

Approved February 11, 1988
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Senator Robert Frey at
Chairperson

10:00 a.m./~~p.m.~~ on February 9, 1988 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~: Senators Frey, Hoferer, Burke, Feleciano, Gaines, Langworthy, Parrish, Talkington, Winter and Yost.

Committee staff present:

Gordon Self, Office of Revisor of Statutes
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Dan D. Rice, Office of Secretary of State
Colonel Donald Pickert, Kansas Highway Patrol
Myron E. Scafe, Overland Park Police Department
Michael Santos, Police Department Legal Advisor
Loren Taylor, Kansas City, Kansas, Police Department
Tony Purcell, Kansas Sheriffs Association
Sheriff Cliff Hacker, Lyon County
Sheriff William Deppish, Geary County
Dale, Finger, Special Agent Kansas Bureau of Investigation
Kyle Smith, Assistant Attorney General assigned to KBI
Dennis Moore, Johnson County District Attorney
Jim Clark, Kansas County and District Attorneys Association
Elizabeth Taylor, Kansas Alcohol and Drug Program Directors

The chairman announced the committee will not take any action on House Bill 2287 today. The bill will be taken up tomorrow when no hearings have been scheduled.

The chairman explained the committee had hearings on House Bill 2240 last year and recommended the bill for interim study. The interim committee had hearings and had extensive recommendations. He suggested the conferees consider the recommendations of the interim committee before testifying on the bill. A copy of the recommendations is attached (See Attachment I)

Dan D. Rice, Office of Secretary of State, presented two bill requests to be introduced as committee bills. The first request concerned the revision to the Kansas Charitable Solicitations Act. The second request concerned a clean up to the Kansas Revised Uniform Limited Benefit Act. Senator Gaines moved the two bills be introduced. Senator Hoferer seconded the motion, and the motion carried.

House Bill 2240 - Forfeitures; controlled substances, simulated controlled substances and drug paraphernalia.

Colonel Donald Pickert, Kansas Highway Patrol, stated he would yield his time since reading the recommendations of the interim committee. A copy of his handout is attached (See Attachment II).

Myron E. Scafe, Overland Park Police Department, testified in support of the bill. He stated this legislation is important to them in the Kansas City area to allow for confiscation of the vehicles upon seisure on apprehension. A copy of his testimony

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

room 514S, Statehouse, at 10:00 a.m./~~p.m.~~ on February 9, 1988.

is attached (See Attachment III). He said he also was speaking on behalf of the Kansas Association of Chiefs of Police and Fred Allenbrand, Sheriff of Johnson County.

Mike Santos, Police Department Legal Advisor, urged the committee to leave in the bill Section 1(b)(4) in line 110. They don't want to seize everything instantly but want the opportunity to come back and seize after have the sale operation is under control.

Loren Taylor, Kansas City, Kansas Police Department, testified we as a whole agree with the interim committee's proposed changes. We have some problems with these recommendations. I agree with the comments made by the Overland Park Police Department. He stated the primary concern should first be given to replacing those expenditures before any mention is made of division of these funds. They are not, nor should they be, a windfall to nonrelated agencies but used strictly to replace resources that are taken from the sparse operating funds of the Administration of Justice agencies directly involved. Copies of his handouts are attached (See Attachments IV).

Tony Purcell, Kansas Sheriffs Association, testified they support this bill and the recommendations of the interim committee, except number six would really be a hindrance to efforts of law enforcement agencies. It is essential to remember the vehicle proceeds of confiscated property can flow back to the agency that made the efforts.

Sheriff Cliff Hacker, Lyon County, testified the sheriffs departments are small departments. This bill is important to them. The only way we can operate is getting funding back to them.

Sheriff William Deppish, Geary County, testified he supports everything that has been said here today. The cost of their drug operations is very large. We have never recouped our cost. At least it gives us something to put back into the system. They can use the facilities from Ft. Riley, and if they didn't have their resources of drug enforcement facilities, we couldn't do what we have been doing.

Dale Finger, Special Agent Kansas Bureau of Investigation, testified the state law enforcement agencies be placed on the same type of footing with regard to the disbursement of forfeited monies/proceeds. A copy of his statement is attached (See Attachment V).

Kyle Smith, Assistant Attorney General assigned to the KBI, testified he generally does support the bill and supports other statements made today. He did have some concerns. In line 80 of the bill he suggested K.S.A. 65-4127a or 4127b be expanded to include other convictions. He said the state would like to be involved in the disposition of funds. In regard to felony violations, this should not be confined to all felonies. Allow probable cause seizure.

Dennis Moore, Johnson County District Attorney, testified in support of the bill. He stated the bill substantially increases the state's ability to forfeit the assets of persons who are dealing illicit drugs for a living. A copy of his statement is attached (See Attachment VI).

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,
room 514S, Statehouse, at 10:00 a.m./~~p.m.~~ on February 9, 1988

House Bill 2240 continued -

Jim Clark, Kansas County and District Attorneys Association, reminded the committee of the original change in the federal statutes dealing with forfeiture. Law enforcement agencies were being penalized with money buy, storage, custody of items seized. He said this is a very expensive item to prosecute. You want to provide incentive. The seconded recommendation by the interim committee was requested by his association. This bill does allow other attorneys to bring the civil forfeiture actions.

Elizabeth Taylor, Kansas Alcohol and Drug Program Directors, testified they do support the bill and asked the committee to consider one change. In new Section 6 allow a portion of the proceeds to be targeted to the treatment programs. Drug treatment is a necessary part for the crimes expressed in this bill.

The meeting adjourned.

A copy of the guest list is attached (See Attachment VII).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE

DATE: 2-9-88

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
ELIZABETH E. TAYLOR	TOPEKA	ALCOHOL & DRUG PROGRAMS
RICH DAMUS	HOISINGTON	BLE
RON CALBERT	NEWTON	U.I.A.
ALAN E. SIMS	Overland Park	City of Overland Park
COL. DON PICKERT	TOPEKA	KHP
ROBERT SCHUMAKER	Topeka	KPOA
LT COL LAYNARD SHEARER	Topeka	KHP
KYLE G. SMITH	Topeka	KBI
CLIFFORD HACKER	HOW CO.	SHERIFF
MYRON E. SOAFE	Overland Park	Police Dept.
MICHAEL N. SANTOS	Overland Park	PD/Law Dept
JIM CLERE	Topeka	KCDAA
DALE A. SINGER	Topeka	KBI
RONDA SPECTOR	Topeka	Attorney General
TONY PORCELL	Topeka	Kansas Sheriffs
JIM HALL	Wichita	Ks. C.U. League
BARB PERMERT	Topeka	KPOA
BRENDA BRADEN	Topeka	AG
NANCY LINDBERG	Topeka	AG
BOB RICE	Topeka	SOS
LOREN L. MAYLOR	KCK	KCK PD
LORRAINE JOHNSON	Topeka	TAC-NFD
WON STUMBARGH	"	CVRB
JIM SHACKLEY	KCK	CITY OF KCK
WILLIAM L. DEPPERT	Junction City	Gray B. Skiff

Attach. VII

Among those concerns identified for special consideration are the following:

1. that the time frame language regarding institution of proceedings contained in the bill be consistent, whether it be "promptly," "within 90 days," "property can be kept as long as necessary," or "after the conclusion of the criminal case, if one is pending;"
2. that language in Section 1(b)(1) of H.B. 2240 be changed to read "the seizure is incident to a lawful arrest or a lawful search conducted by a law enforcement officer," delete subsections (b)3 and (b)4, and, in new section 4 amend the language so that the attorney employed by the law enforcement agency must be approved by the local prosecutor;
3. that in the disposition of forfeited property section, the provision regarding transfer of confiscated property to nonprofit organizations be changed to allow property to be sold and the resultant monies be deposited as state surplus funds and made available to nonprofit organizations;
4. that all involved state agencies be placed on equal footing and treated the same regarding the proceeds of forfeiture and sale of property;
5. that prosecutors be added to those local law enforcement entities that could receive a share of the proceeds; and
6. provision on seizure and forfeiture contained within the bill be made applicable only to felony violations.

SUMMARY OF TESTIMONY

BEFORE THE SENATE JUDICIARY COMMITTEE

HOUSE BILL NO. 2240

PRESENTED BY COLONEL DON PICKERT
KANSAS HIGHWAY PATROL

February 9, 1988

APPEARED IN SUPPORT

Our agency strongly supports adoption of House Bill No 2240 and has so testified in hearings before the House Judiciary Committee and in the interim session.

It would be extremely difficult to overstate the debilitating effect the illegal drug industry has on this nation, and no jurisdiction is exempt these effects.

Our support is based on the most contemporary nature of the proposal and the support it would furnish the law enforcement community.

There is every reason to believe that our geographic location and highway system provides a natural corridor for this activity. The contraband products, both drugs and the required funding, must be transported and this is where our interest lies.

Being totally aware of our mandate, the Patrol's only interest lies in interdicting and disrupting this traffic, and we see our involvement only as a natural adjunct to our primary duties.

In the interest of accomplishing this, our personnel have been trained in interdiction techniques and have met with moderate success at this point. We view this as the tip of the iceberg.

House Bill No. 2240 would greatly assist our efforts.

Considering these facts, we would respectfully request several amendments to include:

Attch. II

1. Page 3, beginning at line 101, addresses certain situations wherein an officer can effect a seizure without process and would appear to restrict this matter to those four instances listed. We would request that, instead of these, language be inserted to the effect seizures could be made in any instance where the officer legally determined the presence of property subject to forfeiture; for example, in the case of inventory searches or where consent to search has been effected.

