



Written Testimony on Behalf of the Iowa Department of Public Safety

Civil Asset Forfeiture

The Department of Public Safety appreciates the opportunity to address some of the issues related to civil asset forfeiture.

The discussion of the current civil asset forfeiture statute in Iowa should begin with a little history. The current statute was enacted after a good deal of media attention that was highly critical of asset forfeiture actions in the early 1990s. The previous statute was an original statute, unique to Iowa and unlike the laws in other states. The previous statute provided a very simple and very broad process for civil asset forfeiture. There were a number of shortcomings in that statute. It allowed for forfeiture in simple misdemeanor cases. It swept in joint owners, regardless of their criminal complicity. Innocent owners were required to endure the entire process before their claims could be adjudicated. Attorney fees could not be paid when owners had demonstrated that the property should not be forfeited. The statute was upheld as constitutional in response to some challenges, but as a policy matter, it seemed unfair to innocent owners.

Because of the legitimate criticisms of the statute, Iowa Attorney General Bonnie Campbell sought to find a civil asset forfeiture process that was fairer to innocent owners. The Attorney General examined a number of different options, and concluded that the Commission Forfeiture Reform Act¹ from the National Alliance for Model State Drug Laws (NAMSDL) offered the options that were most important in the reform of the Iowa law. This includes:

- **Offenses:** Forfeiture is not an option for simple misdemeanor cases. Only indictable offenses can form the basis for civil asset forfeiture.
- **Innocent owners:** Innocent owners can seek an exemption from forfeiture at the outset of the civil forfeiture action, or at any time during the process, regardless of the type of forfeiture action brought.
- **Joint Owners:** Joint owners can claim the status of an innocent owner.
- **Attorney Fees:** An owner who successfully challenges a forfeiture can recoup attorney fees, so that the person is made whole.
- **Property value:** Flexibility in the management of property while the property is pending is provided, so that the value of the asset will not decline as a result of the forfeiture action. This includes the option of allowing the owner to maintain possession of the asset, if that is the most effective way to maintain the value of the property.
- **Property options:** Flexibility also was provided in the disposition of property. There are options for the substitution of property, at the request of the owner.

The current Iowa statute balances legitimate interests of individuals with the legitimate interests of the government. Although the flexibility of the current statute is not legally required, it reflects a policy commitment to greater fairness. Some criticisms of civil asset forfeiture are based on a fundamental disagreement with the very notion of forfeiture. This is a policy question, not a legal question. From a policy perspective, there are many reasons to support the use of civil asset forfeiture.

¹ The model act is available online: http://www.namsdl.org/library/Section_A_Commission_Forfeiture_Reform_Act/

Why use civil asset forfeiture?

At the outset, it is useful to understand an offender's motive in committing a crime, because the motive to offend may offer some options for reducing offending by way of deterrence or prevention. If the motive is based on psychological problems that motivate criminal offending, then treatment may be an option. But many crimes have an underlying motive to obtain money.² When offending is money-motivated, then the most effective response is to take away the money that offenders obtain by committing their crimes. That is the policy reason for civil asset forfeiture. Offenders who commit crimes to make money can be prevented or deterred if their actions do not make money.

In addition, the vast majority of offenders who obtain money by offending also fail to pay their fair share of taxes. They do not have the necessary documentation to show the legitimacy of their income and assets to pay the taxes owed, even if they were inclined to pay taxes.³

In addition to the policy interest in preventing or deterring money-motivated offending, the forfeiture of assets to the government provides additional funding to the government agencies that are authorized to investigate criminal activity. The greater the amount of money generated by illicit activities, the greater the likelihood that offenders will develop sophisticated methods for hiding assets, structuring transactions, and developing methods to avoid detection of the illicit proceeds. Often, the offenders' methods are well-funded by the illicit proceeds of their criminal activity. As a result, criminal justice agencies are at a marked disadvantage in terms of their own resources to address criminal offending. The problem is exacerbated, because the tax revenues used to pay for criminal justice services are lower, due to the offenders' failure to pay their share of taxes on the illicit proceeds. Law enforcement and prosecution agencies receive less funding, because tax revenues decrease, and money-motivated offenders make more money, because law enforcement and prosecution efforts cannot keep up with the well-funded and motivated effort to break the law without a realistic possibility of accountability.

