

Civil Rights *and* Civil Asset Forfeiture in Michigan



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

October 2016

Advisory Committees to the U.S. Commission on Civil Rights

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

Acknowledgements

The Michigan Advisory Committee would like to thank each of the panelists who presented to the Committee during both the May 23rd and May 26th 2016 meetings of the Michigan Advisory Committee, and the Michigan Department of Aeronautics for hosting the May 26th in-person event. The Committee is also grateful to the Chair, Donna Budnick; and to Committee members Matthew Wesaw, Jon Hoadley, Emily Dievendorf, and Sarah Prescott for their work in securing the relevant testimony and directing the project to completion.

**Michigan Advisory Committee to the
U.S. Commission on Civil Rights**

The Michigan Advisory Committee to the U.S. Commission on Civil Rights submits this report regarding the civil rights impact of asset forfeiture in Michigan as part of its responsibility to study and report on civil rights issues in the state of Michigan. The contents of this report are primarily based on testimony the Committee heard during public hearings on May 23 and 26, 2016, as well as related testimony submitted to the Committee in writing during the relevant period of public comment.

The report begins with a brief background of the issue to be considered by the Committee. It then presents an overview of the testimony received. Finally, it identifies primary findings as they emerged from this testimony, as well as recommendations for addressing related civil rights concerns. This report is intended to focus specifically on civil rights concerns regarding due process and the potential for disparate impact resulting from asset forfeiture practices in Michigan. While other important topics may have surfaced throughout the Committee's inquiry, those matters that are outside the scope of this specific civil rights mandate are left for another discussion. This report and the recommendations included within it were adopted by a majority of the Committee on October 3, 2016.

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I. INTRODUCTION

On May 23 and May 26, 2016, the Michigan Advisory Committee (Committee) to the U.S. Commission on Civil Rights (Commission) convened public meetings to hear testimony regarding the civil rights implications of asset forfeiture in the state of Michigan.¹ Specifically, the Committee sought to examine the potential for disparate impact on the basis of race, color, or other federally protected category in the practice of administrative and civil asset forfeiture.

Asset forfeiture is a legal tool which authorizes law enforcement officials to seize property that they suspect is connected to criminal activity. The process of forfeiture begins with asset seizure, when law enforcement officials take and hold suspect property. After a seizure, the title to the seized property remains with the property owner, until such time as legal ownership of the property is transferred to the seizing agency, through a process of administrative, civil, or criminal authorization. This final transfer of property ownership is known as asset forfeiture.² Asset forfeiture can occur under three distinct legal processes:³

- **Administrative forfeiture** occurs when the property owner does not contest the property seizure. In such cases, the forfeiture is processed by the seizing law enforcement agency without judicial oversight. Houses and other real property may not be forfeited administratively, and in most cases the property value must not exceed \$500,000. The vast majority of federal forfeiture cases are administrative forfeitures.⁴
- **Civil forfeiture** may occur when the property owner contests the property seizure. Under civil forfeiture, charges are filed against the property, not the property owner; therefore, a criminal conviction of the property owner is not required for forfeiture. Instead, through a process of judicial review, the government must demonstrate that the property itself is traceable to the offense in question, facilitated the offense, or that it was involved in money laundering.⁵
- **Criminal forfeiture** occurs when an individual's property is forfeited as part of their sentencing for a criminal conviction. Once the government obtains a criminal conviction,

¹ See Appendix A for Hearing Agendas

² *Forfeiture*: Legal Information Institute, Available at: <https://www.law.cornell.edu/wex/forfeiture> (last accessed September 20, 2016).

³ Dery, Alice. *Overview of Asset Forfeiture*. Business Law Today, American Bar Association. June 21, 2012. Available at: <http://apps.americanbar.org/buslaw/blt/content/2012/06/article-02-dery.shtml> (last accessed September 28, 2016). Hereafter cited as *Overview of Asset Forfeiture*.

⁴ *Overview of Asset Forfeiture, Administrative Forfeiture*. See also: *Types of Federal Forfeiture*, The United States Department of Justice, Available at <https://www.justice.gov/afp/types-federal-forfeiture> (last accessed September 20, 2016).

⁵ *Overview of Asset Forfeiture*

a second trial must establish the connection between the property in question and the defendant's criminal conduct.⁶

Under criminal forfeiture, property is forfeited as part of a criminal trial, and defendants have the constitutional right to a full range of due process protections. Therefore, criminal forfeiture was not included in the Committee's inquiry and is not discussed further in this report. Unlike in criminal forfeiture, however, under administrative and civil forfeiture, the property owner does not need to be convicted of a crime. Instead, "civil forfeiture rests on the idea (a legal fiction) that the property itself, not the owner, has violated the law."⁷ Because of this legal distinction, when property is forfeited under administrative or civil, rather than criminal law, many constitutional rights and protections afforded to criminal defendants do not apply. As such, the practices of administrative and civil asset forfeiture have raised numerous civil rights questions for the involved property owners, particularly regarding equal protection and the right to due process of law. These concerns are discussed further in the following sections of this report.

⁶ *Overview of Asset Forfeiture*

⁷ *Forfeiture, supra* note 2.

II. BACKGROUND

The practice of civil asset forfeiture in the United States gained popularity in the 1970s and 1980s as part of the “War on Drugs,” seeking to remove the capital base used by drug dealers to fund their operations.⁸ Federal law governing civil asset forfeiture evolved over the following years through the passage of several statutes including:

1. The Comprehensive Drug Abuse and Prevention Control Act of 1970 first authorized federal law enforcement agencies to seize narcotics and equipment used in their manufacture and transport;⁹
2. 18 U.S. Code (U.S.C.) Chapter 46 Forfeiture provides definitions and general rules for the use of civil forfeiture by law enforcement;¹⁰
3. The Comprehensive Forfeiture Act of 1984, contained within the Comprehensive Crime Control Act of 1984, created the Department of Justice Assets Forfeiture Fund—a federal fund to manage seized assets, provide rewards to informants, and establish “equitable sharing,” which allows local law enforcement to collect a portion of the proceeds of assets seized within their jurisdictions;¹¹
4. The Civil Asset Forfeiture Reform Act of 2000 (CAFRA), is the first (and as of yet, only) bill to be passed that restructured the process of federal civil asset forfeiture. The Act established “preponderance of evidence” as the legal burden of proof required for the federal government to forfeit seized property; abolished the bond requirement, which had previously mandated that property owners post 10% of the value of the seized property in order to defend their claim in court; and created the Innocent Owner Defense, which asserts that an owner must only prove that they are “innocent,” or unaware of the property’s involvement in a crime, by a “preponderance of evidence” in order to have their property returned.¹²
5. In federal forfeiture cases, section 111.120 of Title IX of the U.S. Attorneys’ Manual determines the net equity levels that must be met before civil forfeiture takes place. Residential property minimum net equity must be \$20,000; vehicles minimum net equity must be at least \$5,000; cash must constitute at least \$5,000; aircrafts and vessels

⁸ Murphy, Mary, *Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis*, 16 Tex. J. on C.L. & C.R. 77, 80-81 (2010).

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

¹⁰ 18 U.S.C. §§ 981, 983--987. Available at: <https://www.law.cornell.edu/uscode/text/18/part-I/chapter-46> (last accessed September 20, 2016)

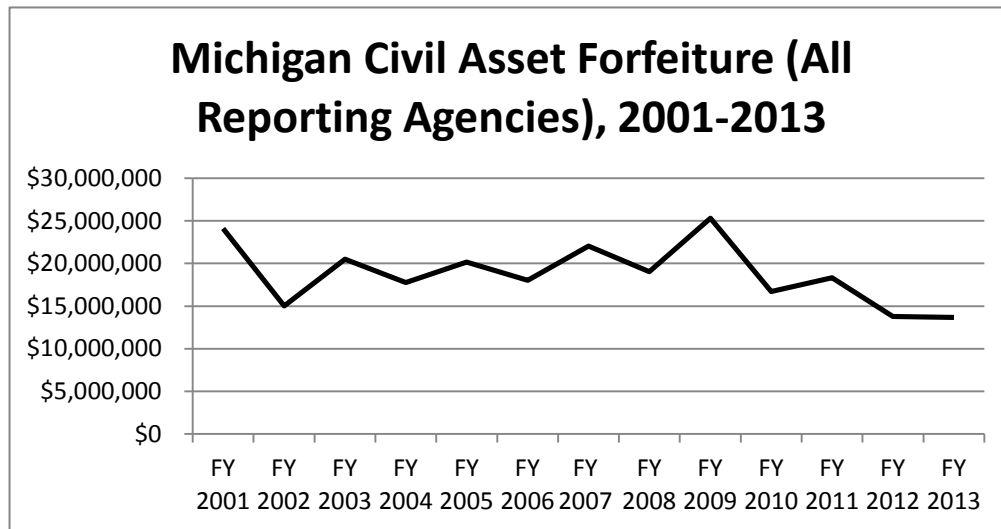
¹¹ The Comprehensive Crime Control Act, Pub. L. No. 98-473, 98 Stat. 1837 §301, et seq. (1984). *See also*: U.S. Department of Justice; The Fund. Available at: <http://www.justice.gov/afp/fund> (last accessed September 20, 2016)

¹² The Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202, 204-06 (2000)

minimum net equity must be at least \$10,000; and all other personal property minimum net equity must be at least \$1,000.¹³

The Institute for Justice, a nonprofit research and advocacy organization that has studied forfeiture laws in each state and nationally, reported that at the federal level, “the Departments of Justice and the Treasury have seen an astonishing increase in forfeiture activity” since the 1980s.¹⁴ In 1986 (the year after the Department of Justice’s Asset Forfeiture Fund was created), federal forfeiture proceeds equaled \$93.7 million. As of 2014, this figure was equal to \$4.5 billion.¹⁵ Federal assets procured into the Asset Forfeiture Fund fall under the authority of the Attorney General, who can then use these funds to “pay any necessary expenses associated with forfeiture operations...and to finance certain general investigative expenses” within the Department of Justice.¹⁶

In Michigan, civil asset forfeiture proceeds have peaked sporadically over the past 15 years, averaging approximately \$18,800,000 per year since 2001, as reported by the Institute for Justice.¹⁷ However, “several agencies’ reports are missing for any given year, indicating that these figures likely severely underreport the full value of forfeitures in Michigan.”¹⁸



¹³ United States Department of Justice, U.S. Attorneys’ Manual, Title IX 9-111.120, Net Equity Values *available at* <https://www.justice.gov/usam/usam-9-111000-forfeitureseizure> (last accessed September 20, 2016).

