



TESTIMONY PRESENTED TO SENATE JUDICIARY COMMITTEE

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Good morning, Chairman Greenleaf and Members of the Senate Judiciary Committee:

Thank you for the invitation to testify today about civil forfeiture in Pennsylvania and specifically to testify in support of Senate Bill 869. There is great public concern over civil forfeiture practices in Pennsylvania and an urgent need for meaningful reform to ensure that the hard-earned property of innocent citizens is adequately protected from wrongful seizure and forfeiture.

This is my twentieth year on the Penn Law faculty during which I have studied and written about civil forfeiture¹, and have represented many property owners who have faced loss of their property to civil forfeiture. I have trained pro bono lawyers from Philadelphia's largest law firms in civil forfeiture and have authored a training manual for their use.² I also am the director of clinical programs at Penn Law School in which faculty colleagues and I supervise a civil practice clinic in which certified law students represent indigent homeowners in civil forfeiture proceedings in Philadelphia. The Clinic's provision of civil forfeiture legal assistance was highlighted in the *New Yorker's* cover story, *Taken*, published in 2013.³

¹ See, e.g., Access to Justice and Civil Forfeiture Reform: Providing Lawyers for the Poor and Recapturing Forfeited Assets for Impoverished Communities, 17 YALE L. & POL'Y REV. 507 (1998); The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture, 14 FED. SENTENCING REP. 87 (2001); On the Road to Civil Gideon: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings, 19 JOURNAL OF LAW & POLICY 683 (2011).

² Civil Forfeiture of Real Property Under the Pennsylvania Controlled Substances Forfeitures Act, Training Manual, July 1, 2013, available on the website of Philadelphia Volunteers for the Indigent Program (VIP) at <https://www.phillyvip.org/content/civil-forfeiture>.

³ See Sarah Stillman, Taken, THE NEW YORKER, August 12, 2013, at 48.

I commend Chairman Greenleaf and the members of the Judiciary Committee for conducting this hearing. Civil forfeiture reform is the subject of legislative action in many state legislatures and is especially an important subject in Pennsylvania. Civil asset forfeiture has come under increasing public scrutiny in the wake of law enforcement abuses that have shocked the American public.⁴ In communities from Tenaha, Texas, and Bradenton, Florida, to Washington, D.C. and Philadelphia, property owners have lost their homes, cars, and cash to the government at alarming rates without ever being convicted of, or even accused of, a crime.

CASE PROFILES

The Penn Law Clinic first became involved in civil forfeiture cases approximately fifteen years ago when low-income homeowners started coming to the clinic reporting that their homes were being taken by the District Attorney's office for small drug-related offenses that did not involve them. They reported that they were not accused of any crime and, in fact, had never been involved with the law. They didn't know what to do and they were frightened that they would lose their homes for something they had not done. Many were elderly and almost all were African American or Latino residents.

They all asked the same question: How is it possible that the government could take their home for something they did not do? How could they lose their property when they were not even accused of a crime?

At first, we tried to refer these clients to the Public Defender's office, but we learned that they did not handle these cases because they were not criminal cases. Local legal services programs did not handle these cases because their limited resources were already overtaxed by demand for help in mortgage foreclosure, landlord-tenant, consumer protection, family law, and public benefits cases.

An early case to come to the clinic was that of a 77 year old African American homeowner who was suffering from end-stage renal disease. She relied on her neighbors to help her and therefore left her North Philadelphia front door unlocked so that neighbors could check on her and complete errands for her. Three days each week she was out of the home to receive dialysis treatment. In 2001, police alleged that they were chasing a neighborhood drug dealer near her home and that he ran through the front door of her home and out her back door as they pursued in chase.

⁴ In addition to *Taken* published in THE NEW YORKER, *id.*, see Michael Sallah et. al., Stop and Seize, Washington Post (Sep. 6, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>; see also Inquirer Editorial Board, *Dirty Money*, PHILADELPHIA INQUIRER (July 6, 2015), http://www.philly.com/philly/opinion/20150706_Dirty_money.html.

The homeowner gave police permission to search her home and the police reported that they found a small quantity of drugs in plain view in her home, presumably dropped by the fleeing individual. Although the elderly homeowner was certainly not charged with any criminal offense, the District Attorney's office filed a petition for civil forfeiture against her home in September of 2001.⁵ The homeowner was indigent and unable to afford a lawyer and came to the Penn Law Clinic in early 2002. The Clinic undertook representation and filed affirmative defenses to the forfeiture petition. In November 2003, some twenty-three months after the filing of the forfeiture petition, the District Attorney's office withdrew the petition against her home.

The Clinic began to see many cases because the Philadelphia District Attorney's office was filing thousands of civil forfeiture petitions in robotic fashion. While the Clinic handled some cars and cash cases, we decided to prioritize our limited resources by focusing primarily on civil forfeiture actions brought against homes. Despite the passage of many years since that early case, the factual profile of civil forfeiture cases have remained remarkably similar.

The following brief case descriptions illustrate the profile of civil forfeiture cases observed by the Clinic over and over again.

Mary and Leon's Story

Several years ago, an African American husband and wife living in West Philadelphia came to the clinic after being served with petition by the district attorney's office seeking to forfeit their home for three alleged \$20 marijuana sales by their adult son, one of which allegedly occurred on the porch of their home. Mary and Leon were 68 and 70 years of age and, upright, law-abiding citizens. They had never been involved with the law in their whole lives, never charged or convicted of a crime. Leon was a former steel plant worker; Mary was a retail saleswoman and former block captain in her neighborhood. Their home was all paid up, and they now lived on very modest means, financially qualifying for free legal services.

They were very frightened about the prospect of losing their home at their age with nowhere to go. They were frightened for their adult son who was now facing criminal charges for a drug offense. They did not know how they were going to help their son through this situation. And they were frightened because Leon was battling pancreatic cancer, and they needed to spend a lot of time at the hospital and with his doctors. They did not know what to do and they did not

⁵ Com. v. 1365 W. Colwyn Street, Court of Common Pleas, 010902903.

understand how their home could be taken when they had not done anything wrong.⁶

If ever an elderly couple needed help, it was Mary and Leon. Pitted against the power of the state and too poor to afford a lawyer, they could have easily lost their home at a most difficult time. With legal help, however, and only after the filing of defenses, discovery, and public exposure focused on their case, they were able to save their home.

But many Pennsylvanians are not so lucky.

Anna's⁷ Story

Anna was a middle-aged, Hispanic single parent, a hard working health care worker employed outside of her home. Police seized and sealed her home under Pennsylvania's civil forfeiture law, kicking her out on the spot without any advance notice or opportunity to be heard. The seizure was based upon low-level drug sales alleged to have been committed by her adult son and her son's friend who was temporarily living with them. She had agreed to allow her son's friend to live in her home because he had nowhere else to go.

Anna's clothes, medicine, and other belongings remained locked in her home. She was out of her home for two months, forced to live temporarily with her sister in overcrowded conditions. She had committed no crime, was never charged with a crime, and was not even suspected by police of any wrongdoing. Indeed, she had never been convicted of a narcotics offense in her life.

With the Clinic's help, she filed a motion to be restored to her home. However, the district attorney's office still refused to allow her to return to her home. The Court held a full hearing, after which it ordered that she be returned to her home. Though justice was ultimately obtained for her, it took two months and full legal proceedings to get her back into her home. Anna was never charged with a crime or even suspected of any wrongdoing.

