Testimony of

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Before the Senate Judiciary Committee
Regarding Senate Bill 869

October 20, 2015
Harrisburg, PA

Good morning Chairmen Greenleaf, Leach, and members of this Committee. My name is Risa Vetri Ferman, and I am the District Attorney of Montgomery County and President of the Pennsylvania District Attorneys Association. Seated with me are Ed Marsico, Dauphin County District Attorney and Legislative Chair of the Pennsylvania District Attorneys Association, as well as George Mosee, Deputy District Attorney in the Philadelphia District Attorney's Office. We very much appreciate you having this hearing on SB 869, which would effectively end civil asset forfeiture.

Let me get right to the point. SB 869 should be entitled the Pennsylvania Drug Dealer Bill of Rights. SB 869 is a give-away to drug dealers. It will empower, enable, and assist them. They would be able to keep, use, and enjoy their illegal profits and the property they use to deal and traffic narcotics. We all know that overdoses are skyrocketing in our communities across the Commonwealth. Why would we, for example, make it easier for heroin dealers to profit from their trade and wreak more havoc in their communities? Why would we give drug traffickers, foreign and domestic, a laundry list of options that would allow them to thrive, traffic more drugs, and make more money? That is precisely what will happen if you enact SB 869.

We know there are those who believe that civil asset forfeiture needs some reform. We do not oppose reform. We believe that the question before you today is whether we can collectively identify a series of reforms that can appropriately tighten the procedures that govern civil forfeiture but do not make it easier for drug dealers to traffic and sell drugs. We believe we can. The responsible thing to do is to find the right balance between tightening up forfeiture procedures while not harming our ability to take the profit out of the drug trade and keep our communities safe from drug traffickers.

Both Senators Folmer and Williams have repeatedly said that they do not seek to harm law enforcement's ability to protect the community, and we absolutely take them at their word. We know they are interested in our concerns and consider the concerns of law enforcement. That is one reason why we will offer some suggestions to identify reforms that are significant yet not likely to reward drug dealers.

The legislation as drafted, however, does not achieve that balance. In addition to rewarding drug dealers, it is oddly punitive with regard to law enforcement and could literally bankrupt district attorney's offices and subject police officers to prison time merely for doing their job.

Civil Asset Forfeiture: Protections and Purposes

By way of background, civil forfeiture is often referred to as an *in rem* action, which means that the action is against the property, not the person. We must prove that the cash or property at issue is closely connected to criminal activity. We must prove this nexus by a preponderance of the evidence.

Civil asset forfeiture works. It allows law enforcement to seize contraband and instrumentalities of crime. Forfeiture takes the tools of crime, such as cash proceeds, cars,

computers, real property, and technology into custody so the crime can no longer be committed. When they are immediately taken away, the suspected criminal is deprived of the ability to use those illegal gains and continue any criminal activity.

Forfeiture is also important because it helps take the profit out of drug dealing. Many criminals are motivated by greed. Forfeiture literally removes the tools, equipment, cash flow, and profit from the criminals, making them less likely to be able to continue to profit from their criminal activities in our very own neighborhoods. A dealer will risk some time in jail if he knows he has money waiting for him when he gets out. This means more public safety, less drug dealing, fewer drug dealers, and fewer properties in our neighborhoods that are used directly to further criminal activity.

To protect people's rights, civil forfeiture proceedings are governed by extensive civil statutory requirements, due process, court rules, and case law. The Commonwealth bears the burden of showing a nexus between criminal activity and the property or money at issue. District Attorneys cannot just take people's property. Only a court or judge can order forfeiture. And that process contains extensive checks and balances that are designed to ensure that innocent people are protected.

The burden of proving criminal activity remains on the Commonwealth. There are legal proceedings, and there must be proof the property was associated with certain crimes. Petitions are filed and court hearings are held or a settlement is reached.

Additional oversight comes in the form of state audits—which are required by law and conducted for every county—that keep a watchful eye to ensure that forfeiture is being used for legitimate purposes.