This request would also encompass the identical language contained on Page 8, beginning at line 0289.

2. Page 13, New Section 6, beginning at line 0469, Subsection (a), directs that forfeitures involving a county or city agency would result in any proceeds realized being placed in special law enforcement funds to be expended only on appropriation to those agencies. We strongly support this concept.

In the case of a state agency, however, it is directed that the funds be paid into the State General Fund. We would request that the same application be applied to state agencies to provide that funding generated by that agency be set aside for the exclusive use of the agency. This is a requirement to receive the funds in a federal prosecution.

Your favorable consideration of the proposed amendments and adoption of this bill is respectfully requested.

CONNECTICUT

DEPARTMENT OF JUSTICE ASSETS FORFEITURE SHARING

Recent action by the Attorney General of the United States provides for equitable distribution of forfeited assets of real benefit to state and local law enforcement. In those localities with weak or non-existent forfeiture procedures, it provides a means of both providing a real penalty to the offender and increasing law enforcement resources at the same time.

The Comprehensive Crime Control Act of 1984 sets forth the parameters under which forfeiture actions may be instituted. Items subject to forfeiture include cash, vehicles, and real property. Provisions are also made for the proceeds of the sale of the properties to be forfeited and shared.

The key to effectively utilizing these procedures is a good day-to-day working relationship with the Federal Investigative Bureau. The law allows the Federal agency to "adopt" state and local seizures for forfeiture also.

Guidelines published by the Attorney General provide for varying decision-making authority for determining the sharing based on the value of the asset. Generally speaking, assets appraised at under \$100,000 will be determined by the head of the Federal Investigative Bureau. Assets are shared based upon the requesting agencies participation in the investigation which led to the seizure.

The State of Connecticut, and in particular the Statewide Narcotics Task Force, has made extensive use of these procedures. To date in excess of \$125,000 has been forfeited to the state along with five (5) vehicles. Currently pending is the seizure of two (2) residences seized as a result of marijuana cultivation investigations. These assets, once turned over to the state or local law enforcement agency, must supplement the operating budget and must be used for law enforcement purposes. An example of the use we intend to make of the assets is the purchase of a new mobile surveillance studio, and the refurbishment of a house as a field office for the Narcotics Task Force. Additionally, we are purchasing replacements for some of our outdated equipment. In these times of budget constraints this process allows us to maximize the impact of the taxpayers dollars.

(EXCERPT FROM STATE REPORTS AT STATE AND PROVINCIAL POLICE PLANNING OFFICERS CONFERENCE, 1986.)

National Institute
of Justice

Research in Brief

July 1985

Use of Forfeiture Sanctions in Drug Cases

Lindsey D. Stellwagen

Forfeiture, the ancient legal practice of government seizure of property used in criminal activity, may prove a particularly useful weapon against illicit narcotics trafficking.

Federal prosecutors have used forfeiture successfully in several major cases. In 1983, for example, more than

\$100 million in cash and property was forfeited to the Government by convicted criminals. The Comprehensive Crime Act of 1984 increased existing Federal forfeiture powers.

Although a National Institute of Justice survey showed that State and local prosecutors and police administrators

rank the drug traffic as their most serious law enforcement problem, use of forfeiture at the State and local level is still relatively limited. Thus, the potential remains for greater State use of forfeiture to disrupt the illegal drug trade by denying traffickers their prof-

Chart follows on next three pages.
Text continues on page 5.

From the Director

We know that fighting drug abuse is fighting crime. Research has shown, as highlighted in two earlier publications in the *Research in Brief* series, that intensive drug abusers are heavily involved in crime, much of it violent.

Without a readily available supply of drugs, however, use of narcotics would dwindle. That is why this Administration has focused enforcement efforts so heavily against those sophisticated criminals who make up the drug trafficking networks. This *Brief* examines an often overlooked legal weapon that could help cripple many drug operations by depriving traffickers of the fruits of their criminal activity.

Federal authorities, as well as police and prosecutors in several States, are using an ancient legal procedure—*forfeiture*—against today's drug traffickers. Forfeiture enables the government to seize property used in the commission of a crime.

As a law enforcement strategy, forfeiture can be used under Federal law to break up a continuing criminal enterprise. Foreign and domestic bank accounts can be seized, together with planes, vessels, cars, and luxury items

like jewelry or resort homes purchased with proceeds from the illicit drug trade. Seizure of such assets disrupts the "working capital" of criminal organizations and perhaps diminishes the motivation to traffic in drugs.

Forfeiture is also a deterrent. For example, a recent Federal case employed forfeiture to confiscate land used to grow marijuana. While a drug seller might be willing to risk loss of his harvest and a conviction for producing marijuana, the danger of losing prime California real estate should give him second thoughts about choosing to grow an illegal crop.

At a time when criminal justice agencies are striving to stretch resources and avoid burdening the taxpayer, forfeiture is a practical option. Forfeiture can be used to recoup some of the money the public spends on pursuing drug traffickers. Not only law enforcement may gain; victim compensation funds, hospitals, and drug treatment centers may also benefit.

Among the States, Florida has been highly successful in its use of forfeiture. While Florida's success is widely known, other States, notably Maryland and Michigan, have also demonstrated

forfeiture can be an effective tool for local police and prosecutors.

In preparing this *Brief*, researchers for the National Institute of Justice constructed a detailed chart showing forfeiture provisions as they apply to drug cases in the laws of all 50 States. They also interviewed some 50 prosecutors nationwide on how they use the forfeiture provisions.

Police and prosecutors will be interested in comparing details of their own State's forfeiture laws with those of other States. Policymakers may wish to consider legislation that encompasses the best features of the Federal forfeiture statutes and the stringent provisions used by States such as Florida.

Many other felonies, particularly those committed by organized crime, can be successfully attacked through appropriate forfeiture provisions. Drug traffickers, however, are particularly appropriate targets for such laws. Effective use of forfeiture can help make a difference in the campaign against drug abuse.

James K. Stewart
Director
National Institute of Justice

State statutory forfeiture provisions for controlled substances violations (numbers refer to notes on page 4)

	AL	AK	AZ	AR	CA	CO	CT	DE	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	
Type of crime																										
Drug trafficking	6
Drug manufacturing
Drug cultivation			.		.	.																				
Drug racketeering (footnote)													10					15								
"Contraband" offenses									.				.	12												
Felonies						.			.																	
Type of property																										
Conveyances
Money
Other negotiable instruments/ securities	
Raw materials, products, and equipment
Paraphernalia						
Crime records
Containers
Personal property						.			.						.											
Real property						.									.											
"Fruits and profits"/ proceeds traceable			
Anything of value furnished in exchange for drugs			
Other (footnote)		1																							23	
Presumptions																										
Money found in close proximity to drugs			
Other (footnote)					3			8										18							24	
Exceptions																										
Owner no knowledge/no consent
Bona fide lienholder no knowledge/ no consent
Common carrier no knowledge/ no consent
Minimum amount of marijuana (amount stated)					10 lbs.				4 oz.								any amt.			10 lbs.					1 kilo	
Possession without a valid prescription			
Other (footnote)		2			4																	19	21			
Proceeds																										
State government	S	S	S			.	.			S		.	.	.	S	S	.	.	S	K		S	.	.	.	
Local government	S		S	S														.	.		K		S	.	.	
School district												K		S	.	.
Law enforcement	K	K	K	K	K			.	S	K	.				K	K	K			K		K	K			
Other (footnote)					5	7			9			11	13	14			16					20	22			
Administration																										
No replevin available	.	.	.				.	.	.	.	.	.	.	.	.	.	.	17	.			.	.	.	.
Default provision (in days)		30			30		45		30		20		20												20	

* Key: K = may keep property for official use
S = payment of sale proceeds

State statutory forfeiture provisions for controlled substances violations (numbers refer to notes on page 4)

	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY
Type of crime																									
Drug trafficking	28	.	.	31
Drug manufacturing
Drug cultivation	.																								
Drug racketeering (footnote)																									
"Contraband" offenses					.							32												44	
Felonies						.																			
Type of property																									
Conveyances	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Money	.		.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Other negotiable instruments/ securities	.		.				.				.		.				.	.	.			.
Raw materials, products, and equipment	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Paraphernalia	.		.			.			.		.		.				.	.	.			.
Crime records	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Containers	.	.	.			.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Personal property				.		.	.											.	.	.	.	.	.
Real property				.		.	.											.	.	.	.	.	.
"Fruits and profits"/ proceeds traceable	.		.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Anything of value furnished in exchange for drugs	.		.						.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Other (footnote)													34											45	
Presumptions																									
Money found in close proximity to drugs													.						.						
Other (footnote)			25	26																					
Exceptions																									
Owner no knowledge/no consent	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Bona fide lienholder no knowledge/ no consent	.		.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Common carrier no knowledge/ no consent	.		.			.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Minimum amount of marijuana (amount stated)	250 grams		1 kilo						1 oz.			small amt.	1 lb.	1 oz.									15 grams		
Possession without a valid prescription												.					.					.	.
Other (footnote)				21	21	21	21	30			33		36									42			
Proceeds																									
State government				S	.							.						.							
Local government		.	S	K	.			S		S								.					.		
School district							S																S		
Law enforcement	.		K	K			K	K		.	K		K		.	.	.					K	.		
Other (footnote)					27	29							35	37	38		39	40		41	43		K		
Administration																									
No replevin available		.	.			.	.	.		.	.	.	.	.	.	.	.	.	.	.	.	.	.	.
Default provision (in days)	20	20								60	30				30		20	20			45				