While the Clinic's cases largely involve home forfeitures, civil forfeiture focuses largely on cars and cash. In one of the Clinic's cases, the police confiscated the piggy bank of our client's young daughter when they searched her home for the alleged wrongdoing of a third person. The piggy bank contained her daughter's birthday money in the amount of \$91. Neither mother nor daughter was ever charged with any criminal wrongdoing, but it still took over twelve months and

⁶ Their story was featured in the *New Yorker*'s cover article, *Taken*, with their permission. At first, they did not want to disclose their story to the public, but they ultimately decided they would do so if their story could help others facing the same situation. See Sarah Stillman, *Taken*, THE NEW YORKER, August 12, 2013, at 48.

⁷ This is a fictitious name to protect the privacy of the homeowner.

many court appearances with a lawyer by the mother's side before she was able to get her daughter's piggy bank money returned.

Law enforcement authorities often say that they bring civil forfeiture actions against homes because the community wants them to do so. The Clinic has investigated that claim in a number of cases. Our students have visited with neighbors to see what they believe. In one case brought against the home of an African American grandmother for the alleged drug offense of her adult son, our students talked with almost all of the residents living on the same block. Out of slightly more than thirty houses on the block, twenty-seven neighbors signed a petition requesting that the District Attorney's office not take the grandmother's home. They attested to the fact that she was a good neighbor.⁸

These stories are not unique. They reflect a pattern of police seizures in which homeowners are neither accused nor convicted of a crime. Criminal activity, to the extent it is proven at all, often involves low-level drug sales by third-party adults for which the district attorney's office seeks to forfeit homes of innocent homeowners on the basis that their property *facilitated* drug activity.

According to government reports for fiscal years 2005 through 2013, the Philadelphia District Attorney's office seized and forfeited 708 houses, 1,866 cars, and 31.5 million dollars in cash, deriving a total income in excess of 44 million dollars from forfeited property. Civil forfeiture is big business at the expense of the hard-earned property of ordinary Pennsylvanians.

The seizure and forfeiture of large amounts of private property, to the exclusive financial benefit of police and prosecutors, has caused substantial public concern. On July 6, 2015, the *Philadelphia Inquirer* published an editorial, "*Dirty Money*,"⁹ stating:

Using the state's civil forfeiture law, which is designed to deprive drug dealers of ill-gotten gains, the Philadelphia District Attorney's Office has routinely thrown innocent people out of their homes on the grounds that investigators believed drug crimes took place in them. The law allows prosecutors to take a property even if the owner has not been accused of a crime and, worse, before a judge reviews the case.

On December 10, 2012, the *Scranton Times-Tribune* urged reform of Pennsylvania draconian forfeiture law.¹⁰ A Philadelphia journalist has described local civil

⁸ Isaiah Thomson, *Law to Clean Up 'Nuisances' Costs Innocent People their Homes*, PROPUBLICA (Aug. 5, 2013), <http://www.propublica.org/article/law-to-clean-up-nuisances-costs-innocent-people-their-homes/single#republish>.

⁹ Inquirer Editorial Board, *Dirty Money*, PHILADELPHIA INQUIRER (July 6, 2015), http://articles.philly.com/2015-07-07/news/64146026_1_property-seizures-forfeiture-law-enforcers.

¹⁰ Scranton Times-Tribune, Editorial (Dec. 10, 2012), available at <http://newslanc.com/2012/12/10/fix-states-draconian-forfeiture-law/>.

forfeiture practices as “*seize first, ask questions later.*” Forfeiture practices in Philadelphia’s Courtroom 478 have been satirized on the *Daily Show* and on John Oliver’s *Last Week Tonight*.¹¹ The Commonwealth Court of Pennsylvania has cautioned that it is only strong procedural protections that prevent civil forfeiture from amounting “to little more than state-sanctioned theft¹².”

CIVIL FORFEITURE

Homeowners whose property is seized usually ask the same question: How is it possible that their homes or their cash can be taken by the government when they have not committed a crime and are not even accused of violating the law? How can this be lawful?

Civil forfeiture was used in the earliest days of the Republic to combat smuggling, piracy, and customs violations aboard cargo ships.¹³ Today, this powerful law is increasingly used against ordinary citizens to place their homes, cars, and cash at dangerous risk even though they are not convicted of, or even accused of, a criminal offense. A tool originally intended to shut down kingpins and criminal enterprises in the War on Drugs, civil forfeiture has become an everyday occurrence unleashed against the property of poor and middle income residents for low-level drug offenses that are often not their doing and frequently unproven.

The financial pay-off to local police and prosecutors from forfeited property is huge. In many states, including Pennsylvania, forfeited funds flow directly to law enforcement agencies with little public accountability or transparency. This distorts prosecutorial discretion, encourages law enforcement abuses, and diminishes public respect for law enforcement and confidence in the fairness of our justice system.

Civil forfeiture became big business at the expense of ordinary citizens when it became part of the war on drugs with the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970.¹⁴ Federal law conveys to law enforcement agencies forfeiture authority over controlled substances and conveyances used to transport controlled substances, and Congress expanded this

¹¹ John Oliver’s broadcast is available at <https://www.youtube.com/watch?v=3kEpZWGgJks>.

¹² Com. v. 605 Univ. Drive, 61 A.3d 1048, 1054 (Pa. Commw. Ct. 2012), *appeal granted in part*, 71 A.3d 915 (Pa. 2013) (quoting Com. v. Younge, 667 A.2d 739, 747 (1995)).

¹³ See, e.g., *Palmyra, Escurra*, 25 U.S. 1, 12 Wheat. 1, 6.L.Ed. 531 (1827) (holding that a conviction for piracy was not a prerequisite to seizing and forfeiting a ship allegedly engaged in piratical aggression in violation of federal law); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1996) (describing the early history of civil asset forfeiture).

¹⁴ 21 U.S.C. § 881(a) (2014) (effective 1970).

authority to moneys and negotiable instruments in 1978¹⁵ and to real property in 1984.¹⁶

Civil forfeiture is an in-rem legal proceeding brought against the offending property on the theory that the property has done wrong by facilitating a crime. Unlike criminal forfeiture which is brought against individuals directly accused of a crime, a civil forfeiture action is directed at the property and therefore the property owner need not be convicted of, or even charged with, any criminal wrongdoing. Once property is forfeited, it becomes the property of law enforcement authorities which may destroy the property, retain it for its own use, or sell it and keep the proceeds.¹⁷ On the federal level, the Justice Department's Asset Forfeiture Fund takes in more than \$1 billion in assets each year.¹⁸

In response to growing concerns over forfeiture abuses and disturbing data showing that 80% of all forfeitures were uncontested, Congress held hearings in the late 1990's and sought to enact reforms to the federal civil asset forfeiture law. The Civil Asset Forfeiture Reform Act of 2000 (CAFRA)¹⁹ attempted to balance more fairly law enforcement needs with the property rights of citizens. It also sought to limit the use of civil forfeiture and to encourage greater use of criminal forfeiture. The enactment of CAFRA resulted in reforms that slightly elevated the evidentiary burden on governmental authorities (from probable cause to preponderance of the evidence), provided a right to counsel for indigent property owners under very limited circumstances, and eliminated cost bonds which were formerly required of property owners in order to be able to defend against forfeiture proceedings.

However, CAFRA did not require a criminal conviction before property could be forfeited, nor did it address the financial incentive inherent in the distribution of assets to the very law enforcement agencies that seize them. Legislative compromises prior to the passage of the Act watered down the final bill and, by many accounts, prevented the reform act from being effective in bringing meaningful reform to civil forfeiture.²⁰

¹⁵ 21 U.S.C. § 881(a)(6) (2014) (effective 1978).

¹⁶ 21 U.S.C. § 881(a)(7) (2014) (effective 1984).

¹⁷ Assets from federal civil forfeiture flow to the Department of Justice's Asset Forfeiture Fund or the Department of the Treasury's Forfeiture Fund and are used for law enforcement purposes.