¹⁴ Policing for Profit: Introduction, 2014, Available at: <http://ij.org/report/policing-for-profit/introduction/> (last accessed July 12, 2016)

¹⁵ *Ibid.*

¹⁶ *The Fund*: The United States Department of Justice, Available at: <https://www.justice.gov/afp/fund>.

¹⁷ Carpenter et. al. Policing for Profit: The Abuse of Civil Asset Forfeiture, 2nd Edition, Institute for Justice. November 2015. Available at: <http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf> (last accessed July 14, 2016) Hereafter cited as Policing for Profit, 2015.

¹⁸ *Ibid.*

In addition, the Institute for Justice reports that Michigan law enforcement agencies have received \$127.6 million in equitable sharing proceeds from the Department of Justice between 2000 and 2013,¹⁹ and \$19 million in equitable sharing proceeds from the Treasury Department.²⁰

As a civil, rather than criminal matter, civil asset forfeiture abridges a number of key rights otherwise afforded to defendants in criminal cases, such as the right to counsel. At the federal level, the legal burden of proof required to forfeit assets (preponderance of evidence) is lower than what is required for convicting owners of forfeited property of having committed a crime (beyond a reasonable doubt).²¹ These particular aspects of civil asset forfeiture are permissible under U.S. law due to the fact that in civil forfeiture cases, charges are brought against the property as separate from charges faced by the owner, and seized property has no enumerated rights under the U.S. Constitution.²²

At the state and local levels (including multijurisdictional task forces), laws regarding the administration of civil asset forfeitures vary widely, and data concerning the characteristics of individual property owners facing forfeiture remains limited. Despite this lack of data, related research suggests that across the country, clear and persistent disparities exist in the frequency and type of contact that law enforcement has with civilians on the basis of race or color.²³ In particular, black and Hispanic males are more likely to be stopped and searched by police than their white counterparts, even though they are less likely to be found in possession of any type of contraband as a result of these searches.²⁴

Given the disproportionately high rates of contact with law enforcement in communities of color in general, the limited due process rights afforded to those subject to forfeiture under current practices, and financial incentives facing law enforcement to augment their funding; in this study, the Committee sought to examine the extent to which civil asset forfeiture in Michigan

¹⁹ Policing for Profit, 2015, p. 91 *Note*: Equitable sharing is the process by which state and local agencies seize property under federal jurisdiction, and in return, the federal government “shares,” or sends back a portion of the profit to the state and local agencies that aided in the seizure.

²⁰ *Ibid*, p. 25

²¹ 18 U.S. Code § 983 (c) Available at: https://www.law.cornell.edu/wex/preponderance_of_the_evidence (last accessed September 27, 2016) *Note*: Preponderance of evidence requires that at least 51% of evidence points to a certain result. Clear and convincing evidence implies a more rigorous standard than preponderance of evidence, and signifies that a party must establish their claim as substantially more likely to be true than not. Beyond a reasonable doubt is the standard used in criminal cases, and implies that if the jurors hold any doubt of the defendant’s guilt, they must acquit the defendant. *See*: Cornell Law Institute, Available at: https://www.law.cornell.edu/wex/preponderance_of_the_evidence, https://www.law.cornell.edu/wex/clear_and_convincing_evidence, and https://www.law.cornell.edu/wex/reasonable_doubt (last accessed August 4, 2016).

²² Murphy, Mary, *Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis*, 16 *Tex. J. on C.L. & C.R.* 77, at 86(2010).

²³ Engel, Robin and Calnon, Jennifer *Examining the Influence of Drivers’ Characteristics During Traffic Stops With Police: Results from a National Survey*, *Justice Quarterly*, Vol. No. 21, p. 49(March 2004). Academy of Criminal Justice Sciences. [Hereinafter cited as *Traffic Stops Survey, 2004*].

²⁴ *Traffic Stops Survey, 2004*, at 76.

may produce a disparate impact on the basis of race or color. The Committee notes that in October of 2015, the Michigan legislature passed a reform package which, among other revisions, requires increased data reporting,²⁵ and raises the burden of proof for civil asset forfeiture in Michigan from “preponderance of the evidence” to “clear and convincing evidence.”²⁶ This reform package, which took effect in January of 2016, may partially address some of the concerns raised as part of this inquiry, and is discussed in greater detail throughout this report.

²⁵ Public Act 148 of 2015 (Effective: 2/1/2016). Available at [https://www.legislature.mi.gov/\(S\(j3533f3z5jbfk2yjlnvxxi0z\)\)/mileg.aspx?page=getObject&objectname=mcl-Act-148-of-2015&query=on](https://www.legislature.mi.gov/(S(j3533f3z5jbfk2yjlnvxxi0z))/mileg.aspx?page=getObject&objectname=mcl-Act-148-of-2015&query=on) (last accessed September 29, 2016)

²⁶ Public Act 154 of 2015 (Effective: 1/18/2016) Available at: [https://www.legislature.mi.gov/\(S\(j3533f3z5jbfk2yjlnvxxi0z\)\)/mileg.aspx?page=getObject&objectName=mcl-333-7521](https://www.legislature.mi.gov/(S(j3533f3z5jbfk2yjlnvxxi0z))/mileg.aspx?page=getObject&objectName=mcl-333-7521) (last accessed September 29, 2016). *See also:* Jonathan Oosting, *Michigan House Approves Civil Asset Forfeiture Reform, Reporting Package*, MLive Media Group, (June 4, 2015). Available at: http://www.mlive.com/lansing-news/index.ssf/2015/06/michigan_civil_asset_forfeitur.html (last accessed Aug. 4, 2015) [Hereinafter cited as *MLive 2015: Michigan Civil Forfeiture Reform*].

III. OVERVIEW OF TESTIMONY

In order to further evaluate concerns regarding the potential for disparate impact on the basis of race, color, or other federally protected category resulting from the current implementation of Michigan civil forfeiture law, the Committee heard testimony from four panels of experts representing a variety of relevant perspectives; including researchers, policy advocates, attorneys, legislators, and law enforcement officials.²⁷ Specifically, the Committee sought testimony regarding potential disparities in the forfeiture of property on the basis of race or color, as well as recommendations to address any related concerns regarding equal protection and the right to due process of law, with respect to civil forfeiture. Testimony focused on currently available data regarding those individuals who are impacted by forfeiture in Michigan, civil rights concerns related to equal protection and due process of law, and the purpose and benefits of civil forfeiture from the perspective of law enforcement.

a. Data Tracking

Currently, very little data exists to determine who is impacted by civil asset forfeiture. In his testimony, Dr. Brian Kelly, Professor of Economics at Seattle University, noted that one of the primary challenges associated with studying the impact of civil asset forfeiture is the variation that exists within data tracking and reporting systems across the United States.²⁸ In many jurisdictions, data is not collected or reported at all.²⁹ In jurisdictions where data is reported, it is often incomplete and is oriented around the total value of the forfeited property, not the characteristics of the property owner.³⁰

From a civil rights perspective, these limitations pose a number of challenges to studying the civil rights impacts of civil asset forfeiture. For example, it is not possible to evaluate the potential for disparate impact on the basis of any demographic characteristics when the characteristics of the property owners are not recorded—or in some cases, are never even identified. Detective Sergeant Theodore Nelson (Ret.), of Law Enforcement Against Prohibition, testified that 80-84% of all civil forfeitures in Michigan occur administratively, meaning that the property owner never identified himself or herself to the court.³¹ In such cases, the identity of the

²⁷ See Appendix B for Panelist Abstracts

²⁸ Dr. Brian Kelly, Testimony before the Michigan Advisory Committee to the U.S. Commission on Civil Rights. Meeting Transcript, May 23, 2016. p. 07, lines 24-30. Available at: <https://database.faca.gov/committee/meetingdocuments.aspx?flr=135586&cid=255>. [Hereafter cited as 5.23 Transcript]

²⁹ Policing for Profit, 2015

³⁰ Kelly Testimony, 5.23 Transcript, p. 05, lines 10-14

³¹ Mr. Theodore Nelson, Testimony before the Michigan Advisory Committee to the U.S. Commission on Civil Rights. Meeting Transcript, May 26, 2016. p. 28, lines 6-10. Available at:

property owner cannot be reported. Panelist Stefan Cassella, a former federal prosecutor and asset forfeiture expert, testified that recording the demographics of the property-owners is made even more difficult when one considers cases that involve multiple defendants, or instances in which the property-owner is simply unknown, such as cases involving drug couriers who are not aware of who the property they are handling belongs to.³² The use of equitable sharing, whereby multiple agencies have a role in the forfeiture of a single property, may further compound these challenges to accurately monitoring data and increase the likelihood that the data could be misrepresented once reported.³³

