, transcript, pp. 268-270.

stated that he was affiliated with Americans for Safe Access, a nonprofit organization that seeks the legalization of medical marijuana on behalf of patients.²⁹⁴

Mr. Hairston and Mr. Walczyk explained their concerns that Tennessee’s civil asset forfeiture law has a chilling effect on the rights of citizens to advocate and petition their government for legalization of medical cannabis on behalf of disabled Tennesseans, including veterans and other patients. They testified that, based on their experience working in this area as advocates, potential volunteers were afraid that if they were to become involved, the police would be able to allege the volunteers were users of marijuana and, as a result, “take their stuff.”²⁹⁵

Mr. Hairston noted that often people working on this policy issue are disabled patients who do not have more than a few hundred dollars in their pocket, and that they fear that signing petitions seeking redress or legislative change could result in the police using the civil asset laws to “steal their assets.”²⁹⁶

IV. DISCUSSION OF TESTIMONY AND WRITTEN SUBMISSIONS

A. The Purpose and Benefits of Civil Asset Forfeiture

The original purpose of Tennessee’s civil forfeiture law was to deter “professional criminals and organized crime.”²⁹⁷ Witnesses supporting the use of civil asset forfeiture similarly characterize it as “an important tool to achieve justice against persons who benefit from criminal activity for financial gain.”²⁹⁸ During the Committee’s hearing, three essential purposes and benefits were advanced to support civil forfeiture:

- i. The need to allow forfeited assets to be used for law enforcement purposes;²⁹⁹
- ii. The need to deter drug dealing;³⁰⁰ and,
- iii. The need to achieve justice against persons who benefit financially from criminal activity.³⁰¹

²⁹⁴ *Id.*, at 268.

²⁹⁵ Hairston Testimony, *Nashville, Tennessee Hearing Transcript*, p. 263; Walczyk, Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 268-270.

²⁹⁶ Hairston Testimony, *Nashville, Tennessee Hearing Transcript*, p. 263.

²⁹⁷ Tenn. Code Ann. § 39-11-701(b).

²⁹⁸ Dunavant Testimony, *Nashville, Tennessee Hearing Transcript*, p. 37.

²⁹⁹ *Id.*, at 38.

³⁰⁰ Lamberth Testimony, *Nashville, Tennessee Hearing Transcript*, p. 87.

³⁰¹ Dunavant Testimony, *Nashville, Tennessee Hearing Transcript*, p. 37.

B. Lack of transparency and consistent data

Witnesses testifying both for and against forfeiture remarked on the absence of sufficient data regarding its use. Witnesses also provided conflicting data regarding critical information on the use of civil forfeiture across the state. For example, the average amount of money seized per forfeiture was reported as “\$9,000-\$10,000”;³⁰² “\$2,200;”³⁰³ “just over \$500;”³⁰⁴ and “\$141.”³⁰⁵

The General Assembly increased reporting requirements in both 2016 and 2017³⁰⁶ However, essential data still remains uncollected. In particular, despite substantial concerns about civil forfeiture’s disparate impact on minorities and people of low socioeconomic status,³⁰⁷ data is not collected on the race or income of individuals whose property is seized or subject to forfeiture.³⁰⁸ Accordingly, one legislator remarked that “We need better data and analysis of the data in order to make [legislative] decisions” on forfeiture.³⁰⁹ Lee McGrath of the Institute for Justice similarly recommended that Tennessee “improve its reporting requirements and make them publicly available.”³¹⁰

Several witnesses at the Committee’s hearing testified that civil forfeiture provided law enforcement with resources that were needed to adequately perform their duties.³¹¹ Others, however, raised concerns about the lack of oversight as to how forfeited funds are spent.³¹² Under Tennessee law, 100 percent of forfeited proceeds are retained by the seizing agency with little to no legislative oversight regarding how forfeited funds are used at either the state or local level. As a result, multiple witnesses recommended that forfeited funds be deposited in the general fund and allocated through the standard public budgetary process. For example, District Attorney Glenn Funk testified that in the interest of protecting the “separation of powers,” any time that “there is an asset forfeiture, funds should go into the general fund as opposed to back to the seizing agency.”³¹³