Key: K = may keep property for official use
S = payment of sale proceeds

Footnotes

1. Firearms.
2. Must be a felony offense for conveyance forfeiture.
3. Rebuttable presumption: person in possession of seized property is owner thereof.
4. Less than 28.5 grams of a controlled substance, 10 pounds dry weight marijuana, peyote, or psilocybin.
5. Fifty percent to Department of Mental Health for prevention programs. Rest covers costs of law enforcement and prosecution of case, any balance to Narcotics Assistance and Relinquishment by Criminal Offender Fund (to finance State and local activities, particularly financial investigator positions).
6. Authorized for Class I public nuisances: trafficking, manufacturing, cultivation of drugs; gambling, prostitution, fencing, child pornography, felonies.
7. Proceeds to the State except court may give property proceeds to seizing agency or victim of the public nuisance.
8. Presumption that conveyance in which contraband is found was used to facilitate illegal act.
9. Court may order 25 percent of proceeds to be paid to an informant or allow any government agency to keep the property.
10. "Narcotics Profit Forfeiture Act" permits forfeiture of profits, proceeds, property interest, security, claims against, and contractual rights. Proceeds are distributed: 50 percent for local narcotics law enforcement (for a State seizure to the Drug Traffic Prevention Fund); 12.5 percent to narcotic prosecution; 12.5 percent to appeals; and 25 percent to the State Drug Traffic Prevention Fund.
11. Under contraband provision for conveyances, law enforcement may keep or sell property; proceeds go to the county government. Under Drug Paraphernalia Act, law enforcement may keep the property. Chart shows distribution for Illinois' Controlled Substances Act and Cannabis Control Act.
12. The motor vehicle forfeiture law authorizes forfeiture for transport of drugs, stolen property, and hazardous waste.
13. Law enforcement may keep motor vehicles for one year.
14. Law enforcement agencies may ask the court for motor vehicles.
15. "Drug Racketeering and Related Organizations" law permits forfeiture of all property. Distribution: 50 percent to the State; 25 percent to the seizing law enforcement agency for narcotics enforcement; 25 percent to the district attorney's office or 6 percent fund.
16. Distribution of sale proceeds: 40 percent to local criminal court; 60 percent to law enforcement for narcotics investigation. For State-level seizures, 60 percent to the Bond Security and Redemption Fund and any excess to the Drug Enforcement Seizures and Forfeitures Fund for State law enforcement equipment for drug investigations.
17. No sequestration or attachment available.
18. Presumption: owner of a conveyance used for three or more illegal drug incidences knew or should have known of its illegal use.
19. Possession of LSD, peyote, mescaline, DMT, psilocybin, psilocybin, marijuana, or an offense limited to use of any controlled substances.
20. Until 10/1/85: 25 percent to the State and 75 percent to the seizing law enforcement budget. After 10/1/85: 50 percent to the State and 50 percent to law enforcement.
21. Must be a felony drug offense.
22. Distribution of sale proceeds: 50 percent to licensed hospitals and drug treatment facilities for drug-related physical/psychological disorders and licensed drug analysis centers; 50 percent returned to the appropriate State agency.
23. Deadly weapons.
24. Presumption that a conveyance is the property of the defendant from whom it was seized.
25. Where person arrested for certain drug violations is in possession of \$300 or more in cash, presumption arises that the cash is traceable to the drug transaction.
26. Conviction raises a rebuttable presumption of illegal use.
27. Law enforcement may keep a motor vehicle for one year.
28. The motor vehicle forfeiture law authorizes forfeiture for unlawful transport, possession, or trafficking of controlled substances.
29. Proceeds from forfeited motor vehicles to State or local government. Other property proceeds distributed: 1. restitution to victim of crime that is the basis of the forfeiture; 2. restitution to any victim of defendant's crimes; 3. any unpaid criminal fines of the defendant; 4. 75 percent to the substance abuse service fund if the crime was a drug felony; 5. 25 percent to the government of seizing agency.
30. Possession of counterfeit drugs.
31. Forfeiture is authorized for permitting a "felony drug abuse offense," which is a first degree misdemeanor.
32. Transportation or possession of a controlled substance in any conveyance.
33. No conveyance forfeiture for creating or delivering counterfeit drugs.
34. Any property.
35. Forfeited cash and sale proceeds: 1. State law enforcement may keep \$1,500 of each forfeiture up to a maximum of \$10,000 per calendar year (CY); 2. law enforcement in cities with population over 20,000 gets \$1,000 per forfeiture and maximum of \$7,500 per CY; 3. all other law enforcement agencies get \$500 per sale and maximum of \$5,000 per CY; 4. excess goes into a State account for law enforcement and, if the balance is over \$25,000, any department may request funds.
36. Exceptions for forfeiture include amounts less than or equal to: one pound of marijuana or hashish; four grains of opium or morphine; two grains of heroin; ten grains of cocaine; or fifty micrograms of lysergic acid diethylamide (LSD).
37. Forfeiture moneys going to the State are to be used for treatment and rehabilitation of drug addicts. Forfeited property goes to the Commissioner on Alcohol and Drug Abuse. However, forfeited conveyances may be given by the Attorney General to: 1. law enforcement, but if item is sold, proceeds are split 50:50 between State and local government; 2. specified State agencies, but if sold, proceeds go to the State; 3. State treasury.
38. Forfeited cash and sale proceeds go to the Drug Control Fund.
39. Not more than 10 percent goes to drug prevention and treatment.
40. Any government agency may apply for forfeited property.
41. Law enforcement may keep motor vehicle.
42. When owner of a conveyance is arrested, conveyance must be seized within 10 days of arrest.
43. Proceeds distributed: 50 percent to Criminal Justice Training Fund and 50 percent to government treasury of seizing agency.
44. Forfeiture of conveyances used to transport property or weapons used or received in the commission of a felony.
45. Buildings.

Continued from page 1.

ts, working capital, and means of doing business.

This *Research in Brief* analyzes major provisions of State forfeiture laws as they apply specifically to narcotics problems. It also reports on a survey of 50 prosecutors nationwide and recommends practical steps for expanding use of this legal tool. Included is a chart showing a State-by-State breakdown of drug-related forfeiture provisions. Typically, however, forfeiture provisions applying to crimes other than drug offenses are scattered through a State's criminal code; the chart does not cover these statutes.

Criminal activities targeted

Virtually all States authorize forfeiture in connection with drug trafficking and manufacture; four States also mention cultivation of drugs. Other States group drug crimes, for purposes of forfeiture, with other offenses such as gambling and hazardous waste violations.

In addition, Illinois and Louisiana have enacted, and other States are considering, special drug racketeering statutes to address large criminal enterprises engaged in organized narcotics traffic. This new direction suggests a state strategy of focusing on a few large cases. This approach holds the potential for a greater impact on public safety than pursuit of many "street level" cases.

Types of property seized

Once a State defines the type of criminal activity for which forfeiture may be invoked, it must define what property can be seized. All States authorize forfeiture of drugs themselves. Statutes also define properties that may not be legal per se but may be seized because they were used to commit the crime.

Common provisions permit seizure of these types of property:

- **Conveyances** (aircraft, vessels, vehicles) used to transport, conceal, or facilitate the crime (47 States).

- **Raw materials, products, and equipment** used in manufacturing, trafficking, or cultivation (42 States) and the **containers** used to store or transport drugs (38 States).

- **Drug paraphernalia** used to consume or administer the controlled substance (19 States).

- **Criminal research and records**, including formulas, microfilm, tapes, and data that can be used to violate drug laws (38 States).

In practice, vehicles and cash are the most frequent forfeiture targets; a few States also authorize pursuit of real and personal property. A growing number of States are adding "traceable assets" (purchased with drug profits) such as jewelry and houses. A financial investigation is often required to link such assets to drug profits. The investigative expense may be cost effective, however, because the property is valuable and the potential for disrupting the criminal organization is high.

A number of prosecutors surveyed pointed out that a *broad* definition of property subject to forfeiture increases the effectiveness of the sanction by reducing the offenders' opportunity to convert profits into nonforfeitable assets.

Disposition of forfeited property

An important and controversial aspect of a forfeiture law involves the disposition of forfeited property. Most State statutes provide that outstanding liens be paid first. Next come the administrative costs of forfeiture, such as storing, maintaining, and selling the property. Some States require that, after administrative costs are reimbursed, the costs of law enforcement and prosecution must be paid.

More than half the States provide that confiscated property goes to the State or local treasury, or part to each. In some States, however, law enforcement agencies may keep the property for official use. If the property is sold or if it is cash, then the money goes to the State or local treasury. In eight States, law enforcement agencies can keep all property, cash, and sales proceeds.

The legislative rationale for allowing law enforcement agencies to benefit from forfeiture seems clear. It is the belief that police departments will be more likely to commit resources to pursue forfeiture of criminal property if the department can gain an automom-

bile for undercover work or cash to supplement the drug "buy fund." Indeed, a few statutes not only allow the police department to keep all forfeited property but explicitly state that forfeited moneys and property cannot be used to reduce appropriations for the police budget.