In addition, reporting data based solely on the total value of forfeited assets results in data that does not reflect the number of properties forfeited, or the individual values for each property.³⁴ This makes it difficult to evaluate whether or not law enforcement is implementing the law as it was intended—to disrupt major drug operations and other organized criminal activity. At the federal level, guidelines determine the minimum net equity at which property may be seized; however, no such protections exist under Michigan law.³⁵ As a civil rights question, such a distinction is important because seizures of petty cash and low-value properties are unlikely to be contested in court, especially if legal costs will outweigh the value of the property, according to Daniel Korobkin of the American Civil Liberties Union of Michigan.³⁶ Mr. Korobkin described an incident in Detroit, Michigan, which occurred during an event at the Contemporary Art Institute. Detroit law enforcement became aware that the facility had been serving liquor to the guests without a proper liquor license. As a result, police raided the facility and seized the cars of more than 100 guests who were in attendance—despite the responsibility for maintaining a proper liquor license falling on the facility, and not the guests. After the raid, guests were reportedly given the option to either pay a \$900 fee for the return of their vehicles, or to challenge the forfeiture in court. Since the costs of hiring a lawyer and challenging the forfeiture in court would likely far exceed \$900, most of the individuals opted to pay the fee in return for their property³⁷—even though in a subsequent court ruling, a federal judge ruled that the police had no probable cause to seize the vehicles in the first place.³⁸

<https://database.faca.gov/committee/meetingdocuments.aspx?flr=135587&cid=255> [Hereafter cited as 5.26 Transcript]

³² Casella Testimony, 5.23 Transcript, p. 17, lines 10-20

³³ Kelly Testimony, 5.23 Transcript, p. 7, lines 1-14

³⁴ Kelly Testimony, 5.23 Transcript, p. 05, lines 21-25

³⁵ United States Department of Justice, U.S. Attorneys' Manual, Title IX 9-111.120, Net Equity Values available at <https://www.justice.gov/usam/usam-9-111000-forfeitureseizure> (last accessed September 20, 2016)

³⁶ Korobkin Testimony, 5.26 Transcript, p. 13-15

³⁷ Korobkin Testimony, 5.26 Transcript, p. 12-15

³⁸ *Mobley, et al. vs. City of Detroit*, 938 F.Supp.2d 669 (E. D. Michigan, 2012).

b. Disparate Impact

Throughout the hearings, the Committee heard testimony that such targeting of small, low-value assets is likely to be concentrated in low income communities of color, where people do not have the resources to defend themselves in civil court, particularly without the right to court appointed counsel.³⁹ Michigan attorney James White testified that about 90% of the civil forfeiture cases he handles come from minority property-owners.⁴⁰ He has never litigated a case where a white, middle-class family faced civil asset forfeiture.⁴¹ This is not to say such cases do not occur within the State, nor does it suggest that rates of crime or drug use differ between racial groups. In Mr. White's experience, the difference is that when a wealthy, white individual is found with drugs, their property (or that of their family members) is rarely seized.⁴² Mr. White testified that in his experience, civil asset forfeiture rarely happens to "people with resources."⁴³ Detective Sergeant Theodore Nelson added to this perspective, noting that in counties "where there's a large population of minorities, you will see a large amount of assets seized. In counties that are primarily white, either people don't use drugs there, don't sell them, or nobody cares."⁴⁴

It was also noted that especially for individuals with very limited economic means, even low-value forfeitures can be devastating. As Dr. Kelly highlighted, it must be considered that someone of limited economic means who loses their \$8,000 car "may be suffering a civil rights abuse as great as one suffering an \$8 million loss from running a gambling ring."⁴⁵ In her testimony, panelist Rebecca Vallas, attorney and Managing Director for the Poverty to Prosperity Program at the Center for American Progress, noted the devastating chain impact that can result from low-value forfeitures, particularly within the most vulnerable populations. The forfeiture of a car for someone with limited resources can often lead to the loss of a job, and consequently, the loss of a home.⁴⁶ Home ownership is vital to fighting intergenerational poverty, and "seizing low income families' homes through forfeiture also poses a threat to wealth accumulation across generations and risks exacerbating the racial wealth gap."⁴⁷

For this reason, the Committee notes that the American Bar Association House of Delegates adopted a resolution in 2006 urging the appointment of counsel "as a matter of right" to all indigent defendants in civil cases (not limited to civil asset forfeiture) where "basic human needs" are at stake, "such as those involving shelter, sustenance, safety, health, or child custody,

³⁹ Carpenter, Vallas, Korobkin Testimony

⁴⁰ White Testimony, *5.26 Transcript*, p. 38, lines 10-13

⁴¹ White Testimony, *5.26 Transcript*, p. 45, lines 11-20

⁴² *Ibid.*

⁴³ White Testimony, *5.26 Transcript*, p. 47, lines 8-11

⁴⁴ Nelson Testimony, *5.26 Transcript*, p. 29, lines 8-15

⁴⁵ Kelly Testimony, *5.23 Transcript*, p. 05, lines 21-28

⁴⁶ Vallas Testimony, *5.23 Transcript*, p. 13-14, lines 42-9

⁴⁷ *Ibid.*

as determined by each jurisdiction.”⁴⁸ Several State Bar Associations have issued similar recommendations and have launched efforts to better protect access to counsel in civil proceedings within their jurisdictions.⁴⁹ Although as of the writing of this report no such protection exists at either the state or federal level to secure the right to counsel in all basic human needs cases, many states do provide the right to counsel in at least some of these recommended categories.⁵⁰

Finally, State Representative Jeff Irwin noted that another federally-protected group at increased risk of facing civil asset forfeiture is people with disabilities.⁵¹ This is due to the fact that disability groups are among the most likely to seek medical marijuana relief instead of other treatments due to its palliative nature and relative lack of damaging side effects.⁵² Detective Sergeant Nelson remarked that since Michigan’s medical marijuana laws are easily misinterpreted, task forces are raiding medical marijuana dispensaries and seizing assets based on very technical violations of the law. They often do not make arrests in these cases, but instead, seize all available assets (regardless of their association with the sale of medical marijuana), such as bicycles and other family items.⁵³

The Committee notes that even with the increased reporting standards required by the 2015 Michigan forfeiture reforms,⁵⁴ the “personal characteristics of property owners involved in forfeitures” still will not be recorded.⁵⁵ However, multiple studies that have been conducted across the United States suggest that the potential for disparate impact within forfeiture practices should not be ignored. According to a study of cash forfeitures conducted by the American Civil Liberties Union of Pennsylvania, in Philadelphia, among all cash forfeitures made without supporting criminal convictions from 2011 to 2013, 70% of those impacted were African-American.⁵⁶ Similarly, testimony provided by Rebecca Vallas highlighted research from Oklahoma which showed that between 2010 and 2015 “nearly two thirds of seizures came from

⁴⁸ American Bar Association’s Task Force on Access to Civil Justice, *Report to the House of Delegates*, Resolution 112A, 2006. Available at:

http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_resolution_06_a112a.authcheckdam.pdf (last accessed September 21, 2016).

⁴⁹ Basic Principles of a Right to Council in Civil Legal Proceedings, American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants, *Report to the House of Delegates* (August 2010). Available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_105_revised_final_aug_2010.authcheckdam.pdf (last accessed September 21, 2016).

⁵⁰ National Coalition for a Civil Right to Counsel. *Status Map*. Available at: <http://www.civilrighttocounsel.org/map> (last accessed September 26, 2016)

⁵¹ Irwin Testimony, 5.26 *Transcript*, p. 91-92, lines 11-5

⁵² *Ibid.*

⁵³ Nelson Testimony, 5.26 *Transcript*, p. 25-26, lines 8-13

⁵⁴ Public Act 148 of 2015 (Effective: 2/1/2016), *Supra* note 25

⁵⁵ Carpenter Testimony, 5.23 *Transcript*, p. 9, lines 24-28

⁵⁶ Guilty Property, *ACLU of Pennsylvania*, p. 10, Available at: https://www.aclupa.org/files/3214/3326/0426/Guilty_Property_Report_-_FINAL.pdf (last accessed September 21, 2016).

African-Americans, Latinos, and other racial and ethnic minorities, despite the fact that 75 percent of the state's population is white.”⁵⁷ These disparities pose a significant civil rights concern and warrant further evaluation. In order to assess these concerns, publicly available data must reflect (1) the demographics and disability status of property owners; and (2) the individual value of each property forfeited, neither of which are currently available.

c. The Right to Due Process

The Fifth and Fourteenth Amendments to the Constitution require that “due process of law be part of any proceeding that denies a citizen ‘life, liberty, or property’ and requires the government to compensate citizens when it takes private property for public use.”⁵⁸ Integral to the philosophy of due process is “the promise of legality and fair procedure.”⁵⁹ As a result of this understanding, many panelists raised concerns to the Committee that the practice of civil asset forfeiture in Michigan does not align with this promise and constitutionally protected right. Representative Irwin remarked, “Most people do believe they are innocent until proven guilty here in America. It strikes me as turning our whole concept of jurisprudence on its head to have this process whereby people can have their assets taken and then be put into a situation, many times, where for them to even challenge the forfeiture would be more costly than the value of the assets that were seized.”⁶⁰ During the course of the Committee’s inquiry, panelists raised a number of concerns regarding due process of law in civil forfeiture cases, including bond requirements, access to counsel, law enforcement discretion, and law enforcement financial incentive.

i. Bond Requirement

As of the Committee’s hearing on this topic, under Michigan civil forfeiture law, property-owners were required to post 10% of the value of their seized property as a bond within 20 days in order to contest the seizure of their property in court.⁶¹ The Committee heard testimony that such a requirement may prove prohibitive for many affected by civil forfeiture, and

⁵⁷ Vallas Testimony, 5.23 Transcript, p. 12, lines 35-38. See also: Forfeiting the American Dream, April 2016. Available at: <https://cdn.americanprogress.org/wp-content/uploads/2016/04/01060039/CivilAssetForfeiture-reportv2.pdf> (last accessed September 21, 2016).

⁵⁸ U.S. Const. amends. V. and XIV Available at: https://www.law.cornell.edu/constitution/fifth_amendment and https://www.law.cornell.edu/wex/fourteenth_amendment_0 (last accessed September 23, 2016).

⁵⁹ *Due Process*, Legal Information Institute, Available at: https://www.law.cornell.edu/wex/due_process (last accessed September 23, 2016).

