



TESTIMONY SUBMITTED TO SENATE JUDICIARY COMMITTEE
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REGARDING SUPPORT FOR SENATE BILL 869
STATE CAPITOL, HARRISBURG
OCTOBER 20, 2015

Good afternoon, Senator Greenleaf, Senator Leach, and members of the committee. Thank you for the opportunity to testify today as to why Senate Bill 869 would bring desperately-needed reform to Pennsylvania's broken civil asset forfeiture system. On behalf of the 23,000 members of the ACLU of Pennsylvania (ACLU-PA),¹ I urge you to support this legislation and put an end to the abusive practices that have thrived under our current civil asset forfeiture laws.

I. **Pennsylvania's Current Civil Asset Forfeiture Laws Are Inherently Unfair and Engender Abuse.**

“Guilty” property. Under current law, the government can take and keep someone's property—everything from the cash in their wallet to their home—if law enforcement suspects the property was used in, or is the proceeds of, certain kinds of crime, including drug dealing.² Law enforcement doesn't have to charge the property owner (or anyone else) with a crime, much less secure a conviction. The property owner doesn't even have to be *suspected* of a crime because civil asset forfeiture is a proceeding against the property itself. Since property owners aren't even parties to these lawsuits, they don't have the basic constitutional protections afforded to criminal defendants, such as the right to appointed counsel. In these civil proceedings, property owners must prove their own innocence. Without an attorney, property owners may not even know that the “innocent owner” defense exists, much less be able to effectively cross-examine police officers or successfully challenge the prosecutor's case.

¹ Founded in 1920, the American Civil Liberties Union is one of the nation's oldest civil rights organizations, with a nationwide membership of more than 600,000 Americans. The ACLU-PA is the state affiliate of the national ACLU.

² Although the majority of forfeitures in Pennsylvania occur under the Controlled Substances Act, there are actually dozens of different state laws that authorize forfeiture—including laws related to gambling, counterfeiting, and even waste disposal. Senate Bill 869 creates a uniform set of procedures to govern all property forfeitures in Pennsylvania.

Skewed law enforcement incentives. Pennsylvania forfeits a staggering amount of property each year.³ Under current civil forfeiture laws, all the revenue generated goes directly to law enforcement and can even be distributed to police and prosecutors as bonuses.⁴ As a result, the agencies making enforcement decisions have a strong financial incentive to pursue as many forfeitures as possible. This profit motive distorts law enforcement priorities, and the inherent conflict of interest and appearance of corruption harm community relations.⁵

Default forfeiture. Under current law, the government wins a civil forfeiture case automatically if the property owner fails to respond to a petition for forfeiture or to appear at every court listing for the forfeiture case. Recent investigations of several counties suggest that the vast majority of forfeiture cases across the Commonwealth end in default, without the government ever offering any evidence to support the forfeiture. In Philadelphia, 87% of forfeitures of cash from 2011-2013 ended in default.⁶ In Montgomery County, 90% of forfeiture cases from 2012-2014 ended

³ Every year, Pennsylvania law enforcement agencies forfeit between \$12 million and \$14 million in cash, vehicles, real estate, and other property using state civil forfeiture laws. Office of the Pa. Attorney General, *Asset Forfeiture Report FY2013-14*, 68 (total income from civil asset forfeiture under Controlled Substances Act was \$13,252,678.31); Office of the Pa. Attorney General, *Asset Forfeiture Report FY2012-13*, 67 (\$12,970,055.69); Office of the Pa. Attorney General, *Asset Forfeiture Report FY2011-12*, 70 (\$13,859,900.87); Office of the Pa. Attorney General, *Asset Forfeiture Report FY2010-11*, 70 (\$13,783,656.66). Those numbers do not include the more than \$10 million given to Pennsylvania annually by federal authorities from federal forfeitures in which state law enforcement participated. See Asset Forfeiture Program, Department of Justice, *Equitable Sharing Payments of Cash and Sale Proceeds Executed during Fiscal Year 2014 - Pennsylvania*, <http://www.justice.gov/afp/reports-congress/fy2014-pennsylvania>. In Philadelphia alone, forfeitures bring in approximately \$5 million each year, which is more than 4 times as much forfeited property per capita as Brooklyn, New York. Compare Office of the Pa. Attorney General, *Asset Forfeiture Report FY2012-13*, 51 (Philadelphia forfeiture revenue of \$4,979,456) with Isaiah Thompson, *The Cash Machine*, Philadelphia City Paper, Nov. 29, 2012, <http://citypaper.net/The-Cash-Machine/> (Kings County [Brooklyn] forfeits \$1.2 million per year, with a population 1.5 times as large as Philadelphia).