What often has gotten lost in the discussion about civil asset forfeiture is that the burden of proof and due process protections that exist in a forfeiture case are the same in a case where a business is sued for fraud or a doctor for malpractice.

Proponents of SB 869 have said that the current system is faulty because the wrongdoing must be proven only by a preponderance of the evidence standard. This concern is misplaced. When corporations are sued for committing fraud, the same civil standard applies; when a bad doctor is sued for medical malpractice, the same civil standard applies; when taxpayers are subject to liens or other proceedings for not paying their taxes, the same civil standard applies. In these situations, the result can mean financial ruin of the corporation, a revocation of the doctor's license, and a sheriff's sale of the taxpayer's home. Hardly anyone objects to the standards in those cases. Why would we have a different system when a person participates in, knows, or consents to such illegal activity?

The case of O.J. Simpson provides a useful and applicable analogy. O.J. Simpson was acquitted of murder, but was civilly sued for the wrongful deaths of Nicole Brown Simpson and Ronald Goldman. Those victims' families were not prevented from seeking another remedy after

Simpson was acquitted in criminal court. They won because they proved by a preponderance of the evidence that Simpson killed Nicole Brown Simpson and Ronald Goldman. Should Simpson not be subject to this judgment? The logic of SB 869 would dictate that the civil judgment against Simpson was unfair.

SB 869 Will Help Drug Dealers and Hurt Our Communities

There are multiple provisions of SB 869 that will help drug traffickers and hurt law enforcement. The most significant is the language that 1) prevents forfeiture unless there is a conviction and 2) limits the forfeiture to proceeds obtained directly from the offense for which the defendant was convicted.

Requiring a criminal conviction as a mandatory condition for forfeiture would be an enormous win for drug dealers and would make it rather simple for drug dealers to protect their property, proceeds, and instrumentalities of crime. This is not an exaggeration. Let us explain how.

Because SB 869 would limit forfeiture to property owned by or belonging to the person convicted, the simplest way to avoid forfeiture would be to make sure you do not own the property you are using to conduct the criminal activity. As long as dealers put the title of their car or house in the name of a friend or relative, the Commonwealth cannot seize the property—even if the dealer is convicted of serious drug trafficking offenses.

Consider the following situations in which forfeiture would not be permitted if SB 869 is enacted:

- A drug dealer who avoided prosecution by becoming a fugitive would keep his illegal drug money.

- If a known drug dealer is stopped and has $40,000, but no drugs because he completed the sale, he would retain the $40,000 and continue selling drugs without consequence.

- If a dealer dies before trial, the illegal money, property, and contraband would go to his next-of-kin.

- A defendant who thwarted conviction by intimidating witnesses would keep his money and property.

- Those who knowingly allow their property to be used by a drug trafficker would be free to keep that property.

- A drug dealer who places his assets in the name of another—anyone else—would successfully shield his assets from forfeiture.

- Most overseas drug traffickers would be able to hide their profit. It is not uncommon for drug dealers and cartels from overseas to have individuals in Pennsylvania (as well as in other states) deposit the cash proceeds from drug deals into bank accounts. The mules have not committed any drug-related crime; they may have had no idea for whom they deposited the cash. But, under this bill, that money would continue to remain with the overseas drug trafficker because we have not convicted him of a crime.

- If law enforcement finds cash and other property associated with drug dealing (such as in a drug house or an abandoned car), but cannot find the person who committed the crimes, such cash and other property could not be forfeited.

- If police enter a room where drugs are being packaged and sold, anyone whom the police do not see committing the drug sale, packaging or other form of trafficking can claim the cash and other property belongs to him. In this instance, the cash and property could never be seized.

- If the police arrest a dealer who has money on him, any money not directly attributable to the specific sales for which he has been convicted belong to the drug dealer. By way of example, if a dealer sells 100 bags of heroin and has all of the proceeds in his possession, but is ultimately convicted of 10 counts, the money associated with the other sales lawfully belong to the defendant. If we were to seize that money, the defendant (as we will explain later) could sue our offices, and we could be liable for his attorney's fees and post-judgment interest.