In addition to allocating forfeiture proceeds to government treasuries and to law enforcement agencies, legislatures have provided for other interests to benefit. A few States earmark a percentage of forfeitures for drug rehabilitation and prevention programs. New York's law provides funds for restitution to victims, while Washington State allocates 50 percent of proceeds to its Criminal Justice Training Fund.

Limitations to forfeiture provisions

Because it involves surrender of property rights, forfeiture is a severe penalty. For this reason, legislatures often include exceptions to forfeiture laws, most of them designed explicitly to prevent innocent people from losing their property.

The most common of such provisions concern forfeiture of conveyances; they protect innocent owners, lienholders, and common carriers. Exceptions are invoked for a person with interest in the property who neither knew of nor consented to its illegal use.

A number of States explicitly limit application of forfeiture to serious drug offenses. Nine States exclude the offense—usually only a misdemeanor—of possessing a controlled or counterfeit drug without a valid prescription. (A counterfeit drug is a substance falsely portrayed as a drug or as a different drug.)

A number of States exclude drug offenses involving a specified minimum amount of drugs, although the minimum varies. For example, Kentucky states that conveyances are not subject to forfeiture for "any offense relating to marijuana"; Pennsylvania provides that a conveyance shall not be confiscated for possession or distribution of a small amount of marijuana (as opposed to sales); California sets minimum amounts for possession of drugs ranging from marijuana to heroin.

Administrative issues

A number of administrative issues must be addressed when a State passes or revises forfeiture legislation.* Most of them fall under five broad categories:

- *Who initiates proceedings.* Most States provide that the prosecutor shall file forfeiture proceedings. In Florida, however, a broad new law allows police to hire an attorney to expedite proceedings. This approach avoids overburdening prosecutors busy with criminal cases and inexperienced in civil forfeiture proceedings. A few States authorize the city solicitor to initiate forfeiture proceedings for similar reasons.
- *Time of filing.* Many States provide that forfeiture proceedings are to be filed "promptly," while some specify a given amount of time. Filing periods range from 15 to 90 days, with the median about 30 days from time of seizure.
- *Provisions for notice and hearing.* Most States establish procedures for notifying people who may have an interest in the property and who may want to contest the forfeiture at the court hearing. Constitutional considerations for due process require provisions for notice and a hearing; indeed, a few forfeiture laws lacking these provisions have been struck down as unconstitutional and have had to be amended.
- *Filing an answer.* Some States provide that, after the government has filed a forfeiture proceeding, anyone with an interest who wants to contest the confiscation must file an answer

* One important issue related to the forfeiture process is not discussed: the issue of whether civil or criminal procedures should be used for forfeiture cases. The question of which approach is more appropriate, and under what circumstances, involves a number of complex legal questions that are summarized in the full report from which this *Brief* is drawn.

within a certain period of time. If no one files an answer within the stated period, the property can be forfeited—automatically, or sometimes after a hearing. Some States do not specify a time to answer; presumably, the period is 20 days, as in the Rules of Civil Procedure.

- *Actions in replevin.* Most State laws prohibit an action in replevin—a suit by the owner claiming that the property was wrongfully taken. Without such a prohibition, multiple lawsuits might result, perhaps even with the replevin action and the forfeiture petition going before different judges. Barring replevin concentrates the entire matter at the forfeiture hearing.

Policy recommendations

Successful use of forfeiture is likely to grow as States and localities gain greater experience in using such sanctions. Most of the 50 prosecutors who were interviewed for this study expressed general satisfaction with the use of the forfeiture sanction for narcotics cases in their jurisdictions. The interviews, however, revealed areas where the process can be improved. The changes most often recommended included:

- Revision of existing statutes to establish clear procedures for condemning property.
- Revision of statutes to specify whether forfeiture is a civil or criminal procedure—or both—and whether a jury trial can be demanded.
- Consideration of expanding the types of property subject to forfeiture by adopting a provision for real property used in the cultivation of drugs or purchased with drug-sale profits.
- Consideration of adding "traceable assets" (property purchased with drug profits) to the types of property subject to forfeiture.

In addition, State and local governments may wish to consider incorporating the forfeiture process into their standard law enforcement procedures.

This is not as easy as it might sound. Development of a more systematic means of using forfeiture would involve an additional effort by States and localities. It could require hiring additional staff or funding of special training for officers in financial investigation and asset management. It might also require adaptation of case-screening mechanisms, procurement of property storage facilities, and development of procedures for seizing property.

However, for jurisdictions burdened with serious drug trafficking, the potential of forfeiture for disrupting the drug trade may outweigh the costs of establishing such a systematic approach.

Information in this Brief was collected for the National Institute of Justice by Abt Associates, Inc., a research firm in Cambridge, Massachusetts. The research team, headed by attorney Lindsey Stellwagen, examined forfeiture statutes relating to drug cases for each of the 50 States. The researchers also interviewed more than 50 prosecutors nationwide on their use of the forfeiture sanctions.

The full text of this report is available on loan from the National Institute of Justice/NCJRS (Use of Forfeiture Sanction in Drug Cases, NCJ 98122). For details, call 800-851-3420 (in Maryland and the Washington, D.C., Metropolitan Area, call 301-251-5500). Other information appears in the National Institute of Justice report Strategies for Supplementing the Police Budget, NCJ 97682, to be available later this year. Call NCJRS for availability information.

U.S. Department of Justice

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TESTIMONY TO SENATE JUDICIARY COMMITTEE

February 9, 1988

RE: HOUSE BILL 2240

Early forfeiture statutes in this country, as well as most of their modern counterparts, provide for civil "in rem" proceedings against the offending property (vs. "in personam" or against the person). Therefore the defendant is actually the property under this theory. Although the property may not be illegal per se, such as boats, cars, airplanes, it has become objectionable because it has been used in connection with illegal activity. The right of the property rests in the government the moment the crime is committed.

Several federal statutes exist which apply directly to the forfeiture concept. Among those are the now famous RICO Act (Racketeer Influenced and Corrupt Organizations Act) and the Continuing Criminal Enterprise Statute which is a part of the Controlled Substances Act. Under present federal law, civil and criminal forfeitures co-exist to make forfeiture applicable to a great variety of situations.

Attch. III

The forfeiture concept is entirely applicable to the problem of drug trafficking. The dramatic increase in drug trafficking and tremendous profits associated with it indicate that current drug laws do not deter and crime does pay. Drug dealers, who accumulate huge fortunes as a result of illegal drug activities, frequently perceive the financial penalties for drug dealing only as a cost of doing business. Specifically the retail value of illicit drugs sold in 1985 was estimated to be between fifty-five and seventy-three billion dollars, whereas under current federal law the maximum fine for most serious drug offenses is only fifty to one hundred thousand dollars and under state law it is only fifteen thousand dollars.

The purpose, therefore, of forfeiture is to "get them where it hurts", to confiscate the tools of the crime to prevent a continuance of criminal activity, and to prevent criminals from keeping the fruits of their crimes.

The current law on forfeitures in Kansas is contained at K.S.A. 65-4135 (1986 Sessions Laws). It was amended in 1986 to make it virtually identical to the civil provisions of the federal law. It is seldom used as most district attorneys view it as cumbersome and confusing. The civil arena is one with which they are unfamiliar and it takes time out of an already heavy workload. In Johnson County, it has only been used three or four times in the last ten years.

The proposed changes are the same as the current Florida statute that is used quite frequently by the law enforcement agencies in that state and very similar to the New York State Statutes that have been used very successfully.

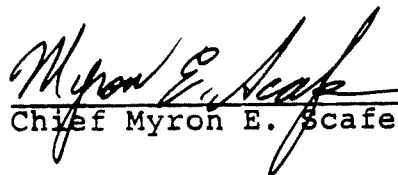
The benefits of the proposed changes in the current forfeiture statutes are:

1. Outlines clear procedural steps to effectuate the forfeiture. Such details make it easier for district or city attorneys to file necessary papers. Currently many are hesitant to file because it is an arena in which they are unfamiliar and the procedure is unclear.
2. Establishes a law enforcement fund to require the money go back into enforcement activity.
3. Allows seizure based on probable cause without process to prevent property from being removed from the state.
4. Allows service on unnamed claimants but does not require them to be named. Naming them requires them to answer and promotes litigation.
5. Allows forfeiture for drug paraphernalia and simulated controlled substances under same conditions.
6. Allows for forfeiture for possession of controlled substances. However, we believe that forfeiture for

possession of controlled substances should be limited to those substances which are identified by DEA as Schedule I or Schedule II drugs (in any amount) and for possession of marijuana in amounts of four ounces or more.

The Kansas Association of Chiefs of Police has endorsed these proposed amendments and I speak on their behalf. Also I have talked with Fred Allenbrand, Sheriff of Johnson County, and he is in favor of this legislature.

I respectfully request that this committee give favorable consideration to this bill.



Chief Myron E. Scafe

Further Thoughts On House Bill 2240

In this day of continuing reduction of resources for the Administration of Justice we are asked to intensify our expenditures of resources in the growing area of organized drug related crime.

We must replenish those resources that are used in these areas or reduce our overall police protection to our communities.

The primary concern should first be given to replacing those expenditures before any mention is made of division of these funds. They are not, nor should they be, a windfall to non related agencies but used strictly to replace resources that are taken from the sparse operating funds of the Administration of Justice agencies directly involved.

After review of the report on Kansas Legislative Intermin Studies/Special Committes/Committe Conclusions and Recommendations the following points are respectfully submitted:

- (1) It is the position of the Kansas City Kansas Police Department to support the concept that the property "be kept as long as necessary" or "after the conclusion of the criminal case, if one is pending;"
- (2) The change in section 1(b)(1) of House Bill 2240 will meet the exigent needs of law enforcement.