⁶⁰ Irwin Testimony, 5.26 Transcript, p. 85, lines 8-17

⁶¹ MCL 333.7523 & 333.7524. Available at: [http://www.legislature.mi.gov/\(S\(irwrja5s1dcmxid0xmu31aqn\)\)/mileg.aspx?page=getObject&objectname=mcl-333-7524](http://www.legislature.mi.gov/(S(irwrja5s1dcmxid0xmu31aqn))/mileg.aspx?page=getObject&objectname=mcl-333-7524) (last accessed September 29, 2016). See also: “Financial means should not be a prerequisite for justice,” Michigan House Republicans, Available at: <http://gophouse.org/house-cuts-bond-requirement-fight-seized-property/> (last accessed July 28, 2016).

disproportionately so for people of color. The Federal Reserve System's 2014 Report on the Economic Well-Being of U.S. Households found that "forty-seven percent of [survey] respondents say they either could not cover an emergency expense costing \$400, or would cover it by selling something or borrowing money."⁶² These percentages were sharply divided along racial lines, with 38% of white respondents making less than \$40,000/year stating they could cover such an expense, compared to just 18% of non-Hispanic black respondents.⁶³ Furthermore, panelist Daniel Korobkin noted that "nearly half of non-white households have no access to regular banking," in comparison to less than 20 percent of white households.⁶⁴ Korobkin continued to explain that those without access to bank accounts are more likely to carry large sums of cash on their person, which not only renders them more vulnerable to cash forfeitures, but also, diminishes their initial ability to fight the forfeiture in court.⁶⁵ For example, when a woman in Alpena, Michigan, had all of the cash in her home seized due to suspect involvement in drug activity, she was informed that in order to fight the forfeiture, she must post 10% of the seized property value. As Korobkin remarked, "the idea that you have to post a bond with cash in order to get your cash back really doesn't work when the police have taken all of your money."⁶⁶

This bond requirement was not addressed by Michigan's 2015 legislative reform package; however, it should also be noted that as of August 2, 2016, the State of Michigan Court of Appeals ruled the State's bond requirement to be unconstitutional in civil asset forfeiture cases, when it is applied to indigent individuals who are unable to afford the bond.⁶⁷ The State did not appeal the court's ruling. While praising this decision as a step in the right direction, advocates have noted that without further action from the state legislature to eliminate the bond requirement entirely, challenges to due process do remain. In a statement issued to the Committee following the ruling, Mr. Korobkin wrote,

This is a powerful and important decision that confirms what the ACLU and other advocates have been arguing for years -- and the legislature should take its cue from this decision and repeal the bond requirement from the law. Unfortunately, the Court of Appeals decision does not, by itself, solve the problem for property owners who are unable to afford the bond requirement, because neither the court's decision nor the statute establishes an actual mechanism for indigent property owners to assert a claim on their property -- even though it is now clear that they have a constitutional right to do so. My understanding from speaking with other practitioners is that law

⁶² Report on the Economic Well-Being of U.S. Households in 2014, Board of Governors of the Federal Reserve System, 2015, Available at: <http://www.federalreserve.gov/econresdata/2014-report-economic-well-being-us-households-201505.pdf> (last accessed July 28, 2016).

⁶³ Ibid.

⁶⁴ Korobkin Testimony, 5.26 Transcript, p. 19, lines 8-17

⁶⁵ Ibid.

⁶⁶ Korobkin Testimony, 5.26 Transcript, p. 15-16, lines 20-14

⁶⁷ *In re Forfeiture of 2000 GMC Denali and Contents*, ___ N.W.2d ___, 2016 WL 4097938

(Court of Appeals of Michigan, August 2, 2016). Available at:

http://publicdocs.courts.mi.gov:81/OPINIONS/FINAL/COA/20160802_C328547_38_328547.OPN.PDF (last accessed August 10, 2016). See also: Korobkin, Written Testimony, Appendix C

enforcement agencies continue to provide property owners with the statutory notice that says they must -- without exception -- post a bond in order to preserve a claim on their property.⁶⁸

The Committee also notes that in May of 2015 Michigan Representative Peter Lucido introduced a bill to the Michigan House of Representatives, which would accomplish this very task—eliminating the bond requirement in all civil forfeiture cases.⁶⁹ This bill passed in the House in March of 2016 and has been referred to the Committee of the Whole in the Michigan Senate.⁷⁰ As of the writing of this report, the bill remained under the consideration of the Committee, and its outcome is not yet known.

ii. Access to Counsel

Property owners have the right to challenge civil forfeiture in court; however, as noted by panelist Daniel Korobkin, “there is no right to counsel when you face civil asset forfeiture, and if you are able to hire counsel, your counsel is not able to recover their attorney’s fees if they prevail”⁷¹ (a practice known as “fee shifting”).⁷² Panelist Rebecca Vallas noted that Public Defenders’ Offices typically focus on criminal matters, and cannot meet the needs of every low-income individual facing civil proceedings.⁷³ Dr. Dick Carpenter of the Institute for Justice remarked that to fight for the return of their property, “owners face a Byzantine process that often imposes costs greater than the value of the contested property.”⁷⁴ While data revealing the average value of forfeited property in Michigan has not been recorded, the average value of forfeited property in Minnesota is \$1,000, and in Georgia, it is close to \$650, according to Dr. Carpenter.⁷⁵ Without evidence to suggest that the average value of forfeitures in Michigan differs significantly, such concern remains an important area of consideration for civil rights review.

Particularly when considering both the costs of an attorney and opportunity costs, Dr. Carpenter remarked that this lack of access to counsel creates a “greater likelihood” of erroneously forfeiting the property of innocent owners, “and disproportionately so [against] those who are protected classes.”⁷⁶ Dr. Carpenter noted, “Any rational actor quickly sees fighting for the property is a waste of time and they give up, even if they are not guilty of any wrongdoing.”⁷⁷

⁶⁸ Korobkin, Written Testimony, Appendix C

⁶⁹ H.B. 4629, 98th Leg. (Mich. 2015).. Available at:

[http://www.legislature.mi.gov/\(S\(5qwcubemdksqtf5uzwpwiiiv0\)\)/mileg.aspx?page=GetObject&objectname=2015-HB-4629](http://www.legislature.mi.gov/(S(5qwcubemdksqtf5uzwpwiiiv0))/mileg.aspx?page=GetObject&objectname=2015-HB-4629) (last accessed September 29, 2016) See also Lucido Testimony, 5.26 Transcript , p. 80-81, lines 19-3

⁷⁰ H.B. 4629, 98th Leg. (Mich. 2015).

⁷¹ Korobkin Testimony, 5.26 Transcript , p. 18, lines 20-24

⁷² American Bar Association. *Fee Shifting*. Available at

http://www.americanbar.org/groups/delivery_legal_services/reinventing_the_practice_of_law/topics/fee_shifting.html (last accessed September 27, 2016)

⁷³ Vallas Testimony, 5.23 Transcript , p. 14, lines 32-38

⁷⁴ Carpenter Testimony, 5.23 Transcript , p. 10, lines 43-45

⁷⁵ Carpenter Testimony, 5.23 Transcript , p. 10, lines 45-46

⁷⁶ Carpenter Testimony, 5.23 Transcript , p. 10, lines 39-42

⁷⁷ Carpenter Testimony, 5.23 Transcript , p. 10-11, lines 47-2

He added, this may be in part because in addition to monetary concerns, low income property-owners may lack other resources necessary to contest their forfeiture in court, such as “social networks, sophistication, personal agency, or time.”⁷⁸ As Dr. Carpenter testified, “Those in certain protected classes tend to have less access to such resources, which means they may be even less likely to protest the forfeiture in order to win the property back, regardless of their innocence. He concluded that the result is a disparate impact on those who are punished inappropriately.”⁷⁹ Daniel Korobkin added to this concern, noting that people living in low income communities of color are likely “less able to take time off of work, to go without a car, or navigate a complex legal system.”⁸⁰

In response, Eaton County Prosecuting Attorney Chris Anderson expressed that his office makes every effort to “work with” those facing civil forfeiture and “give them a little bit of assistance,” particularly concerning reminders about posting bond or filing a written claim.⁸¹ He suggested that while some individuals decide not to pursue their forfeiture case, it is not because they lacked the opportunity or ability to speak with his office.⁸² Nevertheless, testimony indicated that informational assistance and reminders to post bond from the prosecutor’s office is not a substitute for access to counsel, an area of concern that the 2015 Michigan reform package does not address.

iii. Law Enforcement Discretion

Panelist Daniel Korobkin noted that the civil asset forfeiture system in Michigan “provides an enormous amount of discretion to police officers and law enforcement, with no need for law enforcement to provide hard evidence of a connection to criminal activity.”⁸³ Panelist and State Representative Peter Lucido explained that as long as law enforcement officials believe “that the property is part of a crime or was obtained as a result of a crime, they have a right to take it.”⁸⁴ Similarly, Rebecca Vallas remarked that “the civil asset forfeiture process is weighted extremely heavily in favor of the government,” as the burden falls completely on the property owner to initiate the legal proceedings necessary to fight for their property.⁸⁵ Once probable cause is established and the property is seized, if the property owner does not contest the seizure in civil court, the property may be forfeited administratively with no further review or burden of proof at all. For instance, Mr. Korobkin recalled the story of one woman in Grand Rapids, whose car was seized after her husband (whom she was separated from) was accused of involvement in drug activity. Although they did not live together and there was no evidence to suggest that her