SB 869 Creates an Inefficient, Burdensome Process That Will Prevent Criminal Forfeitures

SB 869 sets forth a very complex series of procedural requirements that we would have to follow in order to forfeit any cash or other property. They are so convoluted and inefficient that they appear to be designed to make criminal-based forfeiture unduly burdensome and often impossible. Indeed, SB 869's procedural reforms create a process that would make Rube Goldberg proud.

Under this bill, property can only be seized if police have probable cause to believe that 1) the property in question is owned by or belongs to the suspect; 2) the suspect will likely be convicted of a specific crime for which forfeiture is authorized; and 3) the property in question is a proceed of the specific crime, was used to facilitate the specific crime, or bears a "significant relationship" to the specific crime.

After seizure of a person's property, the defendant can then file a motion for return of the property. A hearing on whether there is probable cause to believe that the property is subject to forfeiture would most likely be held. If the defendant loses, he can file another motion

claiming that the continued seizure of the property will cause "substantial hardship" to him or his family. If successful, the court is required to release the property.

This is only the beginning of a very long process. If the defendant has lost these motions, he has many more opportunities to file additional motions at the underlying criminal trial. At trial, if the defendant is found guilty of a crime permitting forfeiture, there is a separate forfeiture phase where the Commonwealth must prove to the jury by clear and convincing evidence that the property is indeed forfeitable.

If the Commonwealth meets its burden, then there is more for the court to consider. Specifically, the court must determine whether the value of the property is grossly disproportional to the gravity of the underlying offense. As this determination is extraordinarily subjective and designed to tip the scales in the defendant's favor, this undertaking will be neither simple nor quick and could very well involve expert testimony.

We are not done yet. The Commonwealth must then notify any person who "reasonably appears to be a potential claimant with standing to contest the forfeiture." There will then be yet another, separate hearing to determine who has any legal interests in the property. The forfeiture order is then adjusted according to the third party's interests.

All told, there are around five different procedural processes and hurdles involved in this process—more than in practically any other aspect of our law. Reform is one thing, but SB 869 puts up barriers and hurdles that appear to be designed to effectively end forfeiture, even after a criminal conviction.

SB 869 Is Indeed About Protecting Rights: The Rights of Drug Dealers

Proponents of this legislation argue that because law enforcement can seize the property pending the conviction, there are no public safety concerns implicated by waiting for a criminal conviction. Despite their well-intentioned attempt to mollify the forfeiture restrictions that SB 869 creates, this argument is flatly wrong. Even if we are able to seize the cash and other property in the first place, most property will likely end up in the hands of the defendant and his confederates in short order.

<u>A lot of drug cash and other drug property could never be seized in the first place</u>

As we explained earlier, it is unlikely that a considerable amount of the cash and other property used by the defendant to traffic drugs, or gained by the defendant through his illegal drug trade, could ever be seized in the first place. Again, if a third party consented to the defendant using property to break the law, that property cannot be seized. Nor could it be seized if the defendant says that the cash is not his and a cohort claims that the cash belongs to him or her—even if we can prove that the property is directly related to the illegal drug activity for which the defendant is convicted. And, as we know, the cash and other property unfortunately will go back to the defendant's drug business.

SB 869's return of property provisions will help some defendants avoid convictions

Law enforcement's ability to temporarily seize some cash and property would only represent a pyrrhic victory against drug traffickers because this provision will ultimately help traffickers avoid conviction and make it easier for them to intimidate witnesses. Let us explain how.

After the initial seizure, a defendant can file for a motion for return of property, which requires the Commonwealth to establish to the court probable cause that the property is subject to forfeiture. One necessary element of proving such probable cause is that the Commonwealth is likely to convict the defendant.

Think about what this means. It means that many months before the criminal trial, we would have to effectively put up our criminal case in open court. Doing so would give drug traffickers an unfair advantage by giving them a preview of our evidence, case strategy, and witnesses. This means that in every single case where we need to seize a drug dealer's cash and other property in order to stop his profit-machine and drug dealing, we would likely be faced with a mini-trial that can only help the defendant eventually escape conviction. If there is any risk of losing the case because of this hearing, prosecutors would likely not proceed with the forfeiture action, all the while the defendant is enjoying the proceeds of his crimes and continuing his drug trade with impunity.