¹⁸ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-736, JUSTICE ASSETS FORFEITURE FUND: TRANSPARENCY OF BALANCES AND CONTROLS OVER EQUITABLE SHARING SHOULD BE IMPROVED (2012), <http://www.gao.gov/assets/600/592349.pdf>. (The Asset Forfeiture Fund increased from \$500 million in 2003 to \$1.8 billion in 2011).

¹⁹ Pub. L. No. 106-185, 114 Stat. 202 (codified in various sections of 18 U.S.C. and 28 U.S.C.).

²⁰ See, e.g., John R. Emshwiller & Gary Fields, *Federal Asset Seizures Rise, Netting Innocent With Guilty*, THE WALL STREET JOURNAL (Aug. 22, 2011), <http://www.wsj.com/articles/SB1000142405311903480904576512253265073870>.

Civil Forfeiture in Pennsylvania

Pennsylvania enacted its own civil asset forfeiture statute in 1988,²¹ modeled largely upon the federal statute. Known as the Pennsylvania Controlled Substances Forfeiture Act, Pennsylvania law provides for the seizure and forfeiture of controlled substances, drug paraphernalia, conveyances, including aircraft, vehicles, and vessels used to transport controlled substances, money, negotiable instruments, firearms, and real property used or intended to be used to facilitate a violation of Pennsylvania's Controlled Substance, Drug, Device, and Cosmetic Act. Forfeited property is transferred to the custody of the district attorney -- if the seizing authority is local -- or to the Attorney General -- if the seizing authority has statewide authority -- and may be retained for official use or sold, with 100% of proceeds going to law enforcement authorities.

Civil forfeiture in Pennsylvania is big business. In Fiscal Year 2012-13 (the last year for which official figures are available), the Report of the Attorney General reveals that law enforcement authorities took in \$17,904,147.60 in income from forfeited property. Before deducting for expenditures for the fiscal year, law enforcement authorities in Pennsylvania amassed an aggregate grand total of \$43,241,640.80 in their forfeiture fund accounts.

Pennsylvania Asset Forfeitures FY 2012-2013

During fiscal year 2012-13, eight county prosecutor offices in Pennsylvania each took in more than one-half million dollars in income derived solely from forfeited property.

²¹ 42 Pa.C.S. § 6801 et. Seq.

The following chart shows the top ten income-generating counties derived from forfeited property during FY 2012-13.

County District Attorneys Reports	Cash Forfeitures	Real Estate	Vehicles	Total Income from Forfeitures	Total Available in Forfeiture Fund (Before Expenditures)
Philadelphia	3,457,449.00	38	169	4,979,456.00	8,294,788.52
Montgomery	1,159,628.77	0	25	1,213,361.55	4,291,943.16
Allegheny	701,623.24	0	11	776,204.16	1,517,274.87
Lehigh	533,169.36	0	60	717,204.26	791,451.03
Lackawana	178,200.83	0	8	698,565.86	1,264,702.10
Lancaster	267,066.65	0	28	686,166.97	2,412,569.70
Cumberland	123,433.37	4	12	683,077.88	909,575.84
Dauphin	280,590.63	0	22	514,344.89	742,388.69
York	236,086.09	0	32	493,253.34	1,619,334.45
Delaware	250,021.00	0	53	308,885.00	679,763.02
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Total of 63 Counties Reporting	8,381,971.77	45	509	12,970,055.69	27,917,859.39
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Office of Attorney General	1,214,057.77	14	210	1,479,047.25	6,525,343.78
State Police	3,297,009.91			3,455,044.76	8,798,437.74
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Grand PA Totals FY 2012-13	12,893,039.40	59	719	17,904,147.60	43,241,640.80

Civil Forfeiture Income-Generator Index (Per Capita Forfeited Income)

Although Philadelphia County generates the most income from forfeited property in absolute dollars, it is not the highest generator of forfeiture income when measured on a per capita basis. The Civil Forfeiture Income-Generator Index measures the total income derived from forfeited property divided by county population to look at the highest income generators on a per capita basis. The following index is derived from total income from forfeited property in 2012-13

compared to population figures reported for 2013. It enables comparisons with the statewide per capita average and shows that the six highest counties generating income from forfeited property on a per capita basis are Lackawana, Philadelphia, Cumberland, Lehigh, Dauphin and Montgomery Counties.

The district attorney's offices in Lackawana, Philadelphia, and Cumberland counties took in forfeited income at more than double the state average.

County	FY 2012-13 Civil Forfeiture Per Capita Index
Lackawana	3.27
Philadelphia	3.21
Cumberland	2.83
Lehigh	2.02
Dauphin	1.90
Montgomery	1.49
Lancaster	1.30
York	1.12
Allegheny	0.63
Delaware	0.55
Pennsylvania Average	1.39

The Philadelphia Story

Philadelphia County is one of the nation's most aggressive hot spots in using civil forfeiture as a means to seize and forfeit homes, cars, and cash, with a significant financial gain to the District Attorney's office. In 2011 alone, the Philadelphia District Attorney's office filed 6,560 civil forfeiture petitions against property owners. According to asset forfeiture reports submitted for Philadelphia County, private property is forfeited at disturbing rates that are out of proportion to other urban jurisdictions. According to an Institute for Justice study, although Philadelphia's population is smaller than Kings County (Brooklyn, New York) and Los Angeles County, Philadelphia brought in twice as much civil forfeiture revenue as those two counties combined.

On average over the past decade, Philadelphia's forfeiture practices resulted in the district attorney's office taking in more than \$5 million dollars annually in forfeited property, as detailed in the following chart. (Total income from forfeited property includes the sale of forfeited property and proceeds received from shared forfeitures).

Fiscal Year	Cash Forfeited	Cars Forfeited	Houses Forfeited	Total Income from Forfeited Property
2005-06	\$ 4.3 million	453	99	\$ 6.73 million
2006-07	\$ 3.1 million	352	85	\$ 6.39 million
2007-08	\$ 3.8 million	263	68	\$ 4.67 million
2008-09	\$ 4.5 million	176	118	\$ 6.22 million
2009-10	\$ 4.3 million	116	90	\$ 5.97 million
2010-11	\$ 4.2 million	154	114	\$ 5.54 million
2011-12	\$ 3.8 million	183	96	\$ 4.80 million
2012-13	\$ 3.5 million	169	38	\$ 4.98 million
Total for 8 Fiscal Years from 2005-13	\$ 31.5 million	1,866	708	\$ 44.30 million

At times, local prosecutors have attempt to justify the receipt of such huge amounts of money by stating that they spend forfeited monies on community-based drug and crime-fighting programs. It is true that Pennsylvania's civil forfeiture statute authorizes the Attorney General and local district attorneys to designate proceeds from forfeited property to be utilized by community-based drug and crime-fighting programs. However, the Attorney General's own reports document that the Philadelphia District Attorney's office spends zero dollars of its forfeiture funds on community-based drug and crime fighting programs. The same is true of Cumberland and Dauphin Counties, two other high income-generators of forfeited funds.²²

The Penn Law Clinic's representation of homeowners in civil forfeiture proceedings in Philadelphia County over the past fifteen years supports the concern that real estate forfeitures in Philadelphia County disproportionately affect low-income residents and communities of color. Regular observations in Courtroom 478

²² Of the top ten income-generating counties from forfeited property, prosecutor offices in Cumberland, Dauphin, and Philadelphia Counties report that they spent no funds from forfeited property on community-based drug and crime-fighting programs during FY 2012-13. The Lackawanna County district attorney's office spent only \$1,000 of its almost \$700,000 in forfeited income on community-based programs. Only three local district attorney offices -- Allegheny, Delaware, and Montgomery Counties --spent sizeable amounts of forfeited income on community-based programs. The report of the Attorney General does not show any expenditure of forfeited funds spent by that office on community-based programs.

of City Hall (Philadelphia's civil forfeiture scheduling court) over many years reveal that property owners are overwhelmingly African-American or Latino and are unrepresented by counsel. Although actual data is not easily obtained, the Penn Law Clinic is currently examining each and every real estate forfeiture petition filed by the Philadelphia District Attorney's office during calendar year 2010.