⁷⁸ Carpenter Testimony, *5.23 Transcript*, p. 11, lines 4-6

⁷⁹ Carpenter Testimony, *5.23 Transcript*, p. 11, lines 8-11

⁸⁰ Korobkin Testimony, *5.26 Transcript*, p.19, lines 18-20

⁸¹ Anderson Testimony, *5.26 Transcript*, p. 195, lines 1-17

⁸² Anderson Testimony, *5.26 Transcript*, p. 196, lines 2-8

⁸³ Korobkin Testimony, *5.26 Transcript*, p.19, lines 21-25

⁸⁴ Lucido Testimony, *5.26 Transcript*, p.79, lines 10-19

⁸⁵ Vallas Testimony, *5.23 Transcript*, p. 14, lines 22-25

husband used the car in illegal activity, law enforcement forfeited the car administratively after she could not afford to post bond on it.⁸⁶

Representative Lucido raised concern that in all cases, law enforcement dictates every aspect of the civil asset forfeiture process, even the appraisal of seized property. He noted that law enforcement officials appraise the property and set bond, regardless of the fact that they possess no “specialized knowledge or skill in appraising [nor are they] an evaluation specialist as to homes, cars, jewelry, anything of that nature.”⁸⁷ Mr. Korobkin noted that this alone places property-owners at a distinct disadvantage, one that is compounded by the fact that there is little judicial oversight in civil forfeiture proceedings.⁸⁸ Detective Nelson (Ret.) testified that that 80-84% of all civil asset forfeiture cases in Michigan never see the inside of a courtroom—meaning a judge cannot intervene if a property-owner is being treated unfairly.⁸⁹ In addition, Representative Irwin testified that property-owners are often encouraged not to pursue their forfeiture cases by police officers and prosecuting attorneys, and that they may be threatened with criminal charges if they choose to do so.⁹⁰

It should be noted that the 2015 Michigan legislative reforms do not address the numerous barriers preventing property-owners from contesting their forfeiture in the first place, such as the bond requirement and the lack of access to counsel. Therefore, property owners facing administrative forfeitures—which are not reviewed in court—will not benefit from the increased burden of proof standard that the reforms require. Therefore, a majority of forfeiture cases are likely to remain at the sole discretion of the seizing law enforcement agency.

iv. Law Enforcement Incentives

A 2014 Michigan State Police Asset Forfeiture Report notes: “...asset forfeitures will never replace state and local law enforcement appropriations. However, these funds serve as an important supplement and adjunct to enhance ongoing enforcement programs.”⁹¹ This apparent monetary incentive, combined with previously discussed limitations on the right to due process in civil proceedings, has created broad, bipartisan concern from civil liberties advocates regarding the impact of civil asset forfeiture. Some researchers have pointed to evidence that state and local law enforcement may turn to equitable sharing with the federal government in order to circumvent their own state forfeiture laws “when state laws are more burdensome or less financially rewarding to those agencies,” as further “evidence that police operations are

⁸⁶ Korobkin Testimony, *5.26 Transcript*, p.17-18, lines 13-9

⁸⁷ Lucido Testimony, *5.26 Transcript*, p.80, lines 1-12

⁸⁸ Korobkin Testimony, *5.26 Transcript*, p.20, lines 1-6

⁸⁹ Nelson Testimony, *5.26 Transcript*, p. 28, lines 6-10

⁹⁰ Irwin Testimony, *5.26 Transcript*, p.86-87, lines 7-5

⁹¹ 2104 Asset Forfeiture Report. *Michigan State Police*, 2014. Available at: http://www.michigan.gov/documents/msp/2014_Asset_Forfeiture_FINAL_463679_7.pdf (last accessed Aug. 4, 2015)

influenced by financial incentives.”⁹² In Michigan, law enforcement agencies retain as much as 100% of the profits from their own civil asset forfeitures,⁹³ and the state engages extensively in the practice of equitable sharing.⁹⁴ Some have argued that such an arrangement creates undue incentive for agencies to seize assets prior to the commission of any crime or a conviction related to that crime. In the Institute for Justice’s 2015 assessment of state forfeiture laws, the state of Michigan earned a D- grade and placed 44th in the nationwide ranking, primarily as a result of these practices.⁹⁵

In addition to this type of monetary incentive raising concerns regarding the right to due process, researchers and advocates have suggested that law enforcement reliance on civil forfeiture proceeds to support, supplement, or augment enforcement programs may result in racial and economic disparities among property owners whose assets have been seized. Specifically, the concern is that pressure to secure funding through forfeiture may provide a perverse incentive for law enforcement officials to target seizures in low income communities of color, where residents are least likely to have the resources to defend themselves in civil court—particularly without the right to court appointed counsel.⁹⁶ Detective Sergeant Nelson (Ret.) noted that “Drug teams need money to survive and they will use those assets to keep their drug teams going.”⁹⁷ Michigan attorney James White remarked, “The only way these teams exist is if they come up with the financing, and the financing is provided through forfeitures. I can’t think of a more ripe environment for corruption.”⁹⁸

State Representative John Chirkun testified that “back in the 1980s, Wayne County had a drug unit, and basically it was funded on the backs of forfeitures.”⁹⁹ While he noted that laws have been made stricter since then, due to funding limitations, local law enforcement agencies may be more dependent on forfeiture revenue than agencies at the state level. Representative Chirkun also added that in Wayne County, it is not solely police departments who receive a large portion of civil asset forfeiture proceeds but additionally, prosecuting attorneys.¹⁰⁰ In response, Eaton County Prosecuting Attorney Chris Anderson noted that prosecutors rarely pursue civil asset forfeitures; instead, they act as a “resource for law enforcement agencies, [and] also as a check and balance.”¹⁰¹ Nevertheless, Representative Irwin concluded that the incentive system driving

⁹² Holcomb, Tomislav, and Marian. *Civil asset forfeiture, equitable sharing, and policing for profit in the United States*, Journal of Criminal Justice 39 (2011) 273-285

⁹³ MCL § 333.7524(1); MCL § 750.159r

⁹⁴ Policing for Profit, 2015

⁹⁵ Policing for Profit, 2015

⁹⁶ *Murphy: Race and Civil Asset Forfeiture, 2010, supra note 8, at 96*

⁹⁷ Nelson Testimony, 5.26 Transcript, p. 30, lines 3-5

⁹⁸ White Testimony, 5.26 Transcript, p.44, lines 6-11

⁹⁹ Chirkun Testimony, 5.26 Transcript, p.95, lines 6-13

¹⁰⁰ Chirkun Testimony, 5.26 Transcript, p.102, lines 5-16

¹⁰¹ Anderson Testimony, 5.26 Transcript, p.196, lines 9-18

civil asset forfeiture “warps the priorities of law enforcement,”¹⁰² and creates a strong incentive to target those less likely or able to defend themselves, which results in members of federally-protected categories “being subjected to [civil] asset forfeiture at a rate greater than others.”¹⁰³

In response to these claims, Detective First Lieutenant Brian Bahlau of the Michigan State Police testified that “forfeiture is not driven by money. We don’t focus on one particular group because they have more money than the rest.”¹⁰⁴ Instead, he said that State Police “follow the drugs and the drugs only,” with the intent to disrupt any and all criminal enterprises.¹⁰⁵ He noted that State police salaries are not funded by civil asset forfeiture; instead, forfeiture proceeds “just allow [them] to operate, and focus solely on narcotics,” meaning they cover the costs of equipment, such as vehicles, and “buy money,” which is used by undercover agents to buy drugs from narcotics dealers.¹⁰⁶ Detective First Lieutenant Bahlau also clarified that State police do not pursue forfeitures on simple possession charges. Property is only forfeited if it is involved in a narcotics transaction, for example, a drug deal or delivery.¹⁰⁷ Testimony provided by Sheriff Kenny Marks, of the Michigan Sheriff’s Association, was largely congruent with that of Detective Bahlau. Sheriff Marks testified that forfeiture in his county (Menominee County) “is not based on race, color, origin, disability status, and politics.”¹⁰⁸ Instead, it is implemented so that “drug traffickers are held accountable, regardless of their characteristics.”¹⁰⁹ Nevertheless, Sheriff Marks acknowledged that “every law is open for abuse.”¹¹⁰ As a result, best practices, such as bias training, should be put into place in order to preserve the intent of civil forfeiture laws; which, in his understanding, is to “stop drug trafficking...and to prevent heroin overdoses and loss of life.”¹¹¹

d. Forfeiture: Purpose and Benefits

Despite its challenges, the Committee notes that civil asset forfeiture is considered by many law enforcement officials to be an essential tool necessary to disrupt dangerous illegal activity, and that any related civil rights concerns must be weighed against these needs. According to testimony provided by Stefan Cassella, civil forfeiture laws came into existence in the 18th century in order to “combat piracy and slave trafficking, and they have been expanded over time

¹⁰² Irwin Testimony, *5.26 Transcript*, p. 88, line 15

¹⁰³ Irwin Testimony, *5.26 Transcript*, p. 92, line 2-5

¹⁰⁴ Bahlau Testimony, *5.26 Transcript*, p. 163, lines 9-12

¹⁰⁵ Bahlau Testimony, *5.26 Transcript*, p. 161, lines 15-25

¹⁰⁶ Bahlau Testimony, *5.26 Transcript*, p. 166-167

¹⁰⁷ Bahlau Testimony, *5.26 Transcript*, p. 167, lines 7-17

¹⁰⁸ Marks Testimony, *5.26 Transcript*, p. 172 lines 9-17

¹⁰⁹ Marks Testimony, *5.26 Transcript*, p. 172, lines 9-20

¹¹⁰ Marks Testimony, *5.26 Transcript*, p. 172, line 25

¹¹¹ Marks Testimony, *5.26 Transcript*, p. 178, lines 5-7

to cover a vast array of criminal offenses that violate federal law.”¹¹² For instance, today civil forfeiture laws can be used to combat child pornography offenses, suppress human trafficking, disrupt money laundering or terrorist financing, and to recover property that has been taken from victims of fraud.¹¹³

In discussing the importance of civil forfeiture, Mr. Cassella made the point that “not every case can or should be prosecuted criminally, and in those cases, civil forfeiture is the only way to enforce the law and recover the property involved in the offense.”¹¹⁴ He noted several examples of situations in which criminal forfeiture is either not possible, or not appropriate, such as:

1. if the accused has passed away, has fled the jurisdiction of the United States, or is otherwise unable to stand trial;
2. when it is unclear who committed the crime (such as a courier who was found transporting drug money for someone else);
3. when the defendant uses the property of an individual who is not an innocent owner (meaning they are aware their property is being used to commit a crime);
4. if there is not sufficient evidence to convict the defendant “beyond a reasonable doubt.”