Based on its review of the testimony provided and other materials submitted for the Committee’s review, the Committee agrees with several witnesses that data on both the race and socioeconomic status of individuals whose property is forfeited and the average amount forfeited per case should be collected by the Department of Safety and reported publicly as part of the Department’s annual report. The Committee further recommends that all forfeited assets be deposited into the State’s general fund and that law enforcement agencies be required to apply to

³⁰² Crump, Testimony, *Nashville, Tennessee Hearing Transcript*, p. 45.

³⁰³ Daniel Testimony, *Nashville, Tennessee Hearing Transcript*, p. 93.

³⁰⁴ Weinberg Testimony, *Nashville, Tennessee Hearing Transcript*, p. 137.

³⁰⁵ Reddy Testimony, *Nashville, Tennessee Hearing Transcript*, p. 130.

³⁰⁶ Dunavant Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 44, 55.

³⁰⁷ Weinberg Testimony, *Nashville, Tennessee Hearing Transcript*, p. 138; Mothershead Testimony, *Nashville, Tennessee Hearing Transcript*, p. 194; Bellamy Testimony, *Nashville, Tennessee Hearing Transcript*, p. 237.

³⁰⁸ Weinberg Testimony, *Nashville, Tennessee Hearing Transcript*, p. 171; Radice Testimony, *Nashville, Tennessee Hearing Transcript*, p. 206; Hardaway Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 100-101.

³⁰⁹ Hardaway Testimony, *Nashville, Tennessee Hearing Transcript*, p. 100.

³¹⁰ McGrath Testimony, *Nashville, Tennessee Hearing Transcript*, p. 143.

³¹¹ See, e.g., Lara Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 10-11, 19; Crump Testimony, *Nashville, Tennessee Hearing Transcript*, p. 32; Dunavant Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 37-38.

³¹² See, e.g., Funk, Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 22-24; Hardaway Testimony, *Nashville, Tennessee Hearing Transcript*, p. 100; Ozment Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 208, 224.

³¹³ Funk Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 21, 26.

the General Assembly for all of their funding needs through the standard public budgetary process. Short of that, policymakers should require stronger legislative oversight of state and local agencies engaged in civil forfeiture to ensure that forfeited funds are not spent improperly. Such reforms will help reduce perverse incentives to seize property in order to fill budget gaps and provide additional layers of accountability to the public. Accordingly, the Committee suggests the following:

- a. Amending Tennessee law to require the collection of data on the race and socioeconomic status of individuals whose property is forfeited;
- b. Requiring collection of data on the median and mean value of each forfeiture by judicial district;
- c. Requiring public disclosure of how forfeited assets are used in each judicial district;
- d. Posting all data collected on civil forfeiture online; and
- e. Enabling legislative oversight of forfeited assets by mandating that all forfeiture proceeds be deposited into the general fund and that all law enforcement funding be appropriated by the General Assembly or local legislative bodies through standard, public budgetary processes.

C. Due Process Considerations

During the Committee hearing, several witnesses testified about the process by which property is seized and ultimately forfeited in Tennessee. High-profile abuses of civil forfeiture by law enforcement officials have contributed to several recent reforms. According to District Attorney General Stephen Crump, District Attorney General Michael Dunavant, and other law enforcement witnesses, Tennessee law now contains sufficient procedural due process protections to protect innocent owners and prevent abuse. In contrast, however, both current and former law enforcement officials, such as District Attorney General Glenn Funk and former Assistant District Attorney General Christopher Bellamy, and virtually all non-law enforcement witnesses called for multiple additional changes to the procedural rules surrounding civil forfeiture to eliminate perverse incentives and protect innocent owners.