There is great question, however, in the proposed amendment to Section 4 to require that the attorney employed by the law enforcement agency be approved by the local prosecutor. Major law enforcement agencies such as Kansas City, Kansas have attorneys specially trained in the area of Administration of Justice. Kansas City Kansas Police Legal Unit, is an example, it should automatically be the agency involved for such action. There is no reason for any approval from local prosecutor. It should be a cooperative effort between the office of the local prosecutor and the law enforcement agency.

- (3) In actions originating within local law enforcement agencies all property and resultant monies should revert to that agency for further law enforcement or local needs.
- (4) It is extremely important that all involved state and local agencies be involved in the equitable distribution of proceeds from forfeiture and sale of property.
- (5) The County prosecutors should be added to those law enforcement entities that could receive a share of the proceeds in appropriate cases. It should be once again noted that in many instances local law enforcement resource are expanded to develop the intelligence and requisite activities to develop drug related seizures. Primary distribution of money should first go to replenishing those resources that were used to initiate the initial forfeiture. All remaining funds could then be equitably

distributed to the participating agencies. It should, however, only be after replacement of the initial expended resources.

- (6) Concern arises in those instances where felony charges may be filed but through plea bargaining or other arrangement the person is placed on Diversion and/or allowed to plead to a lesser offense for cooperation. In these instances it should be considered on a case by case basis by the County Prosecutors as to whether or not forfeiture would be appropriate under the circumstances.

2-9-88
Snyder

Kansas City, Kansas Police Department
Police Legal Unit

Point Paper On Forfeitures In Kansas

We might note that the International Association of Chiefs of Police has taken the position that "law enforcement agencies throughout the nation must recognize the high level of trafficking of illegal and dangerous drugs such as cocaine and heroin, which poses as serious a challenge as has ever been faced by law enforcement, and must deploy their resources creatively and actively to prevent and deter drug trafficking and apprehend such drug traffickers. State and local governments must recognize that the resources currently devoted to preventing and deterring such drug trafficking, apprehending and prosecuting drug traffickers are woefully insufficient. Federal, state and local governments must make significant additional resources available to law enforcement and other agencies for sophisticated, realistic and effective efforts to combat this emerging situation."

It is the position of the Kansas City, Kansas Police Department that Kansas statutory coverage of forfeiture of contraband, although having made improvement, should be reviewed and enhanced to reflect the realities of the growing problems of drug racketeering. Statutory coverage should include the forfeiture of real and personal property that is used in the course of, intended for use in the course of, derived from, or realized through racketeering. This would be a state "mini RICO Act." (Racketeer Influence and Corrupt Organization Act) There should also be extended seizure and forfeiture of cash and personal property used in the commission of a felony. These could be patterned after the present statutes of the state of Florida. These statutes have withstood numerous court tests and have proven their worth in the fight against drug and other racketeering.

We should first directly face the question of why forfeiture? The primary reason for forfeitures is the recognition of the continuing and growing problem, in Kansas, of drug trafficking and as well as other forms of racketeering. There has grown a need for remedies other than traditional criminal law penalties. Drug trafficking does not exist in a vacuum. There are intricate systems of racketeering involved in the movement and sale of narcotics. The cost of enforcement of the law in this area is in/direct proportion to the growing sophistication and complexity of the problem.

We should not, therefore, forgo the possibility of the offenders partial "funding" of the law enforcement efforts to regulate the drug trafficking activities. In the process we could do much to alleviate the growing frustration of law enforcement agencies and the law enforcement community as they approach the growing complexity of drug trafficking. We must strike the drug community in it's collective pocketbook.

We might note that federal authorities, as well as police and prosecutors in several states, are using this ancient legal procedure - forfeiture - against today's drug trafficker's. Forfeiture enables the government to seize property used in the commission of a crime. As example, federal agencies, as a law enforcement strategy, use forfeiture under federal law to break up a continuing criminal enterprise. Foreign and domestic bank accounts are seized. This is together with planes, vessels, cars and luxury items like jewelry or resort homes purchased with proceeds from the illicit drug trade. Seizure of such assets disrupt the "working capital" of criminal organizations and diminishes the motivation to traffic in drugs. Forfeiture is also a deterrent. For example, a recent federal case employed forfeiture to confiscate land used to grow marijuana. While a drug seller might be willing to risk loss of his harvest in a conviction for producing marijuana, the danger of losing prime real estate would give him second thoughts about choosing to grow an illegal crop. At a time when criminal justice agencies are striving to stretch resource's and avoid burdening the tax payer, forfeiture is a practical option. Forfeiture can be used to recoup some of the money the public spends on pursuing drug traffickers. Not only law enforcement may gain; victims compensation funds, hospital and drug treatment center's may also benefit. As noted, Florida has been highly successful in it's use of forfeiture. While Florida success is widely known, other states notably Maryland and Michigan, have also demonstrated forfeiture can be an effective tool for local police and prosecutors.

For background we should remember that forfeiture statutes are premised upon the concept that the thing to be forfeited has itself offended society, either because it is contraband or has been used in the violation of laws deemed of special and social importance. Note State v. Motion Picture entitled "The Bet," 547 P.2d 760 (1976). Unless the forfeiture statutes specifically requires it, a criminal conviction is not a prerequisite to forfeiture. Note State v. McManus, 70 P. 700 (1902); The Palmyra, 25 US 1, 14-15, 6 L.Ed. 531 (1927). Although enforced through proceedings in rem,

forfeiture are penal in nature. Note U.S. v. U.S. Coin and Currency, 401 US 715, 91 S.Ct. 1041, (1971).

We might wish to note that as far as the revenue generation portion of our approach we might:

- a. create law enforcement funding sources apart from tax dollars;
- b. create a trust fund system, such as funding special projects in the continuing fight against drug trafficking.

We should also remember that there are numerous remedies that can be made available through appropriate statutory coverage. These remedies include, but are not limited to:

1. Injunctive measures
2. Forfeiture action
3. Administrative remedies

We should note that in determining what "offending property" should be forfeited, the legislature should also determine whether, and to what extent, to protect the rights of those having an "innocent interest" in the property. Note U.S. v. One Ford Coup, 272 US 321, (1926). It was therein held that a vehicle used to transport untaxed liquor could be forfeited under the federal revenue laws even though the owner had no guilty knowledge that it was to be used for a illegal purpose. This was in contrast to the protection afforded innocent owners in certain vehicle forfeitures under the Prohibition Act. Under current Kansas law our legislature, in adopting the Uniform Controlled Substance Act, obviously adopted for protection of the innocent interest, possibly overly so. This should be an area for further review. Note the past Kansas case of State of Kansas v. One 1978 Chevrolet Corvett, 667 P.2d 894.

Concerning the matter of vehicle forfeitures, one primary difference between the U.S. Code and the Kansas State Statute is the criteria specified for subjecting such vehicles to forfeiture, to wit:

- * 21 U.S.C. 881(a) (4) authorizes forfeiture for all conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt possession, or concealment of property described in paragraph (1)

or (2).

* K.S.A. 65-4135 (A) (4) authorizes forfeiture for all conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation for the purpose of sale or receipt of property described in paragraph (1) or (2).

The Federal Code is much more liberal in allowing vehicles or conveyances to be subject to forfeiture. Note that the Federal Code authorizes the forfeiture of vehicles or conveyances that are used to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property; while the Kansas State Statute merely authorizes the subjecting of forfeiture for vehicles or conveyances that are used or intended to transport or facilitate the transportation for the purpose of sale or receipt of property.

In the majority of cases presently pending, provable cases of using the vehicles or conveyances for actually selling or receiving drug contraband are limited at best, while the preponderance of pending cases would have little or no problem proving the possession or concealment of drug contraband. The additional deterrent effect of this more liberal forfeiture wording would have invaluable benefits.

In Florida, as example, property is not forfeited if the owner of such property neither knew, nor should have known, after a reasonable inquiry that such property was being employed or likely to be employed in criminal activity. It is also noted that no bonafide lienholder's interest should be forfeited under the provisions of the act if such lienholder establishes that he neither knew, nor should have known after reasonable inquiry, that such property was being used or was likely to be used in criminal activity; such use was without his consent, express or implied; and that the lien had been perfected in a manner prescribed by law prior to the seizure. If it appears to the satisfaction of the court that a lienholder's interest satisfies the above requirements for exemption such lienholder's interest would be preserved by the court, by ordering the lienholder's interest to be paid from such preceding's of the sale.

We might point to Florida as example where there are two proven primary levels of forfeiture coverage:

1. Seizure and forfeiture of cash and personal property used in the commission of a felony, generally a distinct offense; Florida Contraband

Forfeiture Act, Section 932.701 et. seq., Florida statutes (1985).

2. Forfeiture of real and personal property that is used in the course of, intended in the use of, derived from, realized through racketeering; their RICO Act (Chapter 895, Florida statutes) (1985).

Inasmuch as programs of this type require evaluative experience of professional investigators and attorneys, it is suggested that the Attorney General's office become the center for information on forfeiture actions. This might well follow the excellent example of the state of Florida.

In review of the Florida State statutes we might note that their approach to the definition of racketeering is very broad. They have made it unlawful for any person who has, with criminal intent, received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds, or the proceeds derived from the investment, or use thereof, in the acquisition of any title to, or any right, interest, or equity and real property or in the establishment for operation of any enterprise. It is also unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property. It is also unlawful for any person employed by, or associated with, any enterprise to conduct or participate directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.