In these and similar situations, Mr. Cassella testified that the law cannot be appropriately enforced through a criminal proceeding, and civil forfeiture is necessary to deprive the perpetrator of his or her profits and to make restitution to victims.¹¹⁵ Furthermore, Mr. Cassella remarked that “not every violation of federal law requires a conviction and a term of incarceration.”¹¹⁶ He suggested that increasing the use of criminal forfeiture charges would only add to mass incarceration rates in the United States. He does not believe this to be a viable solution when, instead, civil forfeiture proceedings can be implemented as an alternate mode of “enforcing the law and protecting the public in a way that [is] proportional to the crime.”¹¹⁷ It is therefore important to recognize the wide jurisdiction of civil forfeiture laws so as not to eliminate their effectiveness through narrowly tailored reform measures.¹¹⁸

Similarly, testimony provided by Deputy Chief Benjamin McDermott of the Michigan Association of Chiefs of Police, suggested that although civil asset forfeiture laws are not perfect, they are a “highly-effective tool in combating crime.”¹¹⁹ Drug trafficking is a dangerous

¹¹² Cassella Testimony, *5.23 Transcript*, p. 16, lines 3-5

¹¹³ Cassella Testimony, *5.23 Transcript*, p. 16, lines 5-9

¹¹⁴ Cassella Testimony, *5.23 Transcript*, p. 16, lines 21-27

¹¹⁵ Cassella Testimony, *5.23 Transcript*, p. 16-18

¹¹⁶ Cassella Testimony, *5.23 Transcript*, p. 16, line 31

¹¹⁷ Cassella Testimony, *5.23 Transcript*, p. 16, lines 30-40

¹¹⁸ Cassella Testimony, *5.23 Transcript*, p. 16, lines 11-19

¹¹⁹ McDermott Testimony, *5.26 Transcript*, p. 190, lines 8-11

criminal enterprise that cannot survive without the pursuit of profit. Therefore, in Chief McDermott's experience, "seizing their profits and redirecting those profits back at the problem is the best, most effective way to combat the problem."¹²⁰ The strong monetary incentive behind the drug trade has also shaped his belief that civil forfeiture laws are a much more powerful deterrent to crime than the threat of incarceration.¹²¹

Although civil asset forfeiture undoubtedly serves important functions within law enforcement agencies and may act as an effective deterrent to drug traffickers and other criminals, it is important to note that the three law enforcement officials who testified before the Committee are not necessarily representative of the almost 400 police agencies existing within the state of Michigan.¹²² While the testimony provided by these law enforcement officials may be representative of their specific experiences with civil asset forfeiture, it may not account for the experiences of more racially diverse jurisdictions, or attest to whether or not racial minorities outside of their authorities are exposed to civil asset forfeiture proceedings at disproportionate rates.

Finally, the Committee notes that a general lack of clear and consistent standards guiding the implementation of civil asset forfeiture laws between differing local agencies may prevent the presumption that the forfeiture policies discussed within this testimony are applied uniformly throughout the State. Detective Sergeant Nelson highlighted that the discrepancies witnessed in the practice of civil asset forfeiture between different jurisdictions are not due to a lack of training, but rather, result from an inconsistent application of said training within individual agencies throughout the state.¹²³ Therefore, in creating new regulations, local standards must be at least as rigorous as state standards, and measures should be taken to ensure local compliance with state guidelines. While the Committee recognizes the importance of civil forfeiture in some cases as a tool for law enforcement to deter and dis-incentivize crime, testimony indicated that further study and perhaps additional reform is necessary to ensure that this need does not impinge on constitutionally guaranteed civil protections such as the right to due process and equal protection of the law. The Committee's recommendations are detailed in the following section of this report.

¹²⁰ McDermott Testimony, *5.26 Transcript*, p. 190, lines 4-7

¹²¹ McDermott Testimony, *5.26 Transcript*, p. 182, lines 18-25

¹²² Michigan Law Enforcement Agencies, 2016, Available at:

https://www.michigan.gov/documents/mcoles/LEAPhoneDirectory_250363_7.pdf (last accessed July 14, 2016)

¹²³ Nelson Testimony, *5.26 Transcript*, p. 23-24, lines 17-10

IV. FINDINGS AND RECOMMENDATIONS

Among their duties, advisory committees of the Commission are authorized to advise the Agency (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws; and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.¹²⁴ In keeping with these responsibilities, and in consideration of the testimony heard on this topic, the Michigan Advisory Committee submits the following recommendations to the Commission:

a. Findings

1. Testimony indicated the following concerns regarding civil asset forfeiture data collection:
 - a. Currently in Michigan there are no uniform requirements for reporting on incidents of civil asset forfeiture. This makes it difficult to assess any differences in the application of civil forfeiture laws across jurisdictions, and produces a high likelihood of underreporting.
 - b. The characteristics of property owners affected by civil forfeiture are not recorded. As such, it is not possible to monitor or assess the potential for disparate impact of forfeiture on the basis of race, color, disability, or other federally protected category.
 - c. Available civil forfeiture data indicates only the total value of assets forfeited. It does not indicate the value of each individual property. This limitation makes it difficult to assess the frequency of petty cash and low value forfeitures, which may be more vulnerable to civil rights abuses.
2. While current civil forfeiture data limitations prevent assessment of the potential for disparate impact based on federally protected categories, related research does indicate reason for concern.
 - a. According to 2004 data published by the Academy of Criminal Justice Sciences, black and Hispanic males are more likely to be stopped and searched by police than their white counterparts, even though they are less likely to be found in possession of any type of contraband as a result of these searches.¹²⁵

¹²⁴ 45 C.F.R. § 703.2.

¹²⁵ *Traffic Stops Survey, 2004*, supra note 23

- b. According to a study of cash forfeitures conducted by the American Civil Liberties Union of Pennsylvania, in Philadelphia, among all cash forfeitures made without supporting criminal convictions from 2011 to 2013, 70% of the people impacted were African-American.¹²⁶
 - c. A 2016 report of the Center for American Progress highlighted research from Oklahoma which showed that between 2010 and 2015 African-Americans, Latinos, and other racial and ethnic minorities were sharply overrepresented in incidents of property seizure.¹²⁷
 3. The requirement that property owners post a bond in order to challenge a seizure in court may prevent property owners from being able to access proper judicial review.
 - a. Recent survey research published by the Federal Reserve indicates that more than 40% of Americans may not be able to cover an unexpected expense of \$400 without assistance. African American and Hispanic families are less likely than non-Hispanic white families to have access to emergency cash.¹²⁸
 - b. People in low income communities of color may be less likely to maintain their savings in a traditional bank account, and more likely to carry cash savings. This may result in increased vulnerability to cash seizure, and thus an inability to pay a bond if their cash is seized.
 - c. On August 2, 2016, the Michigan Court of Appeals ruled that the bond requirement to contest property seizure is unconstitutional, as applied to indigent individuals who are unable to pay. However, currently there is no mechanism for indigent property owners to claim their property without posting a bond; therefore, challenges remain.
 4. Testimony indicated the following concerns regarding due process of law in civil forfeiture cases:
 - a. There is no right to legal counsel in civil forfeiture cases, and attorney fees cannot be recovered—even if a property owner wins the case. This is especially problematic for low value forfeitures, where court and attorney fees may cost more than the value of the property, preventing owners from contesting unjustified or erroneous seizures. Unlike federal seizures, currently the State of Michigan does not require any minimum net equity value for property to be seized.

¹²⁶ Guilty Property, *ACLU of Pennsylvania*, supra note 56

¹²⁷ Forfeiting the American Dream, supra note 57

¹²⁸ Report on the Economic Well-Being of U.S. Households in 2014, supra note 62

- b. Property seizure and assessment of property value is almost entirely at the discretion of law enforcement. Unless there is a challenge, no judicial oversight occurs, and 80% of civil forfeitures are never challenged.
 - c. No standardized civil forfeiture training is currently required of law enforcement in Michigan, raising concern of significant disparities in implementation across jurisdictions. The accompanying lack of judicial oversight makes this concern particularly troubling.
 5. In Michigan, law enforcement agencies are permitted to retain 100% of the profits from sales of forfeited property.¹²⁹
 - a. Whether or not funds are improperly seized, direct retention of seizure profits by the seizing agency may create the appearance of impropriety, and contribute to community mistrust of law enforcement.
 - b. This may create a perverse incentive for law enforcement to target seizures in communities where people are least likely to have the resources to contest the seizure in court—namely, low income communities of color.
 - c. Funding or supplementing funding for law enforcement programs through forfeiture money may exacerbate this concern.
 - d. In some cases, local and state law enforcement agencies may utilize equitable sharing with the federal government in order to circumvent state or local restrictions on asset forfeiture or the use of related funds.
 6. Despite the noted concerns, civil forfeiture may be an important tool of law enforcement. Any reforms or recommended limitations on civil forfeiture should consider these needs.
 - a. In cases where a criminal conviction is not feasible, such as when a defendant has fled the jurisdiction or is no longer alive, civil forfeiture may be the only recourse for law enforcement.
 - b. In some cases, depriving criminals of their profits may serve as a stronger deterrent to criminal behavior than other criminal penalties such as incarceration and fines.