Julie Warren, Tennessee/Kentucky state director for Right on Crime, testified that even if executed perfectly, the seizure process still remains “constitutionally suspect.”³¹⁴ She noted how property owners are often pitted against a prosecutor and law enforcement officials to negotiate a settlement, resulting in an “intimidating and daunting” setting.³¹⁵ Attorney John Miles testified that civil forfeiture involves a more limited appeal process than courts typically afford criminal defendants.³¹⁶ Attorney Bellamy, a former prosecutor, noted the lack of constitutional due

³¹⁴ Warren Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 147-148.

³¹⁵ *Id.*, at 149.

³¹⁶ Miles Testimony, *Nashville, Tennessee Hearing Transcript*, p. 179-185.

process afforded under the law where someone can lose their property and livelihood based on a reduced burden of proof.³¹⁷

Multiple witnesses testified that the length of the forfeiture process places an undue burden on property owners, especially when vehicles are involved. Because forfeiture hearings often take several months to resolve, and because as of 2016, 72 percent of non-cash forfeitures were of vehicles,³¹⁸ low-income Tennesseans who have access to only one vehicle and rely on that vehicle to get to work are particularly at risk.

Attorney Frank Lannom raised further concerns with the administrative hearing process, expressing concerns, among other things, that appeals are heard by supervisors of Department of Safety prosecutors rather than by an independent judge.³¹⁹

State Representative Mike Carter (R-Ooltewah) testified that several changes to state law would improve the process for seizures, including providing better access to attorneys by allowing attorney's fees to be awarded for improper seizures, and by having forfeiture proceedings conducted by courts.³²⁰

Others called for even stronger reforms. Mr. McGrath of the Institute for Justice recommended that, in order to balance law enforcement's ability to target high-level drug dealers against the protections of other property owners, the state should require criminal forfeiture for all cases involving seizures of property worth less than \$100,000.³²¹ Such a change would allow the traditional protections of the criminal justice system to attach to property owners whose property value is under that threshold, while allowing law enforcement to continue using civil forfeiture to target high-level drug dealers.

Based on this testimony, the Committee suggests strengthening the procedures surrounding forfeitures in order to protect the due process of property owners by doing the following:

- a. Permitting innocent owners to recoup their full costs and attorney's fees whenever they have successfully contested a forfeiture;
- b. Providing for expedited proceedings when an automobile is seized;
- c. Requiring that all forfeiture proceedings be conducted by a judge in a court of record, rather than by an Administrative Law Judge employed by the Department of Safety;

³¹⁷ Bellamy Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 236-237.

³¹⁸ See Weinberg Testimony, *Nashville, Tennessee Hearing Transcript*, p. 137; Warren Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 149, 150; Lannom Testimony, *Nashville, Tennessee Hearing Transcript*, p. 218; Tennessee Department of Safety & Homeland Security, Legal Division / Office of General Counsel, *Annual Seizure Report as Required by T.C.A. sec. 40-33-216 for Calendar Year 2016*, March 1, 2017, pp. 2-4, herein, at Appendix 3.

³¹⁹ Lannom Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 213-221.

³²⁰ Carter Testimony, *Nashville, Tennessee Hearing Transcript*, p. 74-77.

³²¹ McGrath Testimony, *Nashville, Tennessee Hearing Transcript*, p. 146.

- d. Requiring that property owners be afforded the right to court-appointed counsel in civil forfeiture cases where basic needs are at risk, such as shelter, sustenance, safety, health, or child custody; and
- e. Requiring criminal forfeiture proceedings for all cases involving seizures of property worth less than \$100,000.00.