We might also specifically note the Florida definition of "PATTERN OF CRIMINAL ACTIVITY" which means engaging in at least two incidents of criminal activity that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents; provided that the last of such incidents occurred within five years after a prior incident of criminal activity. For the purpose of their statute, the term "PATTERN OF CRIMINAL ACTIVITY" does not include two or more incidents of fraudulent conduct arising out of a single contract or transaction against one or more related persons.

The above is particularly important when noting the extent to which "CRIMINAL

ACTIVITY" was defined to mean, to commit or to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit:

- a. Any crime which is chargeable by indictment or information under any of the following provisions of the Florida statutes:
 1. Relating to a evasion of payment of cigarette taxes;
 2. Relating to public assistance fraud;
 3. Relating to security transactions;
 4. Relating to dog racing, horse racing, and jai alai frontons;
 5. Relating to jai alai frontons;
 6. Relating to the manufacture, distribution, and use of explosives;
 7. Relating beverage law enforcement;
 8. Relating to interest and usurious practices;
 9. Relating to real estate time share plans;
 10. Relating to homicide;
 11. Relating to assault and battery;
 12. Relating to kidnapping;
 13. Relating to weapons and firearms;
 14. Relating to prostitution;
 15. Relating to arson;
 16. Relating to theft, robbery, and related crimes;
 17. Relating to computer related crimes;
 18. Relating to fraudulent practices, false pretenses, fraud generally, and credit card crimes;
 19. Relating to commercial sexual exploitation of children;
 20. Relating to forgery and counterfeiting;
 21. Relating to issuance of worthless checks and drafts;
 22. Relating to extortion;
 23. Relating to perjury;
 24. Relating to bribery and misuse of public office;
 25. Relating to obstruction of justice;
 26. Relating to obscene literature and profanity;
 27. Relating to gambling;
 28. Relating to drug abuse prevention and control;
 29. Relating to victims, witnesses, or informants;
 30. Relating to tampering with jurors and evidence.

- b. Any conduct which is subject to indictment or information as a criminal offense listed in 18 USC 1961 (1) (A), (B), (C), (D).

We might also take specific note of their definition of "unlawful debt" which they define as, any money or thing of value constituting principle or interest of a debt that is legally unenforceable in Florida in whole or in part because the debt was incurred or contracted:

- a. In violation of anyone of the following provisions of law:

1. Related to dog racing, horse racing, and jai alai frontons.
2. Related to criminal usury, loan sharking, shylocking.
3. Relating to gambling.

- b. In gambling activities and violation of federal law or in the business of lending money at a rate usurious or if punishable as a crime under state or federal law.

From the above we can see the obvious interrelating responses to the developing structure of racketeering and associated endeavors. It may also be noted that it is wise to face their potential area of coverage prior to commencement, of legal gambling in the state of Kansas.

CONTRABAND FORFEITURE ACT

We might wish to note that Florida has taken a far broader view of forfeiture than Kansas. It includes areas, as of yet, not covered under Kansas law. Along with controlled substances, device, paraphernalia, currency or other means of exchange which has been, is being, or intended to be used in violation of any provision of our narcotics laws, it includes any gambling paraphernalia, lottery tickets, money, currency used or intended to be used in the violation of the gambling laws of that state. It also includes; any equipment, liquid or solid, which is being used or intended to used in violation of the beverage or tobacco laws of that state as well as any motor fuel upon which motor fuel up tax has not been paid as required by law, any personal property, including, but not limited to any item, object, tool, substance, device, weapon, machine, vehicle of any kind, money, securities, or currency which has been or is being employed as an instrument in the commission of, or in aiding or abetting the commission of any felony.

Another matter of concern in the overall subject of drug laws is the misdirected attitude of legislatures towards all controlled substances except the opiates and cocaine.

Presently, Kansas law prescribes a felony under 65-4127(a) for the mere possession of cocaine and the opiates (heroin, morphine, codeine, opium, etc.) However, the mere possession of any other drug is prescribed as a misdemeanor. While it would be foolish to recommend the upgrading of the Kansas law to prescribe a felony violation for the possession of any contraband drug substances, it is recommended that certain more addictive, costly, and potentially dangerous drug substances be upgraded to felonies for mere possession. For example, Phencyclidine (PCP) is widely available in Kansas City, Kansas in liquid and powder form. It is expensive, always clandestinely made, and illegal in any form on the street. It's proven violent reactions to those who use it, it's high cost (currently \$30.00 for a cigarette dipped in PCP), and the commensurate need to commit crimes of theft, burglary, or robbery to supplement this costly habit. Additionally, Lysergic Acid Diethylamide (LSD), is also widely available in Kansas City, Kansas, in various forms including blotter acid, window panes, or micro-dots. These types generally sell for about \$6.00 per dosage unit and it has proven to be a cause of violent, aberrant behavior in the user. Substantial documentation concerning LSD overdosing, bad trips, rampages, bizarre or macabre deeds committed while under the influence of this drug, all lend credence to the fact that its mere possession should be harshly judged. It isn't necessarily cost prohibitive, however, the dangers associated with the taking of this drug warrant inconclusion as a felony. Methamphetamin is another drug that is becoming fairly common in Kansas City, Kansas. It cost about the same amount of money as cocaine (approximately \$100.00 - \$125.00 per gram, or about \$2000.00 to \$2200.00 per ounce). It's extremely addictive nature, and it's high cost leads to crime patterns to support the user's habit. It therefore follows that we must make effort to deter its use by upgrading its possession to a felony classification.

ADDITIONAL THOUGHTS ON CIVIL ACTION

Although it is a more controversial area, the 1986 session of the Florida legi-

slature enacted a statute that allowed any person who proves by clear and convincing evidence that he/she has been injured by reason of any violation or the provisions of the "mini Florida RICO Act" shall have a cause of action for threefold the actual damages sustained and, in any action, is entitled to minimum damages in the amount of \$200.00, and reasonable attorneys fees and court costs in the trial and appellate courts. It might be noted that in no event will punitive damage be awarded under this section. The attorney is entitled to recover reasonable attorneys fees and court costs in the trial and appellate courts upon finding the claimant raised a claimed which was without substantial fact or legal support. In awarding the attorneys fees and costs under this new section the court considers the ability of the opposing party to pay such fees and costs. There is also a civil remedy for theft. Any person who proves by clear and convincing evidence that he/she has been injured in any fashion by reason of any violation of the provisions of the new act, has a cause of action for threefold actual damages sustained and, in any such action is entitled to a minimum damage in the amount of \$200.00 and reasonable attorneys fees and court costs in the trial and appellate courts.

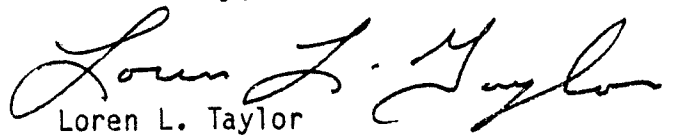
We might point to the state of Missouri for additional thoughts on this legislation entitled "The Criminal Activity Forfeiture Act." It appears that Missouri has, for a period of time, developed use of this procedure far beyond that envisioned in our current legislation. In their statutes all property of every kind used or intended for use in the course of, derived from, or realized through criminal activity is subject to civil forfeiture. Civil Forfeiture under their statutes "shall be had by a civil procedure known as the CAFA Forfeiture Proceeding." Their action, a in rem "CAFA Forfeiture Proceeding" which is instituted by petition by the prosecuting attorney of the county in which the property is located or by the Attorney General's Office. The proceeding may be commenced before or after seizure of the property. If the petition is filed before seizure, it shall state what property is sought to be forfeited, that the property is within the jurisdiction of court, the grounds for forfeiture, and the names of all persons known to have or claim an interest in the property. The court shall determine ex parte whether there is reasonable cause to believe that the property is subject to forfeiture and that notice to those persons having or claiming an interest in the property prior to seizure would cause the loss or destruction of the property.

We should note that Missouri has also taken a broad view as to the definition of "criminal activity" for purposes of this statute. According to Missouri statutes, criminal activity is the commission, attempted commission, conspiracy to commit, or the solicitation, coercion or intimidation of another person to commit any crime which is chargeable by indictment or information under the following Missouri laws:

- (a) relating to drug regulations;
- (b) relating to defenses against the person;
- (c) relating to sexual offenses;
- (d) relating to offenses against the family;
- (e) relating to robbery, arson, burglary and related offenses;
- (f) relating to stealing and related offenses;
- (g) relating to prostitution;
- (h) relating to pornography and related offenses;
- (i) relating to offenses against public order;
- (j) relating to offenses against the administration of justice;
- (k) relating to witnesses;
- (l) relating to gambling;
- (m) chapter 311, RSMo, but relating only to felony violation of their chapter committed by persons not duly licensed by the supervisor of liquor control;
- (n) relating to weapon offenses;
- (o) relating to regulation of securities;
- (p) relating to regulation and licensing of motor vehicles;

If further thoughts or additional materials are desired please feel free to contact this office at your earliest convenience. I will be available to meet with your representatives at any time in this matter. I have had the opportunity to have contact with key persons involved in this procedure in the state of Florida and other states.