Preliminary results from this examination show that the District Attorney's office filed 472 real estate civil forfeitures in calendar year 2010. Excluding several commercial properties in this mix, the mean official assessed value of these residential properties in 2010 is only \$23,174.34. The median value is lower at \$18,550.00, meaning that half of all homes in civil forfeiture had an official assessed value of under \$18,550.00. Perhaps, most revealing, is that 75% of all homes had an official assessed value of \$29,900 or less. These preliminary figures appear to support the actual experience that civil forfeiture actions brought against homes in Philadelphia overwhelmingly involve families of very modest means who frequently lack the financial resources to afford legal counsel.

The Penn Law Clinic has also mapped out the location of each of the 472 real estate civil forfeitures filed in calendar year 2010 (excluding several commercial properties). This mapping utilizes Policy Map, a geographical mapping software program with official census data and related information integrated into the program. I have attached as Exhibit A to this testimony a map of all real estate civil forfeitures filed in 2010. This map shows that civil forfeiture petitions brought against homes in Philadelphia are overwhelmingly concentrated in those areas of the City that have the highest concentrations of non-white residents. Significantly, this map shows that not a single civil forfeiture petition was brought against a home in an expansive area of the City with high White resident concentrations: From Spring Garden to Washington Avenue, River to River, as well as University City. This means that despite the large resident populations in these areas of the City, including neighborhoods such as Rittenhouse Square, Washington West, Old City, and Society Hill, there was not a single home threatened by civil forfeiture. I have attached a Policy Map showing this part of the City and the location of civil forfeiture petitions as Exhibit B.

A recent ACLU study of cash forfeitures estimates that 71% of innocent owners whose cash is taken by Philadelphia law enforcement are African-Americans.²³ The ACLU report suggests that the high rate of arrest of African-Americans in controversial policing policies may account for this skewed result. Preliminary observations from the Penn Law Clinic's study of real estate forfeiture petitions in 2010 suggest that the percentage of African-Americans impacted by real

²³ Scott Kelly, Guilty Property: How Law Enforcement Takes \$1 Million in Cash from Innocent Philadelphians Every Year—and Gets Away With It, ACLU of Pennsylvania, 10, June 2015, <http://www.aclupa.org/issues/forfeiture/>.

estate forfeitures may be even higher than it is for cash forfeitures. However, the Clinic's study is still at a very preliminary stage.

The Essential Elements of Meaningful Forfeiture Reform

The General Assembly has not enacted any reforms to Pennsylvania's civil forfeiture drug law since the Act's original passage in 1988. Without attempting to be exhaustive, I want to summarize several areas of fundamental concern to which meaningful forfeiture reform should be directed. However, in doing so, I also want to emphasize an important point discussed later in this testimony: Piecemeal efforts to reform civil forfeiture are unlikely to succeed; comprehensive reform is needed.

- **Require that a property owner be convicted of a criminal offense before permitting the forfeiture of his or her private property**

The most common criticism of civil forfeiture is that it permits private property to be forfeited even when the owner is not found guilty of the underlying criminal offense or, indeed, is not even charged with a criminal offense. Instead, civil forfeiture is premised upon the legal fiction that the property has done wrong, and therefore if the Government can show that the property "facilitated" a criminal offense (made it easier to occur), the owner can lose his or her property despite not having committed a criminal offense.

Too often, a parent or grandparent who has never violated the law finds that the family home or car is now at risk of being forfeited to the government because of the actions of an adult child or grandchild who is charged with a low-level drug offense. Sometimes, the alleged criminal wrongdoing does not even involve a family member or household resident. And, in other cases, there is no crime at all, or the third party charged with a crime is acquitted of the offense. Pennsylvanians are shocked to learn that the law permits such a harsh result.

As a result, some states have amended their civil forfeiture laws to require a criminal conviction of the property owner before his or her private property can be forfeited to the government. In 2014, Minnesota enacted legislation that permitted the government to forfeit private property only if law enforcement agencies first obtained a criminal conviction or its equivalent of the property owner.²⁴ This

²⁴ SF 874 was passed by the Minnesota State Senate by a vote of 55-5 and the Minnesota House of Representatives unanimously. It was signed by Governor Dayton on May 6, 2014 and became effective on August 1, 2014. See Nick Sibilla, Op-Ed., *Minnesota Now Requires A Criminal Conviction Before People Can Lose Their Property To Forfeiture*, FORBES, May, 7 2014, <http://www.forbes.com/sites/instituteforjustice/2014/05/07/minnesota-forfeiture-reform>.

change went into effect on August 1, 2014. North Carolina, similarly, permits the forfeiture of property only if the property owner is convicted of a crime.²⁵

While a criminal conviction should be required before forfeiting any property, family homes deserve special treatment, especially when co-owned by someone not involved in any criminal wrongdoing. As a result, some states have required convictions of all homeowners before permitting civil forfeiture of residences or other real estate.²⁶ Alternatively, family homes can be excluded entirely from within the reach of civil forfeiture. The grievous harm caused by forfeiture to the whole family, especially to young children whose education is disrupted and stability uprooted, is too harsh to justify any possible gain by the use of forfeiture. Finally, under no circumstances should the seizure of real property be permitted without affording a property owner advance notice and a pre-seizure hearing.²⁷ Ex parte seizures of family homes have no place in our constitutional framework and states should protect against such practices by including an explicit ban in civil forfeiture statutes.

- **Eliminate the financial incentive for prosecutors in civil forfeiture by directing all proceeds from forfeited property to the state treasury or general county fund**

A major criticism of civil forfeiture is that it creates a powerful profit incentive for law enforcement authorities that skews prosecutorial discretion and distorts agency priorities. Forfeited funds flow directly to law enforcement agencies from the property they seize, rather than to the general treasury. By so doing, these funds largely escape public accountability and transparency.

Pennsylvania directs all forfeiture funds to law enforcement agencies. The sources of forfeited funds, the exact amounts, and their precise uses by law enforcement authorities are guarded information that is very difficult, if not impossible, for the public to access and decipher.

While a majority of states direct all forfeited funds to law enforcement agencies, eight states distribute no portion of forfeiture proceeds to law enforcement agencies. Some other states direct only a portion of forfeited funds to law enforcement

²⁵ N.C. GEN. STAT. ANN. § 14-2.3(b) (West 2014) (North Carolina's general civil forfeiture act reads in part, "The action must be brought within three years from the date of the conviction for the offense.").

²⁶ See, e.g., North Dakota where residences and other real estate are not subject to forfeiture if they are co-owned by someone who has not been convicted of the underlying criminal offense. N.D. CENT. CODE § 29-31.1-01(1)(b) (2013); see also Kan. Const. B. of Rts. § 12 (prohibiting the forfeiture of estates, even in cases of criminal conviction).

²⁷ While such a practice appears to be unconstitutional under the Supreme Court's decision in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), the practice remains in use by local prosecutors (at least until recently when the practice was challenged in a federal lawsuit in *Sourovelis v. City of Philadelphia*, Civil Action No. 14-4687 (E.D.P.A. 2015)).

agencies. For example, Connecticut, Oregon, and California provide that 60, 63, and 65 percent of their forfeiture funds, respectively, be directed to law enforcement agencies. Maine and Vermont direct that all funds go to the state treasury, while Maryland permits local governments as well as the state treasury to receive forfeited funds. Missouri provides that all forfeited funds go to local schools, while Indiana permits funds to go to the state's education fund.