D. Bonding Requirement

Several witnesses provided testimony regarding Tennessee’s \$350.00 bonding requirement for forfeiture cases. In Tennessee, the DOS requires a person contesting a forfeiture to post a bond of \$350.00 per case.³²² Only two other states—Rhode Island and Hawaii—require an individual to post a bond before being able to contest a forfeiture.³²³ Many witnesses criticized Tennessee’s bonding requirement and suggested eliminating it entirely.³²⁴

The overwhelming majority of jurisdictions—47 states and the District of Columbia—do not require a bond to be posted in order to contest the propriety of a civil forfeiture.³²⁵ Thus, Tennessee’s bond requirement is out-of-step with the vast majority of jurisdictions in requiring individuals to post a forfeiture bond in order to begin the process of contesting a property seizure.

The bonding requirement also poses substantial due process concerns. Under circumstances when a small amount of money or low-value item has been forfeited, the requirement that an individual post a \$350.00 bond is likely to deter legitimate forfeiture challenges by innocent property owners, especially when the additional cost of counsel is considered.³²⁶ Multiple witnesses testified that it never makes financial sense to contest a forfeiture of even several thousand dollars.³²⁷

Accordingly, to protect innocent owners and bring Tennessee in line with the overwhelming majority of other jurisdictions, the Committee recommends repealing the requirement that individuals be required to post a bond before being permitted to contest a forfeiture.

E. Perverse Financial Incentives

Several witnesses, including both former and current law enforcement officials, testified that Tennessee’s forfeiture laws introduce or have previously introduced perverse financial incentives

³²² Warren Testimony, *Nashville, Tennessee Hearing Transcript*, p. 148.

³²³ McGrath Testimony, *Nashville, Tennessee Hearing Transcript*, p. 143.

³²⁴ See, e.g., Weinberg Testimony, *Nashville, Tennessee Hearing Transcript*, p. 138; McGrath Testimony, *Nashville, Tennessee Hearing Transcript*, p. 143; Miles Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 183, 184; Lannom Testimony, *Nashville, Tennessee Hearing Transcript*, p. 216.

³²⁵ McGrath Testimony, *Nashville, Tennessee Hearing Transcript*, p. 143.

³²⁶ Radice Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 231, 234; Lannom Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 183-184, 231-232, 234; Miles Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 232-233, 234; Warren Testimony, *Nashville, Tennessee Hearing Transcript*, p. 152.

³²⁷ Radice Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 231, 234; Lannom Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 183-184, 231-232, 234; Miles Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 232-233, 234.

into law enforcement decisions.³²⁸ Offering a particularly pointed example, one attorney testified that a child pornography case that had been transferred to the Department of Justice for federal prosecution in order to enable a more severe sentence had thereafter been transferred *back* to state court—where it was subject to a lesser sentence—at the request of the local sheriff’s department solely because the department wanted to forfeit the defendant’s home.³²⁹

District Attorney Glenn Funk expressed concern that Tennessee’s forfeiture law can incentivize law enforcement to “go out and make some seizures to justify your own salaries, your own budget, [and] your own trips for continuing education.”³³⁰ Similarly, Christopher Bellamy, a former Assistant District Attorney in Robertson County and Montgomery County, testified that in his view, the practice of seizing money, cars, and property happens more frequently in rural areas due to perverse financial incentives. He testified that “[a] lot of these small law enforcement offices grow to depend on . . . [funds seized under Tennessee’s civil asset forfeiture law] as a means to fill their coffers, to buy police cars, to do the things that they think are necessary to enforce the law.”³³¹ He stated his concern that law enforcement officers’ incentives to fund their departments by seizing property raises questions as to the effectiveness of the law, whether it is doing what it was intended to do, and how it is impacting low-income Tennesseans.³³²

Bellamy illustrated his concern about the potential for perverse incentives by recounting the following: A young black male driving through middle Tennessee was pulled over. He had \$1,200 on him in cash. He didn’t have any drugs. There was nothing that indicated he had just sold drugs or was going to buy drugs. They seized the money because ten years earlier he had a misdemeanor marijuana charge. “That was it. And they let him go. So they literally took his money and let him go. They got into court, they went before a general sessions judge and the judge allowed them to keep that money”³³³ Former prosecutor Mr. Bellamy stated that although “civil forfeiture law is supposed to be a tool . . . this tool is not used equitably across the board.”³³⁴

Accordingly, the Committee suggests:

- a. Mandating that all forfeited proceeds be deposited in the state general fund, and that law enforcement agencies be fully funded by appropriate legislative bodies through the standard budgetary process.
- b. Instituting increased mandatory training of all law enforcement agencies utilizing civil asset forfeiture to ensure consistent application across jurisdictions and within and across departments.