⁴ 42 Pa. C.S. § 6801(e)-(g); Kaitlyn Foti, *Berks D.A., Public Defender staffs to receive bonuses from drug forfeitures*, The Pottstown Mercury, Jan. 9, 2015, <http://www.pottsmmerc.com/general-news/20150108/berks-da-public-defender-staffs-to-receive-bonuses-from-drug-forfeitures>.

⁵ As one national late-night TV host put it, “Civil forfeiture laws have warped law enforcement priorities and perception, and nowhere is that more clear than Philadelphia.” *Last Week Tonight with John Oliver* (HBO broadcast Oct. 5, 2014), available at <https://www.youtube.com/watch?v=3kEpZWGgJks>.

⁶ 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, 5, June 2015, <http://www.aclupa.org/issues/forfeiture/>.

in default.⁷ And in Lancaster County, between January 2013 and November 2014, only four people contested their forfeiture case by filing a response.⁸ Although some people may decline to challenge the forfeiture because they are guilty, these findings suggest that structural problems inherent in the current civil forfeiture system lead even innocent people to lose forfeiture cases by default.

Notice problems. Under current law, prosecutors are supposed to serve forfeiture petitions on the owner or person in possession at the time of the seizure, but there is no requirement that a judge verify that the owner received notice before ordering default forfeiture. The ACLU-PA investigations into forfeiture practices in several counties have revealed that the notice requirement is often ignored or circumvented, and many property owners in fact never received notice of their forfeiture case.⁹

Petty cash, expensive litigation. Although the unjust forfeiture of family homes has sparked public outcry and made headlines around the country, for most counties in Pennsylvania, the bulk of forfeiture revenue comes from forfeitures of small amounts of cash.¹⁰ In Philadelphia, the median value of cash forfeited from 2011-2013 was \$192, meaning that half of all cash forfeiture cases were for sums less than that amount.¹¹ In Montgomery County, the median amount of cash forfeited from 2012-2014 was \$307.¹² And challenging a forfeiture case often requires several court appearances.¹³ As a result, many innocent owners decide not to contest forfeitures because the costs of taking time off work and paying a lawyer to challenge the forfeiture routinely exceed the value of the property at stake.

⁷ Scott Kelly, *Broken Justice: An Investigation of Civil Asset Forfeiture in Montgomery County*, ACLU of Pennsylvania, 4, October 2015, <http://www.aclupa.org/issues/forfeiture/>

⁸ Gil Smart & Susan Baldrige, *Turning crime into cash: How forfeiture law works*, LancasterOnline, Nov. 2, 2014, http://lancasteronline.com/news/turning-crime-into-cash-how-forfeiture-law-works/article_ca12c21c-6111-11e4-90ba-0017a43b2370.html.

⁹ ACLU-PA reports on Philadelphia and Montgomery counties indicate that 34% of cash forfeiture cases in Philadelphia from 2011-2013 suffered from improper notice, and the Montgomery County DA's office did not even attempt to serve notice in hundreds of forfeiture cases from 2012-2014. Kelly, *Guilty Property*, *supra* note 6, at 6; Kelly, *Broken Justice*, *supra* note 7, at 4-5.

¹⁰ See Office of the Pa. Attorney General, *Asset Forfeiture Report FY2013-14*.

¹¹ Kelly, *Guilty Property*, *supra* note 6, at 7.

¹² Kelly, *Broken Justice*, *supra* note 7, at 4.

¹³ In Philadelphia, from 2011-2013, property owners had to appear in court an average of four times before reaching a hearing in front of a judge. Kelly, *Guilty Property*, *supra* note 6, at 6. Some property owners had to appear more than 10 times. Thompson, *The Cash Machine*, *supra* note 3. In Montgomery County, from 2012-2014, contesting a forfeiture case required an average of two court appearances when property owners didn't reach a settlement. Kelly, *Broken Justice*, *supra* note 6, at 4.

Not just targeting drug kingpins. Abuses have thrived under current laws that don't require a criminal conviction prior to forfeiture and direct all of the proceeds directly to law enforcement. There is a growing body of evidence that civil forfeiture is routinely used against innocent people who have not been convicted of any related crime:

- In 2010, the Philadelphia DA's office filed a forfeiture petition against Ms. Elizabeth Young's West Philadelphia home and minivan based on alleged sales of small amounts of marijuana by Ms. Young's adult son who lived at home with her. The Commonwealth Court reversed the forfeiture order in 2014, holding that the forfeiture was an unconstitutional "excessive fine," and the DA's office has appealed.¹⁴
- In 2012, Philadelphia police seized \$2,000 of an 87-year-old woman's pension money from her bedroom after arresting her arthritic husband for possessing two marijuana joints that he kept on hand to help with his bone pain. The couple couldn't afford to hire a lawyer to challenge the forfeiture, so the government won by default, and kept the pension money.¹⁵
- In Carbon County in November 2014, a borough police chief pulled over a Hispanic delivery man for a traffic violation. A search of the man's pockets and car turned up \$840 that he had collected during his delivery run. The man explained where the money was from but didn't have any receipts or invoices to show the police. On this basis—and despite there not being one iota of evidence of drug activity—the police chief seized the money as illegal proceeds of drug dealing, and the DA's office filed a forfeiture petition against it. Only when the driver and his employers contacted the ACLU-PA and retained a volunteer lawyer to threaten suit did the prosecutor agree to drop the forfeiture case and return the illegally seized money.
- In Lancaster, law enforcement seized and forfeited \$300 from a mother's purse when her son was arrested on narcotics charges.¹⁶

Stories of these abuses abound, suggesting that the profits and sweeping powers offered by civil forfeiture have distorted a tool originally targeted at cartels and drug kingpins.

¹⁴ See *Commonwealth of Pennsylvania v. 1997 Chevrolet and Contents Seized from James Young*, 106 A.3d 836 (Pa. Commw. Ct. 2014). The government's appeal brief to the Pennsylvania Supreme Court is currently due on November 9, 2015. Order, Sept. 11, 2015 (Dkt. No. 29 EAP 2015).

¹⁵ Kelly, *Guilty Property*, *supra* note 6, at 7.

¹⁶ Gil Smart & Susan Baldrige, *Civil asset forfeiture: policing for profit?*, LancasterOnline, Nov. 2, 2014, http://lancasteronline.com/news/investigations/civil-asset-forfeiture-policing-for-profit/article_119468d6-6106-11e4-99dd-0017a43b2370.html.

There is more than anecdotal evidence that civil forfeiture has strayed from its original intended use against drug kingpins. An ACLU-PA report published in June found that nearly one-third of cash forfeitures in Philadelphia were from people who have not been found guilty of a related crime.¹⁷ In Montgomery County, an estimated 23% of forfeitures involved property owners who had not been convicted of any related crime.¹⁸ An additional 26% of forfeitures were against people convicted of drug *possession*, not distribution.¹⁹

Criminal defendants in a tough spot. Property owners who actually *have* been charged with a crime are often in a tough position, if the civil forfeiture case proceeds before their criminal case has been resolved. Pennsylvania's current laws can force criminal defendants to choose between challenging a civil forfeiture and preserving their ability to assert their constitutional rights in their criminal case, such as the Fifth Amendment privilege against self-incrimination. Defending against forfeiture is even harder for owners who are incarcerated while awaiting their criminal trial. Most people in this double-bind understandably opt to focus on their criminal case, with the result that, when a forfeiture case is filed before the criminal proceedings have concluded, the government will win in the overwhelming majority of cases.²⁰

Racial disparities. Troublingly, Pennsylvania's civil asset forfeiture laws have been used to disproportionately target low-income communities of color. In Philadelphia, for example, a June 2015 ACLU-PA report found that when forfeiture is used to take property from people who have not been convicted of a related crime, the owner is African-American 71% of the time, even though Philadelphia is only 44% African-American.²¹ In Montgomery County, an estimated 53% of the people faced with forfeiture cases from 2012-2014 were African-American, even though the county is only 9% African-American.²²

¹⁷ Kelly, *Guilty Property*, *supra* note 6, at 9, 11.

¹⁸ Kelly, *Broken Justice*, *supra* note 7, at 6. In 23% of forfeiture cases sampled, the property owner was not convicted of *any* related crime. In 26% of cases, the owner was convicted of either drug possession or purchase, but not drug dealing. *Id.*

¹⁹ *Id.*

²⁰ In Philadelphia, 78% of forfeiture cases examined by the ACLU-PA concluded before a related criminal case. When that happened, the government won forfeiture 99% of the time. When the sequence was reversed and the forfeiture concluded *after* the criminal trial, the property owner's odds of success rose tenfold. Kelly, *Guilty Property*, *supra* note 6, at 7.

²¹ Kelly, *Guilty Property*, *supra* note 6, at 10.

²² Kelly, *Broken Justice*, *supra* note 7, at 6.

II. How Senate Bill 869 Would Repair Asset Forfeiture in Pennsylvania

Two key elements of reform. For forfeiture to be effective and fair, reform must embody two fundamental principles:

- 1) No property should be forfeited unless the property owner is first convicted of a crime; and;
- 2) Law enforcement agencies should not have a direct financial incentive to seek forfeiture.²³

Senate Bill 869 embraces both of those guiding principles.