The major problem of directing forfeited funds to law enforcement agencies is that it creates a conflict of interest that incentivizes police and prosecutors to overreach and engage in abusive practices. This danger was amply documented in Tenaha, Texas, where cash forfeitures during traffic stops along infamous highway corridors became commonplace and innocent citizens were coerced to sign waivers of their property in order to protect against threatened arrests, criminal prosecutions, or even loss of their children.²⁸ To varying degrees, such abuses play out in civil forfeiture hotspots around the country.

The problem of “policing for profit” is a real one from many perspectives. In difficult economic times, this inherent conflict of interest threatens to divert scarce resources away from the prosecution of violent criminal offenders that carries no economic payoff and toward the pursuit of non-violent, low-level drug offenders and their families where economic gain can be obtained.

- **Require a Minimum Threshold for Cash Forfeitures**

Cash forfeitures present a special problem. The overwhelming percentage of forfeiture petitions in Pennsylvania are brought to forfeit cash. Cash forfeitures are the most lucrative part of the forfeiture program. In Fiscal Year 2012-13, 72 percent of all income generated from forfeited property was derived from cash forfeitures.

If the amount of a cash seizure is small, as is true in many cash forfeitures, it is not economically feasible for the property owner to lose time from work for multiple court appearances or to incur the expense of hiring a lawyer to defend the property – regardless of the innocence of the property owner or the property. In this common situation, the government wins by default because out-of-pocket expenses needed to defend private property exceed the value of the seized property. Consequently, modest sums of cash can be seized by police almost with impunity.

Recent studies of cash seizures in Philadelphia County reveal that half of all such cases may involve sums as small as \$192 or even less.²⁹ A journalist’s study of cash forfeitures in Philadelphia County published in 2012 concluded that

²⁸ See Sarah Stillman, *Taken*, THE NEW YORKER (Aug. 12, 2013), <http://www.newyorker.com/magazine/2013/08/12/taken>.

²⁹ Inquirer Editorial Board, *Dirty Money*, PHILADELPHIA INQUIRER (July 6, 2015), http://www.philly.com/philly/opinion/20150706_Dirty_money.html.

Philadelphia prosecutors regularly forfeit sums as small as \$100 and that it sometimes took as many as ten separate court dates in order to get a hearing before a judge for the return of this small amount of cash.³⁰ According to the journalist's review of forfeiture data, the Philadelphia District Attorney filed more than 8,000 forfeiture cases for currency in 2010, for an average of just \$550 per individual filing. In a sample of more than 100 cases from 2011 and 2012 reviewed by the journalist, the median amount was only \$178.³¹

To protect against this economic reality, cash forfeitures should have a minimal threshold amount below which cash forfeitures are not permitted. For example, cash forfeitures might be limited to sums that exceed a threshold amount, such as \$1000.³² Alternatively, measures might be introduced to create a presumption against forfeitures of small amounts of cash coupled with economic incentives that award a prevailing owner reasonable attorney's fee and out-of-pocket expenses so that it makes economic sense to mount a defense when cash is wrongfully seized.

- **Elevate the Government's burden of proof to a higher standard, such as "beyond a reasonable doubt" or, at a minimum, "by clear and convincing evidence"**

In a criminal case, the Government is required to prove the guilt of an accused by the highest standard available in the law: *beyond a reasonable doubt*. This demanding burden of proof is imposed upon the Government because of the importance of the proceedings, the seriousness of the consequences that attach to a finding of guilt, and the high value that our justice system places on ensuring that innocence is not wrongly adjudicated as guilt and mistakenly punished.

In contrast, ordinary civil cases typically involve disputes between private parties for the payment of money and require a much lower burden of proof for a plaintiff to prevail. In these cases, a plaintiff must prove the elements of his or her claim only by a *preponderance of the evidence*. Our justice system simply asks whether it is more likely than not (51%) that the plaintiff has proven his

³⁰ Isaiah Thompson, *The Cash Machine: How the Philly D.A. Seizes Millions in Alleged Crime Money – Whether There's Been a Crime or Not*, PHILADELPHIA CITY PAPER (Nov. 28, 2012), <http://citypaper.net/The-Cash-Machine/>.

³¹ *Id.*

³² According to one newspaper account, a Philadelphia police directive that sets guidelines for seizures under drug forfeiture laws requires a minimum figure of \$1,000. However, according to the same article, a Police spokesman, Lt. John Stanford, said it didn't apply to (alleged) drug cases (though amounts smaller than \$1,000 have been subjected to forfeiture in many cases not involving drugs as reviewed by the reporter). See Isaiah Thompson, *The Cash Machine: How the Philly D.A. Seizes Millions in Alleged Crime Money — Whether There's Been a Crime or Not*, PHILADELPHIA CITY PAPER, Nov. 29, 2012, at 8, 10, <http://citypaper.net/article.php?The-Cash-Machine-19189>. Further, the reporter notes from his study of case forfeitures that "if \$1,000 were set as a minimum amount for seizure, the vast bulk of forfeiture cases in Philadelphia — and the vast bulk of the revenue generated from them — would disappear." *Id.*

entitlement to the relief he seeks. Stated differently, this standard asks whether the scales of justice tip ever so slightly in one direction or the other, and if they do in the direction of the plaintiff then that is all that is necessary for the plaintiff to prevail.

In between these two standards, the law provides for an intermediate standard of proof known as *clear and convincing*. It is applied most often in government-initiated proceedings that significantly threaten the liberty, dignity, reputation, or fundamental interests of an individual.³³

The standard of proof required in a legal proceeding has strong due process foundations because it reflects the degree of confidence our society believes a judge should have in the correctness of his or her factual conclusions and it “serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.”³⁴

Although Pennsylvania’s civil forfeiture law is silent about the burden of proof to be applied, Pennsylvania courts have imposed a lower standard of “preponderance of the evidence” upon the Government on the basis that it is a civil proceeding. This low burden of proof is one of the distinguishing features of civil forfeiture that separates it from criminal forfeiture. Criminal forfeiture may only proceed against a person accused of a crime if a conviction of the underlying offense is obtained “beyond a reasonable doubt.” Yet, civil forfeiture is generally recognized as quasi-criminal in nature and punitive, and it is intended to penalize the offender for committing an offense.³⁵ Moreover, especially where one’s home is directly involved and the homeowner is not convicted of criminal wrongdoing, forfeiture implicates fundamental rights of personal security, personal liberty, and private property, all requiring a higher evidentiary standard.³⁶

A number of states impose a higher standard of proof upon the Government. Vermont³⁷ and Connecticut³⁸ require the Government to prove its case by clear and convincing evidence. Oregon requires a clear and convincing standard if the property that is the subject of the civil forfeiture proceeding is real property.³⁹ California requires an even higher standard: cash forfeitures require a clear and convincing standard, while real property forfeitures require that the government

³³ See, e.g., *In re Terwilliger*, 450 A.2d 1376 (Pa. Super. Ct. 1982) (requiring a showing of clear and convincing evidence that sterilization is in the best interests of an incompetent person before ordering the sterilization); see also *Addington v. Texas*, 441 U.S. 418 (U.S. 1979) (requiring all states to find that an individual was mentally ill and dangerous by a clear and convincing evidence standard before imposing involuntary civil commitment).

³⁴ *Addington v. Texas*, 441 U.S. 418, 423 (1979)

³⁵ *United States v. Ursery*, 518 U.S. 267, 303 (1996)

³⁶ *Com. v. Real Prop. & Improvements at 2338 N. Beechwood St. Philadelphia, PA 19132*, 65 A.3d 1055, 1063 (Pa. Commw. Ct. 2013)

³⁷ VT. STAT. ANN. tit. 18, § 4244(c) (West 2014).