For decades, civil asset forfeiture funds have been provided directly to the agencies involved in the forfeiture actions. This policy decision is based on the fact that offenders' sophistication increases along with their illicit proceeds, and criminal justice agencies called upon to address the illicit activity are underfunded and unable to respond effectively. Moving asset forfeiture funds directly to the agencies involved in the forfeiture actions can help those agencies to improve their capacity to respond to crime in their community. There is a disadvantage in putting forfeiture funds into a general fund, or combining all funds at a state level. Generally, crime is local. The type of crime and the level of crime varies from one community to another, and crime problems vary over time. Returning illicit proceeds to the community where the seizure occurred more effectively provides additional options to improve the criminal justice response in the location where the crime has occurred, or where the law enforcement and prosecution officials are willing and able to pursue criminal actions and forfeiture actions.

How much money is involved in criminal offending?

Because the criminal activity involves the underground economy, it is difficult to know how much is involved. Some snapshots give examples.

² Internal Revenue Service, "Overview – Money Laundering," accessible at <http://www.irs.gov/uac/Overview---Money-Laundering>

³ It is possible for criminal offenders to file tax returns and claim their Fifth Amendment right to remain silent with regard to the sources of the funds. The IRS will not notify criminal investigators or prosecutors when a taxpayer claims the Fifth Amendment privilege.

- The Urban Institute’s estimate of sex, drugs and guns in illicit markets in eight urban cities (Miami, Dallas, Washington DC, Denver, Kansas City, San Diego, Seattle and Atlanta) showed that sex trafficking profits exceeded drug trafficking markets in every city, with few exceptions. In every city, the illicit markets were measured in the millions of dollars.⁴
- New York Magazine reported on a crystal meth dealer who netted \$813,600 per year in profits, with a 15-hour work week and no taxes paid.⁵
- The “Breaking Bad” estimate of \$80 million in less than a year for a drug kingpin is realistic, according to CNN Money.⁶
- Even the most conservative estimates have suggested substantial earnings for those operating at higher levels in a trafficking organization. In a 2000 study, researchers estimated that the average street dealer made \$2500 per year or less, the mid-level dealers made \$12,000 per year, and the high-level leaders made \$50-130,000 per year. The researchers found that, at each level, the hours spent averaged far less than 40 hours per week.⁷ Another study found that part-time drug dealers averaged \$30 per hour, but that higher-level traffickers made more money.⁸ Another study showed that low-level dealers averaged less than minimum wage, mid-level dealers made minimum wage or more, and upper-level dealers made more than \$10,000 per month.⁹

What to do with bulk cash?

Criminal offenders who generate large quantities of cash proceeds from their criminal enterprises must find ways to make use of the ill-gotten gains that will not draw attention to the offender.¹⁰ The common methods of money-laundering include:

- Cash couriers
- Cash conversion
- Safe deposit facilities
- Credit cards, prepaid store value cards, alternative remittance systems
- Foreign bank accounts
- Trusts, stocks and bonds, bearer bonds, and corporations
- Fictitious loans
- Real property purchases
- Personal property (cars, boats, plans, stocks, bonds, precious metals and gems, art and antiques, expensive lifestyles)

The greater the amount of illicit proceeds, the greater the likelihood that multiple methods of masking money will be used.

⁴ Dank, et al., “Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major US Cities, Urban Institute Research Report, p. 280, March 2014. This study illustrates the significant differences in offending – and in illicit proceeds – from one local jurisdiction to another.

⁵ Arianne Cohen, “A Drug Dealer,” New York Magazine, published June 3, 2007, accessible online at <http://nymag.com/news/features/2007/profit/32888/>

⁶ Chris Isidore, “Breaking Bad economy: Howa Walt made \$80 million,” CNN Money, Sept. 27, 2013, accessible online at <http://money.cnn.com/2013/09/27/news/economy/breaking-bad-profit/>

⁷ Levitt & Venkatesh, “An Economic Analysis of a Drug-Selling Gang’s Finances,” Quarterly Journal of Economics, Vol. XX, pp. 755-789 (2000).