³²⁸ Funk Testimony, *Nashville, Tennessee Hearing Transcript*, p. 22; Crump Testimony, *Nashville, Tennessee Hearing Transcript*, p. 57; Carter Testimony, *Nashville, Tennessee Hearing Transcript*, p. 78; Daniel Testimony, *Nashville, Tennessee Hearing Transcript*, p. 91; Hardaway Testimony, *Nashville, Tennessee Hearing Transcript*, p. 100; Lannom Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 223-224.

³²⁹ Raybin Testimony, *Nashville, Tennessee Hearing Transcript*, p. 187.

³³⁰ Funk Testimony, *Nashville, Tennessee Hearing Transcript*, p. 22.

³³¹ Bellamy Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 235-236.

³³² *Id.*, at 236-237.

³³³ *Id.*, at 249-250.

³³⁴ *Id.*, at 253.

F. Disparate Impact

Tennessee does not collect data on the race of individuals subject to forfeiture. However, law enforcement indicated that “[r]outine traffic stops can and do create opportunities for seizing property,”³³⁵ and several witnesses testified that there are significant racial disparities in traffic stops and roadside searches.³³⁶

Evidence was introduced to suggest that “in some areas, two-thirds of the assets that are seized . . . are from minorities.”³³⁷ Other jurisdictions have also reported significant racial disparities in their use of forfeiture³³⁸ For example, State Rep. Harold Love, Jr. (D-Nashville) testified that a 2015 American Civil Liberties Union report of forfeitures in Philadelphia found that 53 percent of those whose assets were seized were African-American, while African-Americans made up only nine percent of the city’s overall population.³³⁹ Further, given the significant overlap between forfeiture and drug prosecutions, the racial disparities that result from drug prosecutions disproportionately affect minorities.³⁴⁰

According to Elliot Ozment, an immigration attorney, immigrants, in particular, are also at heightened risk of unlawful forfeiture due to language barriers, reduced knowledge of their rights, and increased use of cash due to their inability to open bank accounts.³⁴¹ Bellamy, reported that based on his experience as a former prosecutor, “the negative impact of these type of [civil asset forfeiture] laws . . . is felt far greatest in your impoverished communities than it is anywhere else, to the point where you rob someone the ability to defend themselves in court.”³⁴²

Additional witnesses similarly testified that civil forfeitures undermine community and law enforcement relations. For example, Jackie Sims of the Tennessee chapter of the NAACP testified that civil forfeiture “exacerbates the community's thoughts that law enforcement is not there to protect them, is not really in their corner, that there's no trust, [and], the trust factor is huge.”³⁴³

Civil forfeiture can drive those in financially precarious situations into homelessness by depriving them of the means to get to work.³⁴⁴ Those experiencing homelessness report having their possessions, including medicine and identification, are seized without the formality of Tennessee’s established civil asset forfeiture process, including by jails.³⁴⁵ Those experiencing homelessness are also at heightened risk with respect to contesting unlawful forfeitures, because they cannot afford representation.³⁴⁶

³³⁵ Lara Testimony, *Nashville, Tennessee Hearing Transcript*, p. 11

³³⁶ Mothershead Testimony, *Nashville, Tennessee Hearing Transcript*, p. 193; Sims Testimony, *Nashville, Tennessee Hearing Transcript*, p. 240.

³³⁷ Ozment Testimony, *Nashville, Tennessee Hearing Transcript*, p. 208.