³⁸ CONN. GEN. STAT. § 54-36h(b) (2014).

³⁹ OR. REV. STAT. § 131A.255(3) (2014).

prove its case beyond a reasonable doubt.⁴⁰ Wisconsin requires that the state shoulder the burden of satisfying or convincing to a reasonable certainty by the greater weight of the credible evidence that the property is subject to forfeiture.⁴¹ New York retains a preponderance of the evidence standard for general forfeitures, but requires a clear and convincing standard for real property.⁴²

In order to properly protect private property from wrongful forfeiture, Pennsylvania should require of government a more demanding burden of proof than the lowest standard of “by a preponderance of the evidence.” Pennsylvania might adopt the criminal standard of beyond a reasonable doubt for all forfeitures or, at a minimum, it should adopt a clear and convincing standard of proof. Where a civil forfeiture action is brought against real property that serves as the primary residence of the property owner, the burden required of the government should be the highest standard possible.

- **Shift the burden from the property owner to have to prove the innocence of his or her property and require that the government demonstrate by clear and convincing evidence that a forfeiture of property will not be disproportionate to the gravity of the underlying offense**

Pennsylvania law currently provides for an “innocent owner” defense to civil forfeiture. However, this defense is an affirmative defense, meaning that it must be asserted formally in the pre-trial pleadings or it is legally waived. Moreover, when asserted, the burden is on the property owner at trial to prove his or her innocence. Under current law, the property owner must demonstrate that he or she did not know of the illegal activity or did not consent to the illegal activity.⁴³

This is a difficult burden for all property owners, but is especially difficult for owners who are not represented by counsel. Moreover, this proposition stands our legal system’s time-honored presumption of innocence on its head. Our justice system is built firmly upon the legal proposition that all citizens are presumed innocent and the burden falls to the Government to prove otherwise. In civil

⁴⁰ CAL. HEALTH & SAFETY CODE §§ 11488.4(i)(1-4) (West 2014).

⁴¹ WIS. STAT. ANN. § 961.555(3) (West 2014).

⁴² N.Y. C.P.L.R. 1311 (MCKINNEY 2014).

⁴³ 42 PA. CON STAT. ANN. §§ 6802(j) (West 2014). (The statute states that the burden of proof is on the owner to show “(1) That the claimant is the owner of the property or the holder of a chattel mortgage or contract of conditional sale thereon.

(2) That the claimant lawfully acquired the property.

(3) That it was not unlawfully used or possessed by him. In the event that it shall appear that the property was unlawfully used or possessed by a person other than the claimant, then the claimant shall show that the unlawful use or possession was without his knowledge or consent. Such absence of knowledge or consent must be reasonable under the circumstances presented.”)

forfeiture, however, this deeply rooted principle is reversed, requiring property owners to prove their innocence even when they are not charged with a crime.

This misplacement of burdens and presumptions should be remedied by amending forfeiture law to require that the Government bear the burden of showing that the owner knew of or consented to the property's illegal use. California has shifted the burden to the Government in this exact fashion.⁴⁴

Maine has adopted a variation on this principle. It requires that the property owner bear the burden of an innocent owner claim, unless the property in question is real property, such as a home, in which case the government bears the burden with regard to the innocence of a spouse or child.⁴⁵

Additionally, the excessive fine clause of the Eighth Amendment to the U.S. Constitution and Article I, Sec. 13 of the Pennsylvania Constitution protect against forfeitures which are disproportionate to the gravity of the offense. Before private property is forfeited, the burden should fall to the government to prove by clear and convincing evidence that this constitutional principle is not violated.

- **Provide for a right to counsel for property owners who cannot afford legal assistance, along with an enhanced notice of rights to all property owners.**

In a criminal case, a person accused of a crime who cannot afford legal representation is entitled to have a lawyer provided for his or defense.⁴⁶ Pennsylvania law does not provide for a right to counsel in most civil proceedings, including civil forfeiture actions. Although Pennsylvania has a highly regarded network of civil legal aid providers, these organizations are seriously underfunded and the Commonwealth is in the throes of a justice gap that leaves most Pennsylvanians without access to free legal help in civil matters. According to most studies, only 20% of low-income Pennsylvanians can be served with current resources.⁴⁷ Civil forfeiture is a quasi-criminal proceeding that falls between our civil and criminal justice systems, and as a result neither public defenders nor legal aid offices generally handle civil forfeiture cases.

⁴⁴ CAL. HEALTH & SAFETY CODE §§ 11488.4(i)(1-4) (West 2014)

⁴⁵ ME. REV. STAT. ANN. tit. 15 § 5821(7)(A) (West 2014) (providing that for real property "the State shall bear the burden of proving knowledge or consent of the spouse or minor child by a preponderance of the evidence"); ME. REV. STAT. ANN. tit. 15 § 5822(3) (West 2014). For property that is not real property, the owner bears the burden of proof.

⁴⁶ *Gideon v. Wainwright*. 83 S.Ct. 792 (1963). In 2013, the nation celebrated the 50th anniversary of the unanimous, landmark Supreme Court ruling in *Gideon*.

⁴⁷ See Toward Equal Justice for All: Report of the Civil Legal Justice Coalition to the Pennsylvania State Senate Judiciary Committee 55 (2014), <https://www.palegalaid.net/sites/default/files/Report%20of%20the%20Civil%20Legal%20Justice%20Coalition.pdf>.

At the same time, the Government is always represented by counsel in civil forfeiture proceedings. The widespread absence of counsel to protect private property has produced a high default rate in civil forfeiture proceedings.⁴⁸ In numerous hearings leading up to the enactment of reforms to federal law, Congress expressed deep concern about the absence of counsel and the very high default rate that repeatedly showed that 80% of all civil forfeiture cases resulted in default judgments for the Government.⁴⁹

In the Civil Asset Forfeiture Reform Act of 2000, Congress attempted to lower the high default rate in civil forfeiture proceedings by boosting access to counsel. Congress adopted three major changes to federal law to increase the availability of counsel for property owners. It granted discretionary authority to federal courts to appoint counsel where the property owner is accused of criminal activity related to the civil forfeiture; provided for the appointment of counsel as a matter of right at public expense for indigent property owners whose primary residences are the subject of the civil forfeiture proceeding; and provided an award of attorney's fees to litigants who have substantially prevailed against the government in civil forfeiture proceedings.⁵⁰ The right to counsel for indigent property owners was funded with moneys from the Department of Justice's Asset Forfeiture Fund and not from tax dollars.

When a civil action is commenced in Pennsylvania, a plaintiff must attach a "Notice to Defend" under Pennsylvania Rule of Civil Procedure 1018.1. The Notice to Defend is intended to inform a defendant of essential information about the commencement of a legal action, caution the defendant about the consequence of not contesting, and provide instructions on obtaining a lawyer. By local rule, each county may designate that the notice be repeated in a language other than English. While this basic notice accompanies every civil complaint, it is not required in civil forfeiture petitions because the statute does not require it.⁵¹ Instead, the government uses an abbreviated notice that only informs claimants that they have thirty days to file an answer setting forth their title in and right to possession of the property and that if they fail to do so a decree of forfeiture and condemnation will be entered against the property.

⁴⁸ See, Louis S. Rulli, *The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, 14 FED. SENT'G REP. 71 (2001). See also, *Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary*, 106th Cong. 90 (1999) (statement of Roger Pilon, Cato Institute).

⁴⁹ Louis S. Rulli, *On The Road To Civil Gideon: Five Lessons From the Enactment of A Right To Counsel For Indigent Homeowners In Federal Civil Forfeiture Proceedings*, 19 BROOK. J. L. & POL'Y 683 (2011).