⁸ Reuter, MacCoun & Murphy, “Money from Crime: A Study of the Economics of Drug Dealing in Washington DC, RAND Drug Policy Research Center, 1990.

⁹ Hagedorn, “Homeboys, Dope Fiends, Legits and New Jacks,” Criminology, Vol. 32(2), pp. 197-219 (1994); Hagedorn, “The Business of Drug Dealing in Milwaukee,” Wisconsin Policy Research Institute Report, Vol. 11(5)

¹⁰ Anthony Kennedy, (2005) “Dead fish across the trail: illustrations of money laundering methods”, Journal of Money Laundering Control, Vol. 8 Iss: 4, pp.305 - 319

The Special Needs for Illegitimate Businesses

Legitimate business owners rely on bankers, financial and investment advisors, and tax consultants. Criminal offenders have an additional need: cash/currency couriers. When the high-end traffickers (usually human traffickers or drug traffickers) operate an illicit cash-based business, it requires careful planning and additional personnel to convert the currency to non-cash assets. A trafficker who makes \$1 million per year must find ways to move the cash into other assets.

This becomes a difficult task, because the Bank Secrecy Act (BSA) and the Internal Revenue Service (IRS) statutes and regulations include reporting requirements for many cash transactions. Deposits of more than \$10,000 in currency should result in the filing of a Currency Transaction Report (CTR). Cash transactions at casinos that exceed \$10,000 generate a Currency Transaction Report for Casinos (CTRC). Transportation of more than \$10,000 in currency outside the country triggers the filing of a Report of Foreign Bank and Financial Accounts (FBAR). Cash payments in excess of \$10,000 for goods and services trigger the filing of a Form 8300, according to IRS filing requirements. These requirements apply to legitimate or illicit business transactions. Their purpose is to identify high-cash transactions that may suggest money laundering and that may evade tax payments.

In addition, banks are under an obligation to know their customers. If they observe transactions that appear to be suspicious, they are required to file a Suspicious Activity Report (BSA SAR). If they see a series of transactions under \$10,000 that appear to be structuring (or “smurfing”) designed to avoid generation of a CTR, or that otherwise appear suspicious, banks can file a BSA SAR, which is available to bank regulators and criminal investigators through the federal Financial Enforcement Network (FinCEN), but is not provided to the bank customer.

As part of the know-your-customer requirements, banks can grant exemptions to high-cash businesses (typically, grocery stores, restaurants, movie theaters, etc.). But an exemption is not mandated for every high-cash business. It is up to the bank to know the customer well enough to assess whether the large cash deposits result from the legitimate business or whether there are questions about the source of the cash.

These regulatory requirements are designed to discourage the laundering of cash proceeds from illicit businesses, and to provide a centralized mechanism for identifying the illicit businesses that conduct largely cash transactions.

As a result, high-cash criminal offenders must find ways to circumvent the reporting of their high cash business. In addition to the needs of running their illicit business, they also must find ways to mask the illicit nature of their cash proceeds. Sometimes it is simply the collection of cash income from the sales of illegal drugs or from the operation of a human trafficking organization. Sometimes it is the effort to spread the currency across businesses in different jurisdictions in order to avoid detection. Sometimes the criminal offender establishes a high-cash business or connects with other illegitimate businesses in order to mask the illicit proceeds.

Often, though, the criminal offender kingpin hires third-party cash couriers to move currency from one place to another. Many of these third-party cash couriers are not involved in the underlying criminal business (that is, they are not connected to the drug trafficking or human trafficking, for example). They are simply hired to move large quantities of cash from one location to another, and are not connected with the criminal organization in any other way. They may not be told how much cash is being transported, and they probably know little about the person or place where the currency will be delivered. If the currency is discovered, the cash courier is instructed to say nothing to law enforcement, but simply report

back to the offender (or the offender's designee) that the cash was seized. When the cash courier encounters law enforcement and the cash is discovered, the courier does not claim the currency, so it is considered abandoned. The criminal offender simply views that abandonment as a business loss.