¹²⁹ MCL § 333.7524(1); MCL § 750.159r

b. Recommendations

1. The U.S. Commission on Civil Rights (Commission) should issue a formal request to the U.S. Department of Justice to:
 - a. Require consistent and complete reporting of civil forfeiture data by state and local law enforcement. Where possible, such data should include: (1) the number and value of individual properties seized; (2) the demographics of property owners. Such data should be publicly available, and disaggregated at the individual seizure level.
 - b. Require that property owners be afforded the right to court-appointed counsel in federal civil forfeiture cases where basic needs are at risk, such as shelter, sustenance, safety, health, or child custody. Furthermore, the Department should require partnering state and local jurisdictions to uphold this right, and recommend the same of all law enforcement agencies.
 - c. The Department should issue the following additional guidance to all state and local law enforcement agencies regarding minimum due process protection in civil forfeiture cases:
 - Agencies should return forfeiture proceeds to a state general fund, and not to the seizing agency.
 - All seized property, other than cash, should be valued by an independent appraiser, rather than by law enforcement directly.
 - Agencies should not require property owners to post a bond in order to contest their property seizure in court.
 - Seizure of low-value properties should be prohibited, according to the guidelines set forth in the U.S. Attorney’s manual. Under these guidelines, residential property must have a minimum net equity of \$20,000; vehicles must have a net equity of at least \$5,000; cash must constitute at least \$5,000; aircrafts and vessels must have a minimum net equity of \$10,000; and all other personal property must have a minimum net equity of \$1,000.
 - Fee shifting, to allow claimants (property owners) to recover reasonable legal costs if the courts rule in their favor, should be permitted in all civil forfeiture cases.

- d. Prohibit the use of equitable sharing with state or local jurisdictions that do not comply with minimum federal guidance regarding reporting and due process protection.
 - e. Commission a study regarding the impact on criminal activity and law enforcement financing in states that have eliminated civil asset forfeiture, utilizing only criminal forfeiture. Such a study should include consideration of exceptions for certain cases that cannot be prosecuted criminally, such as when a defendant has fled the jurisdiction.
2. The Commission should issue a formal recommendation to the Governor and the State of Michigan Legislature urging the state to:
- a. Commission a study regarding the impact on criminal activity and law enforcement financing in states that have eliminated civil asset forfeiture, utilizing only criminal forfeiture. Such a study should include consideration of exceptions for certain cases that cannot be prosecuted criminally, such as when a defendant has fled the jurisdiction.
 - b. Require all law enforcement agencies throughout the state to report consistent and complete civil forfeiture data, including: (1) the number and value of individual properties seized; and (2) the demographics of property owners where possible. Such data should be publicly available.
 - c. Require that all property owners be afforded the right to court-appointed counsel in civil forfeiture cases where basic needs are at risk, such as shelter, sustenance, safety, health, or child custody.
 - d. Require that all law enforcement agencies in the state return forfeiture proceeds to a state general fund.
 - e. Require that an independent appraiser value seized property, rather than law enforcement directly.
 - f. Eliminate the requirement that property owners post a bond prior to contesting the seizure of their property in court (as applicable).
 - g. Institute a minimum net equity value for property seizures at the state level, according to current federal guidelines set forth in the U.S. Attorney's manual.
 - h. Institute increased, mandatory training of all law enforcement agencies utilizing civil asset forfeiture, to ensure consistent application across jurisdictions and

within/across departments. Such training should involve command staff and supervisors as well as street/patrol officers.

- i. Prohibit state and local law enforcement agencies that do not comply with minimum state standards from participating in equitable sharing of asset forfeitures with federal law enforcement.
- j. Institute a fee shifting statute to allow claimants (property owners) in civil forfeiture cases to recover reasonable legal costs if the courts rule in their favor.

V. APPENDIX

- A. Hearing Agendas
- B. Panelist Abstracts
- C. Korobkin Written Testimony



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

Monday May 23, 2016 | 3:00 – 4:30 p.m. EDT

AGENDA:

- I. Welcome and Introductions (3:00-3:05pm)
 - *Donna Budnick, Chair*
- II. Panel Discussion: Civil Rights and Civil Asset Forfeiture in Michigan (3:05-4:00pm)
 - *Brian Kelly, Seattle University*
 - *Dick Carpenter, Institute for Justice*
 - *Rebecca Vallas, Center for American Progress*
 - *Stefan Cassella, Asset Forfeiture Law*
- III. Committee Questions (4:00-4:15pm)
 - *Michigan Advisory Committee*
- IV. Open Forum (4:15-4:30pm)
 - *Public Participation*
- V. Adjournment (4:30pm)

U.S. COMMISSION ON CIVIL RIGHTS



Civil Rights and Civil Asset Forfeiture in Michigan

Hosted By:

The Michigan Advisory Committee to the U.S. Commission on Civil Rights

Date:

Thursday May 26, 2016

Time:

9:00 a.m.-3:45 p.m. EDT

Location:

Michigan Department of Transportation
Office of Aeronautics Auditorium
2700 Port Lansing Road
Lansing, MI 48906

U.S. COMMISSION ON CIVIL RIGHTS

Regional Programs Unit
55 West Monroe
Suite 410
Chicago IL, 60603

Phone: 312-353-8311
Fax: 312-353-8324
Online: www.usccr.gov

The Michigan Advisory Committee to the United States Commission on Civil Rights is hosting a public meeting regarding civil rights and civil asset forfeiture in Michigan. This meeting is free and open to the public. Of concern to the Committee is the extent to which law enforcement seizure of property believed to be connected to illegal activity may have a disparate impact on the basis of race, color, or other federally protected category.

Schedule (new panel order and times):

Opening Remarks and Introductions (9:00am-9:10am)

- Panel 1: (9:10am-10:20am) Attorneys & Advocates
- Panel 2: (10:30am-11:40am) Legislators
- Open Forum* (11:40am-12:00pm)

Break (12:00pm-1:30pm)

- Panel 3: (1:30pm-2:40pm) Law Enforcement
- Open Forum* (2:45pm-3:30pm)

Closing Remarks (3:30pm-3:45pm)

The Committee will hear public testimony during the open forum periods as time allows. Please arrive early if you wish to speak. This is the second in a two-part series of public meetings on the topic. The first meeting will take place on *Monday May 23rd from 3:00-4:30pm EDT via web-conference*. For more information please contact the Regional Programs Unit of the U.S. Commission on Civil Rights.

**Open forum may be extended as necessary to accommodate additional testimony.*

State Advisory Committees to the U.S. Commission on Civil Rights are composed of state citizens who serve without compensation. The Committees advise the Commission of civil rights issues in their states, providing recommendations and advice regarding such matters to the Commission.

Agenda

Opening Remarks and Introductions (9:00am-9:10am)

- Donna Budnick, Chair

Panel 1: (9:10am-10:20am) Attorneys & Advocates

- Daniel Korobkin, American Civil Liberties Union of Michigan
- Theodore Nelson, Law Enforcement Against Prohibition
- James White, White Law PLLC

Panel 2: (10:30am-11:40am) Legislators

- Peter Lucido, (R) State Representative, District 36
- John Chirkun, (D) State Representative, District 22
- Jeff Irwin, (D) State Representative District, 53

Open Forum (11:40am-12:00pm)

Break (12:00pm-1:30pm)

Panel 3: (1:30pm-2:45pm) Law Enforcement

- Brian Bahlau, Michigan State Police
- Kenny Marks, Michigan Sheriffs Association
- Benjamin McDermott, Michigan Association of Chiefs of Police
- Christopher Anderson, Eaton County Prosecuting Attorney's Office

Open Forum (3:00pm-3:30pm)

Closing Remarks (3:30pm-3:45pm)

Dr. Brian Kelly, Associate Professor of Economics, Seattle University

My presentation will first provide some basic definitions and explanations that are relevant to any quantitative assessment of forfeiture. Using federal data, I show how the property seized can be analyzed across several different dimensions, illustrating the diversity and complexity of forfeiture. For Michigan, I provide some sense of scale by comparing Michigan's own reporting of forfeiture with the figures for federal equitable sharing. Finally, I discuss the difficulties of transparency from seized property back to characteristics of the property owners and discuss the limited options of using correlation approaches by police agency or country.

Dr. Dick M. Carpenter II, Director of Strategic Research, Institute for Justice

Questions about disparate impacts of forfeiture have no good answers. This is largely because of a lack of sufficient transparency in forfeiture. Only 11 states make any forfeiture reporting available online, including Michigan. In 16 states, agencies are not required to keep records of or report their forfeiture activities. The federal government produces reports with aggregate numbers and makes them available online. In Michigan, agencies must report forfeitures at the case level with details that few other states presently require. The details in Michigan do not include anything about the property owners. No state reports include data on the personal characteristics of property owners involved in forfeiture. Recommendations include: requiring agencies to report forfeiture data at the property level and include characteristics of property owners, eliminating civil forfeiture and making everything criminal forfeiture, and eliminating the profit incentive in forfeiture.

Ms. Rebecca Vallas, Managing Director, Center for American Progress

In the United States, the basic tenet of the criminal justice system is that one is presumed innocent until proven guilty. However, over the past several decades, many thousands of people across the country have had their property seized by the government without being charged with a crime. Regardless of these individuals' innocence, their cash, homes, cars, and personal property can be taken if law enforcement believes it was involved in a crime or if it is the proceeds of a crime.

Although civil asset forfeiture affects people of every economic status and race, a growing array of studies indicates that low-income individuals and communities of color are hit hardest. The seizing of cash, vehicles, and homes from low-income individuals and people of color not only calls law enforcement practices into question, but also exacerbates the economic struggles that already plague those communities.

Making matters worse, these individuals are the least able to shoulder the cost required to regain their property through complicated legal proceedings that are heavily weighted in favor of law enforcement. Moreover, because there is generally no constitutional right to an attorney in forfeiture cases, property owners who cannot afford legal representation are often left with no choice but to attempt to represent themselves in court.

Fortunately, as bipartisan outrage at unjust civil asset forfeiture practices continues to grow across the United States, policymakers have a unique opportunity to find common ground and enact laws that restore forfeiture to its original purpose. While federal reform is urgently needed, states can do a great deal to protect their residents—and especially vulnerable populations—from the abuse of civil asset forfeiture laws.