³³⁸ Love Testimony, *Nashville, Tennessee Hearing Transcript*, p. 97.

³³⁹ *Id.*

³⁴⁰ *Id.*, 96.

³⁴¹ Ozment Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 211-213.

³⁴² Bellamy Testimony, *Nashville, Tennessee Hearing Transcript*, p. 236-237.

³⁴³ Sims Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 240-241.

³⁴⁴ Lester Testimony, *Nashville, Tennessee Hearing Transcript*, p. 242; Bellamy Testimony, *Nashville, Tennessee Hearing Transcript*, p. 251.

³⁴⁵ Lester Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 243-244, 246.

³⁴⁶ *Id.*, at 245.

Several witnesses testified in opposition to the current Tennessee civil forfeiture law due its impact on poor people and those with limited resources.³⁴⁷ One witness noted that poor rural communities are particularly hurt by civil forfeiture laws. In places where whole families are dependent on one car for work, for example, if the family’s vehicle is seized, one or more family members might lose their job, and eventually, the family might become homeless as a result.³⁴⁸ Several witnesses also expressed concerns about infringement upon constitutional rights arising from forfeiture proceedings.³⁴⁹ Of note, the Tennessee Court of Criminal Appeals has held that vehicle forfeitures—which account for between 80 and 90 percent of forfeitures in recent years—can violate constitutional proscriptions against excessive fines.³⁵⁰

Ms. Sims also noted that even low-dollar seizures could impact a person’s financial circumstances. Providing a personal perspective, Ms. Sims noted that if \$141 were taken from her, she would not be able to pay her cell phone bill and might have to juggle food and utilities. According to Sims, seizures of, for instance, \$500—an amount which is not unusual in forfeiture cases—have serious consequences on the lives of poor and low income people.³⁵¹

Mr. Lester, who worked on the report of the study on driving while black in Davidson County, noted that the experience of being subjected to racially disparate treatment by law enforcement in traffic stops, as in seizures, diminishes trust. He cited the report for its finding that “more blacks in Nashville between 2010 and 2015 were pulled over annually than the population, and most . . . were innocent of any crime.”³⁵²

Accordingly, the Committee suggests amending Tennessee law to require strict compliance with the established civil asset forfeiture process regardless of the value of assets seized, and to make an award of attorney’s fees mandatory in the event that a forfeiture is undertaken without being reported.

G. Immediate, Intermediate and Long-Term Reforms Needed

Based on its review of Tennessee’s civil forfeiture laws and all testimony and materials provided, the Committee concludes that substantial reforms are needed to improve transparency, promote due process, protect innocent owners from wrongful seizures, and reduce perverse incentives to seize property in Tennessee. Accordingly, the Committee specifically recommends that the Tennessee General Assembly adopt the following immediate, intermediate, and long term reforms:

³⁴⁷ See, e.g., Bellamy Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 235-237; Sims Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 240-241; Lester Testimony, *Nashville, Tennessee Hearing Transcript*, p. 254.

³⁴⁸ Bellamy Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 250-251.

³⁴⁹ Clemmons Testimony, *Nashville, Tennessee Hearing Transcript*, p. 82; Hardaway Testimony, *Nashville, Tennessee Hearing Transcript*, p. 99.

³⁵⁰ See *Thurman v. Tennessee Dep’t of Safety & Homeland Sec.*, No. M2016-02215-COA-R3-CV, 2017 WL 2895934 (Tenn. Ct. App. July 7, 2017) (holding that “the seizure of the truck constituted an excessive fine in violation of the United States and Tennessee Constitutions”).

³⁵¹ Sims Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 240-241.

³⁵² Lester Testimony, *Nashville, Tennessee Hearing Transcript*, pp. 254-255.