⁵⁰ See Louis S. Rulli, *The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, 14 FED. SENT'G REP. 71, 88-90 (2001).

⁵¹ See Commonwealth v. \$1,800 U.S. Currency, 679 A.2d 275, 277 (Pa.Cmwlth.1996).

Pennsylvania should require a detailed notice of basic rights of property owners in every civil forfeiture action. Fairness requires that property owners receive at least the same detailed notice of rights provided to defendants in other types of civil proceedings under court rules.

Pennsylvania authorities have not publicized the official default rate in civil forfeiture actions in the Commonwealth, but studies suggest that the rate is likely to be very high.⁵² Pennsylvania should enact a right to counsel in civil forfeiture cases to balance the scales of justice against the Government and insure that private property is not taken for reasons not permitted under state law. Certainly, the right to counsel should extend to indigent homeowners whose primary residence is at risk in a civil forfeiture proceeding (similar to the protection afforded in federal civil forfeiture proceedings), as no family should lose their home to forfeiture because they cannot afford legal help.

Finally, Pennsylvania forfeiture law should recognize that there may be legitimate hardship reasons why seized property should be returned to the owner pending the outcome of the forfeiture proceeding. The law should explicitly provide for this essential need.

- **Ensure that property owners do not have to jeopardize their constitutional right against self-incrimination in order to protect their property in forfeiture proceedings**

In the Civil Asset Forfeiture Reform Act of 2000, Congress provided a defendant with a right to an automatic stay of civil forfeiture proceedings when criminal proceedings are still pending.⁵³ It did so to insure that an individual would not have to choose between protecting his or her Fifth Amendment rights against self-incrimination and preserving ownership of seized property.

Pennsylvania's forfeiture law has no comparable provision.

- **Require greater accountability and transparency of data**

The financial incentive inherent in civil forfeiture is further compounded by the lack of accountability and transparency surrounding the accumulation and use of such large amounts of forfeited funds. Pennsylvania does not easily grant access to the most basic information about the source or extent of forfeiture funds and how they are used. While each county is responsible for conducting an audit of all

⁵² Isaiah Thompson, *The Cash Machine: How the Philly D.A. Seizes Millions in Alleged Crime Money — Whether There's Been a Crime or Not*, PHILADELPHIA CITY PAPER, Nov. 29, 2012, at 8, 10, <http://citypaper.net/article.php?The-Cash-Machine-19189>.

⁵³ 18 U.S.C. 981(g)(2) (2000).

forfeited funds, this audit is not made public and instead must be forwarded to the state Attorney-General.⁵⁴ The Attorney-General is required to submit an annual report to the Appropriations and Judiciary Committees of the state legislature, but the public does not have easy access to detailed information necessary to hold government authorities accountable.⁵⁵ Moreover, there are no detailed reports -- comparable to federal general accounting office reports -- assessing accounting practices or measuring outcome objectives to determine the efficacy of forfeiture practices.

- **Prevent equitable sharing initiated by local authorities and other measures intended to get around state enacted reforms**

Forfeiture reforms will only be successful if they are not thwarted by law enforcement authorities. Police and prosecutors have undermined state legislative reforms by engaging in a practice of “equitable sharing” with federal law enforcement agencies. Equitable sharing is a practice that has federal authorities adopt property seized by state or local law enforcement under state law in order for the property to be forfeited under federal law. In this way, the legal proceedings will not be encumbered by state law restrictions. Once forfeiture is complete, federal authorities share proceeds with cooperating state law enforcement agencies, with states typically receiving up to 80% of forfeited funds.⁵⁶ While this practice was halted by executive order of then Attorney General Eric H. Holder, Jr., on January 16, 2015, it can be reinstated by another attorney general. State legislatures must protect against local initiation of this practice as a means of undermining state reforms.⁵⁷

- **Prohibit prosecutorial demands for waivers of important rights**

States must also take strong measures to prohibit onerous waivers that take advantage of power imbalances between police or prosecutors and ordinary citizens. Waivers may take many forms. In Tenaha, Texas, and Bradenton, Florida, police pressured motorists to sign written waivers on-the-spot, requiring property owners to give up any legal claim to seized cash or other property in exchange for an agreement by police not to arrest or pursue further criminal action against them, or

⁵⁴ 42 PA. CON STAT. ANN. § 6801(i) (West 2014).

⁵⁵ 42 PA. CON STAT. ANN. § 6801(j) (West 2014).

⁵⁶ In fiscal year 2011, equitable sharing brought more than \$9 million to Pennsylvania law enforcement agencies.

⁵⁷ Congressional concerns over the transparency and controls on equitable sharing led to a Government Accountability Office (GAO) report in July 2012 in which the GAO recommended that the Attorney General take identified steps to improve transparency over AFF’s funds during the annual budget process. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-736, JUSTICE ASSETS FORFEITURE FUND: TRANSPARENCY OF BALANCES AND CONTROLS OVER EQUITABLE SHARING SHOULD BE IMPROVED (2012).

to refer their cases to local juvenile authorities for the purpose of removing their children from their custody and care.⁵⁸

Waivers can take other forms as well. In Philadelphia, the district attorney's office has employed a practice of demanding that homeowners waive their statutory and constitutional rights in exchange for returning seized property. Prosecutors may require such a waiver in exchange for their willingness to settle a current civil forfeiture claim filed against an innocent owner or, at other times, as a pre-condition of agreeing to return a homeowner back into her home pending the outcome of a civil forfeiture proceeding. They also frequently require that property owners permanently evict family members as a settlement pre-condition.⁵⁹ On occasion, they have also demanded that citizens give up their right to sue the local municipality and responsible parties for wrongful seizure before being willing to return seized property.

Demands for such waivers from property owners thwart the clear intent of the legislature to ensure that homeowners have their day in court to protect their property from wrongful seizure and forfeiture. Moreover, these demands exploit power imbalances and reasonable fears that property will be taken from them in civil forfeiture proceedings unless they are willing to agree to such onerous terms. These waiver demands also arguably violate due process protections, especially when implemented against unrepresented parties. They may also raise important professional responsibility issues under Rule 3.8 of the Pennsylvania Rules of Professional Conduct. Under this ethical rule, "a prosecutor has the responsibility of a minister of justice and not simply that of an advocate."⁶⁰ A prosecutor has a solemn duty to assure procedural justice in every case and waivers which are solely intended to deprive property owners of their day in court violate this solemn responsibility.

Senate Bill 869

Although I have suggested several essential elements of meaningful reform, it is very important to recognize that efforts to reform civil forfeiture in piecemeal ways have not met with great success. There is no better example of this proposition than the limited success of the Civil Asset Forfeiture Reform Act of 2000 in which legislative compromises resulted in only piecemeal change. In that legislation, Congress slightly elevated burdens of proof on the government, eliminated cost bonds required to defend against forfeiture, and introduced some

⁵⁸ See Eric Moores, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777 (2009).

⁵⁹ See Judge Robreno's opinion denying Motion to Dismiss in Sourovelis v. City of Philadelphia, Civil Action No. 14-4687 (E.D.P.A. 2015).

⁶⁰ PA. RULES OF PROF'L CONDUCT, Rule 3.8, Comment [1] (stating that a prosecutor's ethical responsibility includes specific obligations to see that a defendant is accorded procedural justice).

financial incentives to expand legal help. However, the primary goals desired by ranking members of both political parties in the House Judiciary Committee -- requiring criminal convictions and removing the pecuniary interest of law enforcement -- were not achieved. As a result, CAFRA have proven to be disappointing in its overall impact on civil forfeiture concerns.