My testimony will highlight the impact of these abusive practices on low-income individuals and communities of color, and offer steps that state policymakers can take to prevent civil asset forfeiture abuses from pushing already struggling families and communities into or deeper into poverty.

Mr. Stefan D. Cassella, Owner and Consultant, Asset Forfeiture Law LLC

Mr. Cassella was a federal prosecutor for 30 years. Prior to his retirement in 2015 his specialty was asset forfeiture and money laundering under federal law. He is the author of the treatise, *Asset Forfeiture Law in the United States*.

His testimony will cover the following points:

1. Civil forfeiture cases cover a wide variety of conduct, from human trafficking and child pornography to the recovery of firearms and stolen property. Drug cases constitute only a fraction of civil forfeiture cases, and the cases involving police seizures of minor amounts of money are a small fraction of the drug cases.
2. Civil forfeiture is an essential tool of law enforcement; it is often the only way to recover property for victims, enforce certain statutes, and deprive criminals of the proceeds of their crimes.
3. Civil forfeiture does not require a criminal conviction, but it does require proof that a crime occurred and that the property was derived from or used to commit that crime.
4. Civil forfeiture procedure protects human rights: there are strict deadlines for commencing a case and for giving notice to interested parties; a right to a jury trial; an innocent owner defense; the right to suppress illegally-seized evidence; a proportionality requirement; and the right to recover attorney's fees if the property owner prevails.
5. Civil forfeitures do not disproportionately target minorities. Enforcement of the drug laws disproportionately targets drug dealers, who may in some communities comprise more minorities than others, just as enforcement of the tax laws, racketeering statutes, money laundering laws and other offenses target persons who commit them, who may in some communities comprise more minorities than others.
6. Any concerns about the improper use of civil forfeiture by police agencies in cases involving low-value seizures can be addressed without making changes that undermine the utility of civil forfeiture in the vast majority of cases where it is both essential and non-controversial.

Panel I: Attorneys & Advocates**Theodore Nelson, Law Enforcement Against Prohibition**

Theodore L. Nelson retired after 25 years with the Michigan State Police, and is currently a speaker for Law Enforcement against Prohibition (LEAP). He taught Civil Asset Forfeiture to narcotics task forces for over ten years, spent 18 months teaching officers on the road, and served on an interdiction and conspiracy enforcement task force. He will discuss how the procedures he taught in the classroom were actually implemented in practice, why drug teams abused civil asset forfeiture, and why prosecutors enabled this abuse. He will explain the current use of civil asset forfeiture to target medical marijuana programs and lay out the policy changes necessary to reform the system.

Daniel Korobkin, Deputy Legal Director, ACLU of Michigan

Dan Korobkin, deputy legal director of the American Civil Liberties Union of Michigan, advocates for forfeiture reform in Michigan through litigation, lobbying, and public education. His presentation will highlight some of the most egregious problems with the civil asset forfeiture system in Michigan, including known instances of abuse by law enforcement and the judiciary. He will also review the available evidence that forfeiture abuses have a disproportionate impact on communities of color and other vulnerable populations.

James White, White Law PLLC

My presentation on Michigan Civil Asset Forfeiture will begin with a general overview of the general legal concepts and principles that apply to civil asset forfeiture cases in Michigan, including the recent changes in the law. Next, I will talk about what the civil asset forfeiture process looks like in practice—from the initial seizure of the property through settlement or litigation—using anecdotal observations from my personal participation in countless civil asset forfeiture cases. I will briefly conclude with my thoughts regarding the existence and extent of abuse of the civil asset forfeiture framework and possibilities for workable reformation.

Panel II: Legislators**Peter J. Lucido (R), State Representative, 36th District**

Representative Lucido will be talking about the following:

1. The nature of civil asset forfeiture.
2. The issue with criminal charges not being necessary to have assets civilly forfeited.
3. The reform package he worked on last year.
4. His current bill regarding removing the cash bond requirement.

John Chirkun (D), State Representative, 22nd District

While there may be abuses, civil asset forfeiture laws serve a valuable function in curbing crime in our communities. More specifically they provide local law enforcement with resources and additional tools to keep the public safe. At a time when revenue sharing has been cut over many years and locals are struggling to man their police departments, civil asset forfeiture helps keep departments going and certain departments such as drug units functioning allowing resources to be used elsewhere. I will provide real life examples of personal experiences of asset forfeiture and how it has helped further law enforcement activities. In addition, I opposed those bills (4500-4507) establishing additional reporting requirements because it was an unfunded mandate that makes law enforcement agencies fill out more paper work when they should be patrolling the streets. Without funding, essential local police functions are hampered. Rather than throw the baby out with the bath water, more practical and modest reforms involving the law enforcement community are needed.

Jeff Irwin (D), State Representative, 53rd District

Civil asset forfeiture as it is practiced today violates the Constitutional right to due process and the prohibition on unreasonable seizures. While recent legislation has slightly improved Michigan's forfeiture laws, more reforms are needed to guarantee citizens' rights. At a minimum, the government should have to prove that criminal activity occurred before it can take someone's property. I have introduced a bill, House Bill 4361, that would require a criminal conviction before forfeiture.

Panel III: Law Enforcement**Brian Bahlau, Michigan State Police**

Many criminals are motivated by greed and the acquisition of material goods. Therefore, the ability of the government to forfeit property connected with criminal activity can be an effective law enforcement tool by reducing the incentive for illegal conduct. Asset forfeiture takes the profit out of crime by helping to eliminate the ability of the offender to command resources necessary to continue illegal activities.

The use of asset forfeiture in criminal investigations aims to undermine the economic infrastructure of the criminal enterprise. Criminal enterprises in many ways mirror legitimate businesses. They require employees, equipment, and cash flow to operate. Criminal enterprises also generate a profit from the sale of their “products” or “services.” The obvious difference is that the profit generated from criminal enterprises is derived from criminal activity. Asset forfeiture can remove the tools, equipment, cash flow, profit, and, sometimes, the product itself, from the criminals and the criminal organization, rendering the criminal organization powerless to operate. [Source: FBI forfeiture statement.]

Kenny Marks, Michigan Sheriffs Association

Menominee County relies on the cash received from Civil Asset Forfeitures to fund drug investigations in the county. We are in many ways, a cash poor county and unable to rely on tax proceeds for the funding of this battle. Drug traffickers from Chicago, Milwaukee and the Twin Cities area are infiltrating our county with drugs that destroy our families and friends. The forfeitures we seize are used for drug buy stings and equipment for surveillance. We do not target the drug user; rather we try to use them as our Confidential Informants, funding their efforts to help us bring down the major drug traffickers. Menominee County utilizes the Asset Forfeiture law as it was intended, to stop drug trafficking which in turn, will save lives.

Benjamin McDermott, Michigan Association of Chiefs of Police

During my address I plan to testify regarding the history and uses of forfeiture in my department, and my experiences working with forfeiture within the Federal and State systems. I will also be addressing why the majority of the time we utilize civil rather than criminal forfeiture and the counter measures to asset seizure that offenders undertake. The last issue I would like to offer comments on is demographics as it relates to forfeiture.

Christopher Anderson, Assistant Prosecuting Attorney, Eaton County

County prosecutors in the state of Michigan don't civilly forfeit property on a regular basis. Rather, they represent law enforcement agencies in their jurisdictions seeking to forfeit property under applicable state forfeiture laws. In this capacity prosecutors act as a check and balance to law enforcement, providing feedback and guidance to law enforcement agencies regarding forfeitures. As with the execution of their criminal prosecuting functions, county prosecutors throughout the state provide this service to the people of the state without reference to a subject's race, color, national origin, or any other disability status.

From: Dan Korobkin [mailto:dkorobkin@aclumich.org]
Sent: Wednesday, September 28, 2016 3:30 PM
To: Melissa Wojnaroski
Subject: RE: Civil Asset Forfeiture: Michigan Advisory Committee to the U.S. Commission on Civil Rights

Melissa,

The following can be treated as supplemental written testimony.

In its August 2, 2016 decision, the Michigan Court of Appeals held that the bond requirement is unconstitutional as applied to persons who are indigent and cannot afford the bond. The decision is published, and the state did not appeal. Therefore, it is now binding precedent throughout the state.

This is a powerful and important decision that confirms what the ACLU and other advocates have been arguing for years -- and the legislature should take its cue from this decision and repeal the bond requirement from the law. Unfortunately, the Court of Appeals decision does not, by itself, solve the problem for property owners who are unable to afford the bond requirement, because neither the court's decision nor the statute establishes an actual mechanism for indigent property owners to assert a claim on their property -- even though it is now clear that they have a constitutional right to do so. My understanding from speaking with other practitioners is that law enforcement agencies continue to provide property owners with the statutory notice that says they must -- without exception -- post a bond in order to preserve a claim on their property.

As I think you know, Rep. Lucido's bill, House Bill 4629 (2015), would eliminate the bond requirement and fix this problem. The bill passed the House but is still awaiting hearing in the Senate.

Finally, the Michigan state-law system on forfeiture includes the following statutes:

- sections 7521 to 7533 of the public health code, 1978 PA 368, MCL 333.7521 to 333.7533 [drug forfeiture];
- sections 19 to 19d of the identity theft protection act, 2004 PA 452, MCL 445.79 to MCL 445.79d;
- chapter 38 of the revised judicature act of 1961, 1961 PA 236, MCL 600.3801 to 600.3840 [nuisance abatement]; and
- chapter 47 of the revised judicature act of 1961, 1961 PA 236, MCL 600.4701 to 600.4709 [general forfeiture]

(See MCL 28.122, the uniform forfeiture reporting act.)

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**Michigan Advisory Committee to the
United States Commission on Civil Rights**



U. S. Commission on Civil Rights

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