Yours truly,


Loren L. Taylor
Police Legal Advisor
Kansas City, Kansas Police Department

RICO: A Theory of Investigation

2-9-88
Taylor

By Supervisory Special Agent DONALD V. NORTH, Organized Crime Section, Criminal Investigative Division, Federal Bureau of Investigation, Washington, D.C.

In recent years, prosecutions of the hierarchy and membership of the La Cosa Nostra (LCN) are indicative of the successful battle being waged against organized crime in the United States. Notable convictions have occurred in Cleveland, Kansas City, St. Louis, Philadelphia and New York. Particularly significant was the November 1986 conviction of the leadership of the five New York LCN families for being the "LCN Commission," a ruling body over a nationwide criminal enterprise. As a result of this LCN prosecution, 100-year prison sentences were meted out by the presiding judge. Public attention was drawn to these accomplishments not by the status of the defendants—who were recognizable only to the law enforcement community—but by exposing these secret criminal enterprises and proving them to be in control of various segments of the U.S. economy. Exposing their influence and control over such diverse industries as construction, trucking, waste disposal and shipping, to name a few, created a political and public awareness of the menace of organized crime.

However, criminal investigators are well aware that prosecutive successes are primarily determined by the investigative strategy and the evidence accumulated and documented during the investigation. U.S. Attorney Rudolph Giuliani of the Southern District of New York, in attempting to analyze the reasons for these significant accomplishments, stated: "Civil and criminal applications of the RICO (Racketeer Influenced and Corrupt Organizations) Statute, used in conjunction with the Witness Security Program, court-authorized electronic surveillance, and ongoing cooperative efforts between and with federal, state and local law enforcement agencies, are all important parts of the offensive against organized crime."

What has changed during the past 20 years in the investigation of organized crime? Certainly law enforcement tools and techniques have improved, but so has the sophistication of criminal groups. The most dramatic change in the evolution of investigating organized crime was the enactment of the RICO

Certainly, law enforcement tools and techniques have improved over the past 20 years, but so has the sophistication of organized criminal groups. The most dramatic change in the evolution of investigating organized crime was the 1970 enactment of the RICO statute.

statute in 1970, although it has been only since 1982 that this seemingly complex federal statute has been understood and fully utilized by law enforcement. Many prosecutors and investigators continue to view RICO as a flexible conspiracy statute, which it is not. To describe the theory of a RICO investigation, some comments must be presented concerning the legislative intent for the statute and the prosecutive theory of utilizing the RICO statute.

The law enforcement community has investigated and prosecuted organized crime figures in the United States for 50 years or more, achieving notable successes. But while individual organized crime members were being jailed at an ever-increasing rate, the crime problem remained unchanged. The most vivid example was the FBI "Unirac" investigation, which focused on the LCN's control of the shipping industry through its dominance over the International Longshoremen's Association (ILA). This investigation culminated in 1980 with the prosecution and incarceration of over 100 LCN members, associates, union officials and co-conspirator businessmen. A follow-up study of this effort revealed that waterfront corruption, through LCN control of the ILA,

allowed the multimillion-dollar dockside rackets to continue unabated. This resulted in higher costs to consumers on imported goods and higher costs for American products shipped abroad.

The 19th-century American criminal justice system developed the criminal trial model, which is extremely efficient at dealing with street crimes. This system is predicated on an individual's committing a crime against a single victim at a particular place and time. The sanction imposed by this system is a loss of liberty or incarceration. Witness or suspect statements are admissible in this legal system only as they related to a specific offender or offense. The addition of conspiracy statutes allowed several individuals to be charged with a specific crime or a series of connecting crimes.

The traditional method of investigating crimes under this system is to identify suspects by identifying individuals who have the motive to commit the offense. The failure of this system in the investigation of organized crime is that the system does not recognize structured and organized groups that engage in crimes for profit and whose hierarchy has no direct link to any specific criminal act. The tried and true method of prosecuting members of these groups for specific offenses actually had a detrimental effect on solving the crime problem caused by the group. The members prosecuted were often the weak links in the group and their removal by the government left a stronger criminal organization. The group's established mechanism allowed the criminal activity, such as control of businesses or domination of labor unions or public officials, to flourish and was unaffected by individual prosecution of group members. Further, the organized crime groups became better aware of investigative techniques because of the trial process and legal disclosure, allowing them to take steps to isolate further their criminal activities from law enforcement scrutiny.

Another recognizable problem with

individual prosecutions is the minimum sentence exposure of most specific crimes, which allows the convicted organized crime felon to return to society and to the criminal organization with enhanced stature in the group because he served his sentence and maintained the code of silence. The last and major deficiency of this prosecutive system in combating organized crime is that it fails to remove the profit gained from and through the criminal activity.

The RICO statute was enacted to address each of these problems and to provide a method to prosecute organized groups for all their diverse criminal activities without the crimes being linked together by perpetrator or common criminal conspiracy. This statute recognizes the profit motive of organized crime and, in addition to allowing for a 20-year confinement exposure for individual defendants, it has mechanisms to address the profit incentive and the recurring crime problem. It allows for forfeiture of any benefits gained by the group or the individual members charged, and allows for private citizens who were victimized to sue civilly to to recoup treble damages. The civil process would entail, almost entirely, the reintroduction of the government's evidence.

The aspect of the statute with the

The investigation of any organized crime group is initiated with a review of the available intelligence base in order to estimate the group's structure, membership and criminal activities.

most far-reaching effect is the government's ability to file a civil suit requesting the court to order sanctions or to provide injunctive relief prohibiting the recurring crime problem. For example, consider the "John Doe" organized crime group controlling the XYZ union through a history of organized crime members or associates holding key union positions. Through this control, the Doe group is able to fix prices in a given marketplace by allowing selective vendors to have labor peace and lower labor costs. Assume (1) that the boss and various members of the Doe group are criminally prosecuted under

the RICO statute and identified as a criminal enterprise "in fact," (2) that the RICO predicate acts are their various criminal activities to include labor violations, (3) that the investigation established that members of the Doe group were shown to have received kickbacks and increased their personal assets, and (4) that the Doe group assumed control over certain vendors through this labor extortion and/or by legitimate acquisition. Then, at the time of criminal indictment, the members' personal assets—equivalent in value to their illegal proceeds—as well as any equity obtained by the Doe group, are frozen. Subsequent to conviction, these assets are subject to forfeiture.

At this point, law enforcement could claim a rightful victory. An organized criminal group has been identified, publicly exposed and prosecuted for what it really is, a group that engaged in far-reaching, sophisticated racketeering for profit, while publicly portraying themselves as legitimate businessmen. However, did we solve the crime problem? More often than not, some members or associates of the Doe group remain in control of the XYZ union. Within a short period of time, when the publicity has subsided, it becomes business as usual in the marketplace, with the remaining Doe membership



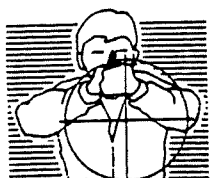
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restructured and controlling the vendors.

This is the point where the civil provisions of the RICO statute must be utilized. The government must structure a civil complaint to permanently enjoin members of the Doe group from controlling the XYZ union. The evidence to support this complaint requires a lesser standard of proof than "beyond a reasonable doubt," which is required in a criminal proceeding. This complaint demonstrates to the court the need for injunctive relief. The government would demonstrate the Doe group's control over XYZ and request relief, such as placing XYZ under a government trustee until free elections are held and banning DOE group members from holding office or associating with XYZ officers or employees. After this law enforcement step is taken, any attempt by the Doe group to reassume control over this marketplace merely requires the government to establish the contact that violates the civil court order and provides for a contempt of civil court prosecution.

Subsequent to all the above government actions, either the government trustee of XYZ or the legitimate vendors,

The next step is to conduct a background investigation through agency file reviews, agency and public record checks and available informants of the group on the individual members and their criminal activities. During this stage, the investigator attempts to identify individual and group assets, as well as proprietary interests.

who were economically damaged through the proven unfair competition in the marketplace, can sue in civil court for treble damages based on the evi-

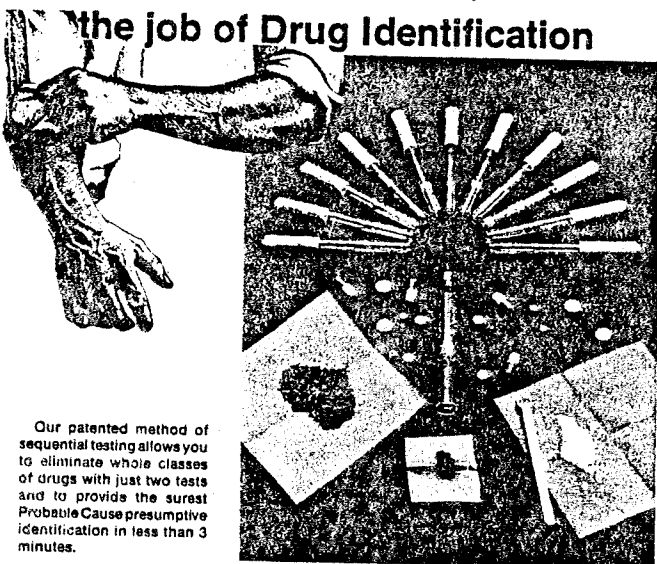
dence previously presented by the government. Any damages awarded will further punish the Doe group and its associates, as well as the vendors who economically benefited through the unfair labor practices.

This example would appear to a traditional investigator to be a model for structuring the prosecutive action. Historically, evidence developed in an investigation is presented to a prosecutor who structures the indictment and thus the method of prosecution. However, this is not the case utilizing the RICO Enterprise Theory of Investigation. The investigative strategy structures the prosecution from the inception of the investigation.