Immediate Reforms:

- Require all state law enforcement agencies and judicial districts to report consistent and complete civil forfeiture data, including: (1) the number of property seizures; (2) the mean and median value of all property seizures; (3) the race and socioeconomic status of property owners; and (4) full disclosure of how forfeited assets are used in each judicial district.
- Annually report and make all forfeiture data available to the public, including online.
- Eliminate the bonding requirement for contesting seizures.
- Require that all property owners be afforded the right to court-appointed counsel in civil forfeiture cases where basic needs are at risk, such as shelter, sustenance, safety, health, or child custody.
- Institute increased mandatory training of all law enforcement agencies utilizing civil asset forfeiture to ensure consistent application across jurisdictions and within and across departments. Such training should involve command staff and supervisors as well as street and patrol officers.

Intermediate Reforms:

- Require that all law enforcement agencies in the state return forfeiture proceeds to the state's general fund, and appropriate all law enforcement funding through standard, public budgetary processes.
- Require that all forfeiture proceedings be conducted by a judge in a court of record, rather than by an Administrative Law Judge employed by the Department of Safety;
- Require expedited proceedings when an automobile is seized;
- Prohibit state and local law enforcement agencies that do not comply with minimum state standards from participating in equitable sharing of asset forfeitures with federal law enforcement.
- Adopt a fee-shifting statute to allow property owners in civil forfeiture cases to recover reasonable legal costs, including attorney's fees, for successfully contesting a forfeiture.
- Require strict compliance with the established civil asset forfeiture process regardless of the value of assets seized, and make an award of attorney's fees mandatory in the event that a forfeiture is undertaken without being reported.

Long-Term Reform:

- Abolish the practice of civil forfeiture altogether, at least for actions involving less than \$100,000 in property value, and instead utilize criminal forfeiture for these proceedings, allowing traditional constitutional protections to attach to these cases.

V. FINDINGS AND RECOMMENDATIONS

The following findings and recommendations made through the U.S. Commission on Civil Rights to state and local officials are submitted in accordance with the provisions of Section 703.2(e) of the Commission’s regulations calling upon Advisory Committees to “initiate and forward advice and recommendations to the Commission upon matters which the State Committee has studied.”³⁵³

Findings

1. Tennessee’s civil asset forfeiture law is among the **least protective of property owners** in the United States.
2. Tennessee is one of only three states that require a property owner to pay a **cost bond** in order to initiate the administrative process necessary to have wrongfully seized property returned.
3. In practice, a primary purpose of Tennessee’s civil forfeiture law is to **augment local law enforcement budgets** without the need to seek funding from a legislative body through the standard public budgetary process.
4. Tennessee law permits law enforcement to keep 100 percent of cash, private property, and proceeds forfeited with minimal oversight as to how forfeited assets are used or spent. This framework provides for **perverse financial incentives** and **encourages abuse**.
5. In 2016 and 2017, Tennessee law was amended to require the collection and reporting of certain data regarding civil asset forfeiture in the State. While these changes promoted additional transparency, the data being collected and reported is unduly limited and devoid of sufficient demographic and geographic information. As a result, **current reporting requirements are inadequate** to inform Tennessee’s citizens as to how, when, where, and from whom private property is being seized and forfeited by law enforcement. Current reporting requirements also fail to provide adequate transparency regarding how forfeiture proceeds are used and accounted for by law enforcement and other public officials.
6. There is abundant evidence that Tennessee’s civil asset forfeiture law **does not adequately protect the rights of innocent property owners**. The law’s reduced standard of proof, cash bond requirement, failure to provide a right to counsel even when basic needs are at risk, failure to provide a neutral and independent arbiter to preside over forfeiture proceedings, failure to provide meaningful judicial review, and failure to compensate innocent owners for successfully challenging wrongful property seizures all individually and collectively contribute to inadequate procedural protections.
7. There is an unacceptable risk that civil asset forfeiture, as practiced in Tennessee, is **disparately impacting poor and low-income individuals, immigrants, people of color**

³⁵³ The findings and recommendations were adopted by a vote of 11 yes to 0 no at a public, telephonic meeting of the Tennessee Advisory Committee on February 14, 2018.

and those without the means or ability to engage an attorney or contest the taking of their property.