Sometimes the cash courier is also a drug courier, usually a mid-level trafficker. The courier delivers drugs to an associate in one location and then brings back the cash from that associate to give to the high-level drug trafficker. Sometimes the mid-level drug/cash courier both delivers drugs and transports the cash.

Although many of these types of cash seizures involve large amounts of money – often in excess of \$100,000 – for the top-level trafficker who is making several million dollars per year, the \$100,000 loss is a relatively small percentage of the overall illicit profits. Seizure of \$100,000 is 10% of a \$1 million business, but it is only 1% of a \$10 million business.

The Forfeiture Process

The current Iowa forfeiture statute only allows for civil asset forfeiture if the asset is tied to criminal conduct involving an indictable offense.¹¹ The seizure can occur either based on a court order, or based on probable cause to believe that the property is forfeitable.¹² If the court finds that probable cause was lacking, the forfeiture action will be dismissed.¹³

Innocent owners can file a petition for exemption from forfeiture at any time.¹⁴ The innocent owner has the burden to go forward (that is, to produce some evidence of innocent ownership), but the State has the burden to “negate” the exemption, according to the Iowa statute.

If the property is not contraband (e.g., illegal drugs, child pornography, illegal firearms, etc.) or evidence in an investigation, there are statutory provisions for the management and preservation of the property.¹⁵ There are also provisions that allow substitution of assets after a forfeiture is ordered.¹⁶

Property may be forfeited if any of the following are proven by the State:

- The person has engaged in conduct giving rise to forfeiture.
- The property was acquired by the person during the period of the conduct giving rise to forfeiture or within a reasonable time after that period.
- No likely source of acquisition exists, other than the conduct giving rise to forfeiture.

There are two different ways that property can be forfeited:

- (1) In rem proceedings are focused on the property itself. The State has the burden to prove, by a preponderance of the evidence, that the property is subject to forfeiture. If the State carries the burden, then the claimant has the burden to prove an exemption from forfeiture.
- (2) In personam proceedings are tied to the person and the property. The court uses a similar procedure to determine whether the property tied to the person should be forfeited. Any other property that is not tied to the person can be subject to an in rem forfeiture proceeding

¹¹ Iowa Code § 809A.3.

¹² Iowa Code § 809A.6.

¹³ Iowa Code § 809A.12.

¹⁴ Iowa Code § 809A.11.

¹⁵ Iowa Code § 809A.7.

¹⁶ Iowa Code § 809A.15.

The prosecution must comply with strict timelines, and failure to comply with deadlines may result in loss of the forfeiture action and return of the property, and the property holder may seek costs or damages.

The United States Supreme Court held that civil asset forfeiture may be limited by the Eighth Amendment's Excessive Fines prohibition, if the forfeiture serves a punishment purpose and if the value of the property forfeited is "grossly disproportionate" to the underlying crime.¹⁷ Thus, there are some constitutional limits to the use of civil asset forfeiture.

Allocation of Forfeited Property

Chapter 809A provides that information about forfeited property must be communicated to the Attorney General, so long as the property is not needed as evidence in a criminal case, and the Attorney General may authorize the destruction, sale or delivery of the forfeited property to "an appropriate agency for disposal" consistent with the statute.¹⁸ There are specific provisions for the disposal of controlled substances, firearms and ammunition, obscenity, and property subject to forfeiture under statutes related to the department of natural resources.

The Iowa Department of Public Safety has adopted a process in which requests for use of monies from the Civil Asset Forfeiture Account are presented to a reviewing board (consisting of the Commissioner, the Executive Officer and the Division Directors). Monies are spent on projects or goods that benefit law enforcement, and generally include training, technology, equipment, or contracted services that have not been budgeted in the general fund appropriations to the Department. Salaries will not be paid from the Civil Asset Forfeiture Account. The reviewing board will consider several factors in determining whether to spend monies, including:

- The cost of the item/service/training requested, and the related benefit it provides to the Department, to other agencies, or to the public.
- The availability of other funding that could be used to obtain the item/service/training.
- Whether the item/service/training is consistent with Departmental and Division priorities.
- Whether purchase of the item/service/training is consistent with Departmental policies.