SB 869 sets up a welfare-like system for drug dealers

Even if the Commonwealth proceeds and proves that it is likely to win at trial and that the property is both owned by or belongs to the defendant and directly related to the drug activity, SB 869 provides a bizarre, additional provision that would allow the defendant to get back what has been proven to be drug-related cash and property. If defendant demonstrates that our continued seizure of his illegal contraband or profits or other property causes him a "hardship," the court is *required* to give it back to him. Even if we succeeded in proving we are likely to win at the formal post-conviction forfeiture hearing, buildings from which a sophisticated drug operation was housed, cars from which drugs were sold, proceeds from illegal heroin sales, and other cash that we know will be used to pay drug mules and suppliers would have to go back to those who have been arrested for selling drugs. All the defendant needs to show is that not having the property and proceeds makes his or her life difficult. This is tantamount to welfare for drug dealers.

By Removing Forfeiture Proceeds From Law Enforcement, SB 869 Would Harm Our Ability to Identify and Prosecute Drug Dealers, Treat Drug Addicts, and Save Those Who Overdose

This legislation is also problematic because it would completely change the way forfeiture dollars are distributed. Under current law, forfeiture funds go to the prosecutor's office that handled the forfeiture matter to be used, as required by the forfeiture statute, in enforcing the

provisions of the Controlled Substance, Drug, Device, and Cosmetic Act and for community-based drug and crime fighting programs and for relocation and protection of witnesses in criminal cases. Under the bill, the money would go to cover the costs of storing the seized property, to restitution, and ultimately to the general operating fund of the district attorney's county or, in the case of forfeiture by the Attorney General's Office, to the Department of Revenue for deposit into the General Fund.

Money from forfeiture is used for very important and valuable purposes. Some district attorneys use the funding for critical drug task forces, which are incredibly necessary in our collective fight against prescription drug and heroin abuse. Technological advancements have been funded with forfeiture dollars. Some police departments would not have Naloxone—the antidote which literally saves the lives of those overdosing on heroin—but for our forfeiture funds. These monies pay for overtime and salaries for municipal and state police officers. The cars that are forfeited are used as undercover vehicles by the police. Many district attorneys give portions of forfeiture money to their local police, or alternatively make important purchases for them. When counties and municipalities cannot afford to pay their police officers overtime because, for example, they want to better fund schools, our forfeiture dollars provide the funding necessary to pay these officers. I don't think anyone on this committee would want our officers merely working from 9 to 5. Drug dealers, on the other hand, would be thrilled.

It is hard to see how this bill is appealing to principles of conservatism, because if enacted, our municipalities will need to raise taxes in order to fund the significant shortfalls to law enforcement that we would see. In addition, of course, to the fact that this legislation provides a system of welfare to drug dealers.

Proponents have repeatedly claimed that forfeiture incentivizes law enforcement to undertake as many forfeiture cases as possible in order to make the most money. Not only is this untrue, it is inappropriate. It suggests impure, unethical motives on our part. Resorting to a personal attack that challenges our professionalism and ethics has no place in our system. While such statements make for good press and good fundraising sound bites, they make for poor reflections of the truth.

SB 869 Gets it Backwards: It Requires Taxpayer Dollars To Go To Drug Dealers Who Beat The System, But Is Punitive Toward Law Enforcement

If all this isn't bad enough, we are struck by and rather offended at the punitive nature of some of the bill's provisions. SB 869 goes so far as to penalize the Commonwealth if the forfeiture proceeding is unsuccessful. If the defendant or any claimant "substantially prevails" for any reason, we are liable for attorney fees and other litigation costs incurred by the defendant or claimant. These would be tax dollars that would go to paying the drug dealers' attorneys. The Commonwealth is also liable for post-judgment interest and any interest actually paid or imputed to the property during the time of the Commonwealth held the property. Drug dealers win cases sometimes. Other times it is nearly impossible to determine what portion of

the money found on the drug dealer himself is associated with particular drug sales. Or other times we may drop some charges against a drug dealer while he is convicted of other trafficking charges. Under SB 869, the drug dealer could substantially prevail in each of these scenarios and could, consequently, be entitled to a lot of extra money paid for by taxpayers, at the expense of our offices.