Criminal Forfeiture Protects Property Owners. Senate Bill 869 requires that all forfeitures occur as part of the sentencing phase of a criminal trial.²⁴ This type of forfeiture—usually referred to as criminal forfeiture—is already available under Pennsylvania law, and the proposed legislation simply establishes it as the exclusive way for forfeitures to be conducted in the Commonwealth.

Requiring a criminal conviction of the property owner prior to forfeiture ensures that this powerful tool is used as it was originally intended, against people who have committed crimes.

Making forfeiture part of the criminal process would also strengthen protections for property owners. Importantly, it would guarantee that no property is forfeited by default, and that every forfeiture is supported by proof of a connection between the property and the crime for which the property owner was convicted.²⁵ It would also streamline the court process, minimizing the number of unnecessary court dates, and allowing property owners to focus on their criminal case and assert their constitutional rights without sacrificing their ability to challenge the forfeiture.

Tying forfeiture to the criminal process would also eliminate the notice problems that plague civil forfeiture in Pennsylvania. Senate Bill 869 requires that prosecutors give criminal

²³ The Philadelphia Bar Association has called on the legislature to enact a reform measure that embraces these two principles. *Resolution Supporting Legislation to Abolish Civil Asset Forfeiture*, Philadelphia Bar Association, Mar. 26, 2015, available at http://www.philadelphiabar.org/page/ResMar15_1?appNum=1. So has the Coalition for Forfeiture Reform, a broad-based partnership of national and local organizations and community groups that believe that Pennsylvania needs stronger protections to prevent the government from abusing the power to take and keep people's property. See Coalition for Forfeiture Reform organizations, <http://www.aclupa.org/issues/forfeiture/coalition-forfeiture-reform-member-organizations/>.

²⁴ See S.B. 869 §§ 5802(a), 5802(c)(1), 5803(f)(1) (Pa. 2015).

²⁵ See S.B. 869 § 5803(g) (Pa. 2015).

defendants written notice in the indictment that they intend to seek forfeiture, and list the specific property that the government believes is forfeitable.²⁶

Perhaps most importantly, incorporating forfeiture into the sentencing phase of the underlying criminal proceeding would ensure that property owners have access to a lawyer to assist them in challenging the forfeiture in court.

Restore Public Trust in Law Enforcement. Senate Bill 869 would restore public confidence in law enforcement by eliminating law enforcement's direct financial incentive to pursue forfeiture. Senate Bill 869 would direct proceeds from forfeiture first and foremost to crime victims, after law enforcement has been reimbursed for costs incurred in storing and selling forfeited property.²⁷ After other related costs are paid, the remaining proceeds from forfeiture enforcement would be deposited in general funds controlled by state or local legislatures (depending on which agency made the initial seizure) to be allocated through the normal budgeting process, rather than going directly into the coffers of the police and prosecutors who enforce forfeiture laws, bypassing the legislature.²⁸ If both state and federal law enforcement cooperate on a joint investigation that leads to forfeiture under federal law, then Pennsylvania's share of the revenues would likewise have to be deposited in a general fund.²⁹

In sum, Senate Bill 869 represents a badly needed overhaul of Pennsylvania's asset forfeiture laws that would realign forfeiture law to properly balance the public's interest in deterring and fighting crime with legal protections for property owners and safeguards against abuse. On behalf of the ACLU of Pennsylvania's members, I respectfully urge you to support the bill.

²⁶ See S.B. 869 § 5802(f)(2) (Pa. 2015).

²⁷ See S.B. 869 § 5802(f)(1) (Pa. 2015).

²⁸ See S.B. 869 § 5802(e)-(f) (Pa. 2015). If the forfeiture was originated by the Pennsylvania State Police, the proceeds would go into a general fund of the state. If a local law enforcement agency originated the forfeiture, proceeds would go into a general fund of that county. See S.B. 869 §§ 5802(e)(1), (f)(3) (Pa. 2015).

²⁹ See S.B. 869 § 5805(b) (Pa. 2015). The bill would close the equitable sharing "loophole" that other state reforms have suffered from by prohibiting law enforcement agencies from asking federal authorities to take over (or "adopt") property seized by Pennsylvania agencies in order to forfeit the property under federal law. See S.B. 869 § 5805(a) (Pa. 2015). A 2011 study shows that this practice increases when states pass more protective forfeiture laws, because it's a way for state law enforcement to circumvent the protections of state law and still benefit from the forfeiture under an "equitable sharing" agreement with the federal government. Institute for Justice, *Inequitable Justice: How Federal "Equitable Sharing" Encourages Local Police and Prosecutors to Evade State Civil Forfeiture Law for Financial Gain*, Oct. 2011, available at http://www.ij.org/images/pdf_folder/private_property/forfeiture/inequitable_justice-mass-forfeiture.pdf.