8. In 2016 alone, law enforcement agencies in Tennessee seized over **\$17 million in cash**, in addition to seizing thousands of vehicles and other items. Tennessee's civil forfeiture law permits law enforcement officials to use forfeited funds **without adequate legislative or public oversight**. Occasionally, Tennessee law enforcement has used such funds for impermissible, non-law enforcement purposes in violation of federal law.
9. There is evidence that the practice of civil asset forfeiture **erodes respect for authority and engenders mistrust of law enforcement**.
10. Without additional legislative oversight and public accountability regarding the use of civil forfeiture in Tennessee, and unless enhanced procedural safeguards protecting the rights of innocent property owners are adopted, **respect for property rights and the rule law** will continue to be undermined.

Recommendation

Forfeiture laws that are designed to safeguard the public while ensuring the fair and equitable administration of justice further important public policy interests. Such laws can protect communities from crime while simultaneously promoting cooperative and respectful relationships between law enforcement agencies and state residents. Accordingly, the Committee recommends that the Tennessee General Assembly and the Governor consider the experiences of other states that have eliminated or substantially reformed their civil asset forfeiture laws to protect innocent property owners, improve transparency, eliminate perverse monetary incentives, and remove unnecessary burdens that prevent citizens from reclaiming wrongfully seized property.

APPENDIX

TENNESSEE ADVISORY COMMITTEE

PUBLIC MEETING – Civil Asset Forfeiture

Nashville Public Library, Main Branch, 615 Church Street, Nashville, Tennessee

July 24, 2017

AGENDA

9:30am INTRODUCTIONS

9:45 - 10:55 am PANEL 1 Law Enforcement Officials

- Glenn R. Funk, Nashville District Attorney General
- D. Michael Dunavant, Tennessee District Attorney General Conference, Incoming President
- Stephen D. Crump, Tennessee District Attorney General Conference, Legislative Chair

11:00 - 12:05 am PANEL 2 Legislative panel

- Rep. Mike Carter, Tennessee General Assembly
- Rep. John Ray Clemmons, Tennessee General Assembly
- Rep. William G. Lamberth, Tennessee General Assembly
- Rep. Martin Daniel, Tennessee General Assembly
- Rep. Harold M. Love, Jr., Tennessee General Assembly

12:10 – 1:15 pm PANEL 3 National /State Organizations

- Vikrant Reddy, Senior Research Fellow, Charles Koch Institute
- Lee McGrath, Senior Legislative Counsel, Institute for Justice
- Thomas H. Castelli, Legal Director, American Civil Liberties Union of Tennessee
- Rebecca Valles, Managing Director, Poverty to Prosperity Program, Center for American Progress

1:15pm - 2:00 pm LUNCH BREAK

2:00 - 3:05 pm PANEL 4 Tennessee Practitioners and Academics

- George Frank Lannom, Attorney, Middle Tennessee Board, Tennessee Association of Criminal Defense Lawyers
- Joy Radice, Professor of Law, University of Tennessee, Knoxville
- John Morris Miles, Attorney, Miles Law Firm, Union City
- Ben Raybin, Attorney, Raybin & Weissman, P.C., Nashville
- Kyle Mothershead, Attorney, Mothershead Law, Nashville

3:10 - 3:40 pm PANEL 5 Advocacy Organizations

- Jackie Sims, Tennessee State Conference of the NAACP
- Christopher M. Bellamy, President, Napier-Looby Bar Association
- Julie Warren, State Director, Tennessee/Kentucky, Right on Crime
- Samuel Lester, Street Outreach and Advocacy Coordinator, Open Table Nashville

3:45 – 4:30 pm PUBLIC COMMENT AND COMMUNITY TESTIMONIALS

4:30 pm Adjourn