Moreover, if state law enforcement authorities refer seized property to a federal agency as part of a joint investigation, that law enforcement agency is civilly liable for three times the amount of the forfeiture and court costs and attorney fees. Even more outrageous, any individual agent who knowingly refers the property in question to a federal agency, again as part of a joint investigation, commits a second-degree misdemeanor. We do not recall a bill that is more anti-police and law enforcement than this bill. Criminalizing police activity in this way is nothing short of offensive.

We do not blame the prime sponsors or any of the cosponsors for these provisions. They are buried in the bill and have not gotten a lot of attention. But they are, nonetheless, in the bill. Surely these provisions reflect some inappropriate antipathy on the part of those groups that drafted the bill toward those that apprehend and prosecute criminals.

Even if that is not the case, what is abundantly clear is that this legislation was drafted by members of interest groups who have never tried criminal cases in Pennsylvania, investigated drug-running operations in the Commonwealth, and have not thought through how drug traffickers actually operate here.

Nor do they understand that forfeiture is about public safety. As many of you know, we often begin forfeiture proceedings because members of our communities and community groups contact us about dangerous and illegal drug activity on their blocks and in their towns. It is their safety we are concerned about. It is when individuals are scared to leave their homes because illegal drug activity brings with it violence and illegal firearms. It is when the values of their homes plummet because a corner store is being used to sell drugs. It is when their kids are scared to walk to school because they have to go through an area where drug dealers are congregated. That is why community groups work with us and often ask us to initiate forfeiture proceedings. To enact the changes in SB 869 is to turn our backs on them and declare that we do not want to do everything we can to help make their existence safer.

Reasonable Reforms

As we said at the beginning of our testimony, we recognize that some changes to our forfeiture laws are not inappropriate. In the spirit of trying to identify the appropriate balance, we would suggest consideration of the following:

- Limiting *ex parte* seize and seal orders: Our statutes and case law permit some instances in which a property may be temporarily seized *ex parte* before the entry of a forfeiture order. Indeed there are some instances in which this may be necessary, such

as if a property serves as a grow house, there has been persistent, illegal activity on multiple occasions, or arrests have been made and search warrants have been executed at the property where contraband has subsequently been found. But we believe statutory language limiting *ex parte* orders to these types of exigent circumstances is appropriate.

- Putting burden on Commonwealth in so-called "innocent owner" cases: Much has been made of Pennsylvania's so-called innocent owner defense. These are cases where illegal activity occurs at a home, but the person committing the crimes is not the owner. Once the illegal activity and the nexus between the home and the illegal activity has been proven by the Commonwealth, the burden is on the owner to establish that he neither had knowledge of nor consented to the illegal activity occurring on his property. It is not unreasonable to change our laws to require the Commonwealth to affirmatively prove that the owner had knowledge of the illegal activity and consented to it. While this may make some cases more challenging, we believe that this suggestion achieves the balance we discussed earlier.

Conclusion

Chairmen Greenleaf and Leach, thank you for the opportunity to speak about SB 869. It is important that this Committee understand that in its current form, SB 869 will reward and empower drug dealers, make our neighborhoods less safe, limit our ability to fund important programs like drug task forces, require our municipalities to either raise taxes or further cut important services that are already struggling to stay afloat, possibly bankrupt district attorney's offices that do not win a forfeiture action, and could result in our local and state police officers being led away in handcuffs for participating in a joint task force with the federal government.

By contrast, we believe there are some areas of potential common ground, areas that maintain our system of civil asset forfeiture, but tighten some of the procedures. We are ready to work with you to achieve these goals, but also stand ready to continue to point out the many disconcerting flaws of SB 869 as drafted.