The investigation of any organized crime group is initiated with a review of the available intelligence base in order to estimate the group's structure, membership and criminal activities. The next step is to conduct a background investigation through agency file reviews, agency and public record checks and available informants of the group on the individual members and their criminal activities. During this stage, the investigator attempts to identify individual and group assets, as well as proprietary interests. All structured criminal groups must have some type of chain of command whereby di-

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rectives flow down and financial gain is shared upwards.

The next investigative phase involves the use of toll records, pen registers, physical surveillance, and analyses of prior arrests and associates to identify meeting places, methods of communication between group members and entities utilized to facilitate their criminal activities. At this stage, the investigator evaluates and defines the criminal group, the enterprise(s) that may be the investigative focus and the potential predicate criminal acts.

The enterprise may be the structured group, licit or illicit, including commercial, benevolent and governmental organizations or associations of criminals in fact. The enterprise may also be the victim of crimes, the vehicles used to perpetrate the crimes, or the benefit derived from the commission of the crimes. Most organized crime investigations will focus on more than one enterprise, as in the above example. The Doe group was a criminal enterprise; in fact, the XYZ union was an enterprise used as a vehicle to perpetrate the criminal activity, and any business seized and operated as a result of the criminal activity is a separate enterprise. Evidence for prosecution and forfeiture must be separated and cataloged for each enterprise.

Prior to entering the proactive investigative stage, consideration is given to the sanctions that appear appropriate and obtainable. The question to be answered is, what type of relief will solve this identifiable problem? If every member of the group is identified and potentially prosecutable, potential criminal RICO prosecution and confinement will suffice. If assets have been gained by the group, forfeiture should be included in the strategy. If criminal prosecution will not eradicate a pervasive problem, the type of civil sanctions that could alleviate the problem should be identified.

Next, a determination must be made whether to pursue an overt or covert investigation. In the overt stage, the investigator uses interviews to develop witnesses, subpoenas records, locates expert witnesses and utilizes a grand jury. With sophisticated organized crime groups involved in complex criminal activity, the initial use of covert investigative techniques has proven more successful. These techniques involve telephone and microphone electronic surveillances, closed circuit television, consensual recordings made by victims, and the use of undercover agents. While these techniques are being utilized, direct and circumstantial evi-

dence must be separately recorded and filed on the sanctions being pursued.

Separate administrative systems must be put in place as a repository for evidence on the structure, membership and purpose of each enterprise, assets identified for each individual and enterprise, identification of illegal profit generation, criminal evidence of RICO predicates, and support for projected civil relief. The predicate criminal acts, the defined enterprises and the required civil sanctions are reevaluated during the course of the investigation. When the criminal RICO indictment is structured, all assets subject to forfeiture must be identified. These assets must be frozen at the time of indictment so that asset liquidation and transfer does not occur prior to seizure.

To date, the RICO statute and its corresponding theory of investigation have been very successful in convicting major LCN members throughout the United States. Through training courses, seminars and law enforcement conferences, more and more prosecutors and investigators will become better prepared and equipped to expand the statute's use by applying this investigative theory to all organized criminal groups in the United States. ★

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LOCATION: Sheriff Nick Navarro has authorized a new Organized Crime Centre Training Facility in Fort Lauderdale where most of the above courses will be presented. Approved for second dollar funds and mandatory re-training hours.

FOR FURTHER INFORMATION CONTACT: Commander William H. Dunman Broward Sheriff's Office, Organized Crime Centre, Post Office Box 2505, Fort Lauderdale, FL 33303, 305/564-0833.

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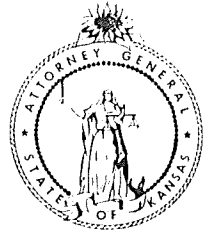
2-9-88



DAVID E. JOHNSON
DIRECTOR

KANSAS BUREAU OF INVESTIGATION

DIVISION OF THE OFFICE OF ATTORNEY GENERAL
STATE OF KANSAS
1620 TYLER
TOPEKA, KANSAS 66612-1837
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ROBERT T. STEPHAN
ATTORNEY GENERAL

TESTIMONY OF SPECIAL AGENT DALE A. FINGER
KANSAS BUREAU OF INVESTIGATION
ON HOUSE BILL 2240
BEFORE THE
SENATE JUDICIARY COMMITTEE
TUESDAY, FEBRUARY 9, 1988
ROOM 514-S
STATE CAPITOL

Mr. Chairman and members of the Senate Judiciary Committee:

My name is Dale Finger. I've been a special agent with the Kansas Bureau of Investigation since 1973, assigned to the Narcotics Division. I'm here today on behalf of the KBI, and also as a representative of Attorney General Robert Stephan's Task Force on Drugs, to testify for certain revisions in the state forfeiture law as outlined in House Bill 2240.

Before giving testimony on this bill, I feel it is appropriate to familiarize you with Attorney General Stephan's Task Force on Drugs. In the fall of 1986, Attorney General Stephan formed the Task Force; membership includes professionals in law enforcement, from the legislative and judicial branches of government, education, and state and local agencies. After the Task Force was formed, several public hearings were held across the State of Kansas in order for persons representing law enforcement agencies, parents, and other concerned community members to voice their concerns and offer their suggestions to help combat drug-related problems in our state. As a result of these hearings, the Task Force assimilated the suggestions and recommendations, and sought

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introduction of a number of legislative bills to further address the ever increasing drug problem.

In answering the law enforcement concerns brought before the Task Force, House Bill 2710 proposing increased penalties for certain violations of controlled substances was introduced by Attorney General Stephan this session. Also introduced was House Bill 2708, which proposes a new law be enacted making it a crime to use a communication facility for the purpose of arranging illegal drug transactions.

Another law enforcement concern which came to the attention of the Task Force involves the bill before you today, House Bill 2240, which deals with the state forfeiture law as it pertains to narcotics violations. I realize there are several sections within the current forfeitures law which are being considered for revision; however, the sections of the law which have risen to the attention of the Task Force needing revision pertain to the sections outlining the disbursement of monies forfeited and disbursement of proceeds of the sales of forfeited properties. As written in New Section 6 of this bill, city and county law enforcement agencies are, in effect, entitled to keep these monies and proceeds (after certain liens and/or costs are paid) as fruits of their labor, and justly so. Local agencies, as proposed, would have special law enforcement trust funds established in their respective jurisdictions in order to hold the forfeited monies and proceeds, and these funds would ultimately be utilized to defray the costs of future law enforcement needs in stated categories. Further, as

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proposed, the forfeited monies/proceeds will "not be considered a source of revenue to meet normal operating expenses."

On behalf of the KBI and the Attorney General's Task Force, I am requesting that state law enforcement agencies be placed on the same type of footing with regard to the disbursement of forfeited monies/proceeds. As currently written, state agencies are required to turn these monies/proceeds over to the state treasury for credit to the state general fund. We are proposing that monies/proceeds gained as a result of forfeitures by a state law enforcement agency be directed for use in that particular state law enforcement agency's budget as a "no limit" expenditure fund to support that agency's drug enforcement effort. Further, it is proposed these funds should not be used to supplant state general fund allocations.

City, County, and State narcotics investigations, as we are well aware, expend a large amount of time, manpower, and money. The Kansas forfeiture law is an effective tool in dealing with narcotics violators. I believe it can become an even more effective tool by providing additional incentive to every law enforcement agency in Kansas to pursue forfeitures as a means to hurt the narcotics violator in the pocketbook, and at the same time financially support their own agency's law enforcement efforts.

Thank you for your consideration. I will be pleased to answer any questions.

2-9-88

STATE OF KANSAS
Tenth Judicial District

OFFICE OF DISTRICT ATTORNEY

DENNIS W. MOORE
DISTRICT ATTORNEY

JOHNSON COUNTY COURTHOUSE
P.O. Box 728, 6TH FLOOR TOWER
OLATHE, KANSAS 66061
913-782-5000, EXT. 333

February 9, 1988

RE: House Bill 2240

Dear House Committee Member:

I appreciate the opportunity to testify here today in support of HB 2240.

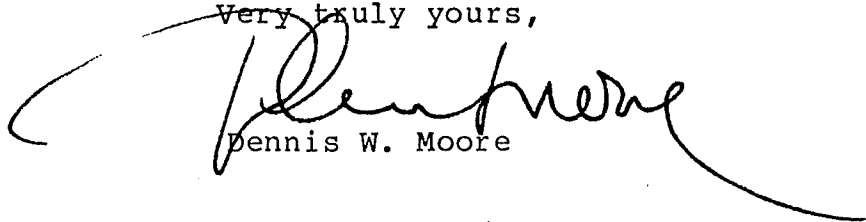
As District Attorney in Johnson County for the past eleven years I see on an almost daily basis the effects that illicit drugs and the people who deal controlled substances have on our community. It is certainly not an understatement to say that the drug problem has reached epidemic proportions in our country and in our state.

As a prosecutor, I have found there are two ways to substantially impair the ability of drug dealers conducting their business: first, put them in jail; second, take their property and money.

HB 2240 substantially increases the State's ability to forfeit the assests of persons who are dealing illicit drugs for a living. I believe this legislation will enhance law enforcement's efforts in fighting the drug problem.

I urge your support for HB 2240.

Very truly yours,



Dennis W. Moore

DWM:JH