In contrast, Senate Bill 869 retains forfeiture but places it in the framework of criminal proceedings which provide the safeguards needed to protect property owners from forfeiture abuse. Rather than engaging in piecemeal efforts, Senate Bill 869 establishes a new forfeiture chapter that eliminates portions of current civil forfeiture law and provides for *in personam* criminal asset forfeiture to ensure that property owners who are not convicted of a crime will be able to protect their property.

Senate Bill 869 provides reform measures at each critical stage of the forfeiture process. It limits the seizure of property without due process and provides for the prompt return of seized property under appropriate circumstances, especially when there is a showing of hardship to the property owner. Rather than being separate from the criminal proceeding of the underlying offense, it is tried in the same proceeding as the criminal case for guilt or innocence. Notice and service of process is greatly expanded to prevent unintended defaults of property forfeitures. The forfeiture proceeding awaits the outcome of the criminal proceeding and only begins after a conviction of the defendant of an offense authorizing forfeiture of property involved in the offense. A defendant has a right to trial by jury in the forfeiture hearing and may waive that right without affecting jury trial rights in the criminal case.

Following the forfeiture hearing, a preliminary order of forfeiture may be entered. However, before doing so, the Commonwealth has the burden of establishing by clear and convincing evidence that the property is forfeitable. Additionally, the Court must determine whether a forfeiture is grossly disproportional to the gravity of the offense by considering many factors, including review of the actual fine imposed in the case and not just the fine authorized by Pennsylvania law. In this determination, the Government – and not the defendant – has the burden of establishing proportionality by clear and convincing evidence.

If the Court determines that forfeiture of property is appropriate, it enters a preliminary order and provides notice to third-party interest holders so that they may come forward and demonstrate their entitlement to the property in question. Notice ensures that joint or partial owners of the property or third parties with bona fide security interests in the property will not have their legal interests impaired. Additionally, the Court will check to see if there are outstanding child support obligations of the defendant.

It is here that detailed notice and meaningful service of process is required and outlined in some detail. The Commonwealth is required to file proof of notice in conformity with the new requirements. If third parties come forward to make claim on the property, the Court holds a timely ancillary proceeding which is civil in form and permits the third party and the Commonwealth to present evidence and witnesses. If the third party is successful in establishing a legal right or interest by a preponderance of the evidence, the Court is required to amend the forfeiture order and enter an appropriate final order.

Senate Bill 869 does more than reform each critical stage of the forfeiture process. It also eliminates the Government's practice of requesting equitable sharing with the federal government as a means to avoid state reforms, it introduces civil liability penalties for violations of reform procedures, and it provides for fee shifting in the event that a defendant or claimant to property substantially prevails in the action. Most significantly, it provides that income derived from forfeited property no longer goes to law enforcement agencies, but rather, after reimbursement for certain law enforcement costs, goes to the operating fund of the county or state, thereby removing the strong financial incentive that exists now and fuels forfeiture abuse. It also provides for annual audits of forfeited property, proceeds, and fees, with enhanced right to know standing for the public to obtain access to information and challenge violations.

These reforms represent a comprehensive approach to reforming civil forfeiture and promise an appropriate balance between the legitimate needs of law enforcement and the protection of innocent property owners in the use and ownership of hard-earned private property.

Recent Civil Forfeiture Initiatives in other States and Localities

An increasing number of states are adopting or considering basic reforms similar to those proposed in Senate Bill 869. In 2014, Minnesota adopted legislation requiring that the government obtain a criminal conviction against a property owner before proceeding against the property in a civil forfeiture proceeding. Despite opposition from law enforcement, the bill passed the state senate by a vote of 55 to 5 and passed the state house unanimously before being signed into law by the Governor.⁶¹

Earlier this year, New Mexico reformed its forfeiture scheme so that a criminal conviction is required before the government may forfeit any type of private property. In addition, New Mexico's reform places all forfeited assets into a

⁶¹ Minn. Stat. §§ 609.531, 609.5314, 609.5316, 609.5318; Nick Sibilla, *Minnesota Now Requires a Criminal Conviction Before People Can Lose their Property to Forfeiture*, FORBES (May 7, 2014), <http://www.forbes.com/sites/instituteforjustice/2014/05/07/minnesota-forfeiture-reform/>.

general fund rather than earmarking forfeited assets for law enforcement use.⁶² Montana has also reformed its civil forfeiture laws to require a criminal conviction before the government can take a person's property through civil forfeiture, and the government must prove through clear and convincing evidence that the property owner knew of the crime associated with the forfeiture.⁶³

Additionally, the Mayor of Washington, D.C. signed into law forfeiture legislation that accomplished several reforms. First, forfeited assets are directed to a general fund rather than going directly to law enforcement. This removes the profit motive that incentivizes police departments to seize the assets of innocent property owners. The new law also prohibits equitable sharing, the process by which local law enforcement authorities could refer forfeiture cases to the federal government and receive a share of the seized assets. Further, this law raises the burden of proof that the government must meet in order to prevail in a forfeiture proceeding. For proceedings against cars, the government must show that the car was used in the commission of a crime by clear and convincing evidence rather than by a preponderance of the evidence. The law also creates a presumption that cash under \$1,000 is not forfeitable. To overcome the presumption, the government must show that the cash is the proceeds of criminal activity by clear and convincing evidence. Finally, in proceedings against a home, the property can only be seized after the homeowner has been convicted of a crime.⁶⁴

Finally, Utah enacted reforms to its forfeiture law in 2014. Utah passed legislation that imposed a deadline of 75 days from the date of seizure for prosecutors to commence a forfeiture proceeding. If prosecutors miss the deadline, the property must be returned to its owner. Additionally, the new law prohibits Utah law enforcement from transferring a forfeiture proceeding to federal court under the "equitable sharing" doctrine if doing so would violate property owners' rights under the Utah Constitution or under the new state law. Finally, the new Utah statute requires courts to award attorney's fees to victorious property owners in civil forfeiture proceedings up to 20% of the value of the property seized.⁶⁵

⁶² N.M. Stat. Ann. §§ 31-27-1—31-27-11 (2015). The New Mexico reform law passed the legislature unanimously, and it was signed into law by the Governor. The bill took effect on July 10th of this year. Nick Sibilla, *Civil Forfeiture Now Requires a Criminal Conviction in New Mexico and Montana*, FORBES (July 2, 2015), <http://www.forbes.com/sites/instituteforjustice/2015/07/02/civil-forfeiture-now-requires-a-criminal-conviction-in-montana-and-new-mexico/>.

⁶³ Mont. Code Ann. §§ 44-12-101 – 44-12-__.

⁶⁴ Nick Sibilla, *Washington D.C. Council Votes to Reform City's Civil Forfeiture Laws, End Policing for Profit*, FORBES (Feb. 13, 2015), <http://www.forbes.com/sites/instituteforjustice/2014/12/03/washington-d-c-council-votes-to-reform-citys-civil-forfeiture-laws-ban-policing-for-profit/>.

⁶⁵ Utah Code Ann. §§ 24-1-102, 24-4-104, 24-4-105, 24-4-110, 24-4-114, 24-4-115 (2014); Nick Sibilla, *Utah Unanimously Restores Protections for Those Facing Civil Forfeiture*, INSTITUTE FOR JUSTICE (May 9, 2014), <http://ij.org/action-post/utah-unanimously-restores-protections-for-those-facing-civil-forfeiture/>.

CONCLUSION

In conclusion, meaningful reform of Pennsylvania's civil forfeiture law is long overdue. Senate Bill 869 addresses the major areas of needed reform while also retaining forfeiture as a tool for law enforcement. Adopting these reforms will go a long way to restoring confidence in the fairness of our system of justice.

Thank you again for the opportunity to testify today. I look forward to discussing these issues in the months ahead.

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