The State Auditor's office provides auditing services for all aspects of the Department of Public Safety's budget, including the civil asset forfeiture fund.

Specific Case Examples

The media have provided information about specific case examples to illustrate the alleged unfairness of civil asset forfeiture. Some media accounts have failed to identify what efforts were made to verify the allegations made by claimants. Perhaps such efforts at verification have occurred, but they have not been documented in the media accounts. Absent that documented verification, the validity of the accounts must be questioned, and the formulation of policy based on unverified accounts is inappropriate.

The experience of law enforcement investigators is that, often, the verifications of the owners' claims can come from public sources of information that are easily accessed. Claims regarding sales of property, distribution of estate assets, sales of a business, or gambling winnings generally can be confirmed via public records or specific inquiries to other parties to the financial transactions. Sometimes the information provided is tested via law enforcement sensitive sources that are not available to the public or the media. Sometimes it is a combination of the two.

¹⁷ United States v. Bajakajian, 524 U.S. 321 (1998)

¹⁸ Iowa Code § 809A.17.

Because government officials bear the burden to prove that assets are the proceeds of illegal activity, law enforcement officials have an obligation to verify the claimants' statements in every case, or to establish that the claims of legitimacy are not proven by the available facts.

The information that is provided by the individual may turn out to be consistent with other information that establishes its legitimacy; and sometimes the information provided by the individual cannot be directly verified, but appears to be consistent with lawful activity. In either case, the property is either not seized, or it is returned to the claimant when the evidence of criminal activity cannot be proven.

It can be difficult for law enforcement agencies to comment on these cases, for three reasons. First, the person from whom the property is seized may have provided information to law enforcement with the assurance that the information will be kept confidential, because it may put the individual at risk of harm if their cooperation with law enforcement is revealed. Second, many of these cases are either under investigation, or have yielded information that is relevant to another ongoing investigation. Revealing the information may put other investigations at risk. Third, in some cases, the investigation has led to information about methods used to commit criminal offenses or connections with criminal organizations, and law enforcement agencies either cannot or will not reveal such information publicly.

Policy Implications and Reforms of Civil Asset Forfeiture

The current focus on civil asset forfeiture is similar to previous calls for reform of forfeiture laws. The underlying question of whether civil asset forfeiture is *ever* appropriate is a policy question for legislators. Law enforcement officials generally have recognized the value of civil asset forfeiture, which cuts into the illicit profits of criminal organizations.

Limiting asset forfeiture to cases in which the asset is directly tied to a specific criminal activity (or that can be forfeited only upon a criminal conviction) ignores the reality that a small percentage of criminal offenders are responsible for the vast majority of illicit profits. The largest number of human traffickers and drug traffickers operate at a low level and are not netting enormous illicit profits. They handle their own business and they launder their illicit proceeds very simply. But a small percentage of offenders make an inordinate amount of tax-free illicit proceeds, and have the sophistication to develop elaborate methods and add layers to their organization, and separate the duties of their subordinates, in order to avoid being held personally accountable. These high-end offenders are in a position to use sophisticated methods for laundering money, including hiring third-party couriers who are simply directed to transport cash, and are not given enough information to be able to describe how the criminal organization operates or who may be involved. This type of intentional ignorance does not convert illicit proceeds into legitimate profits.

As a matter of policy, civil asset forfeiture should not be limited to proceeds from a specific criminal act (akin to what occurs in restitution, which is designed to make a specific victim whole). Rather, the current approach, which places the burden on the State to prove that the assets are proceeds from criminal activity, is an appropriate policy determination. The current statute also provides adequate protection of innocent owners, and offers alternatives for asset management that can preserve the value of the asset and facilitate the most effective management of a variety of assets.

Summary and Conclusion

Despite claims about widespread abuse of civil asset forfeiture and defamatory claims about law enforcement agencies, the current Iowa statute strikes a balance between legitimate individual property interests and legitimate public interests in deterring and preventing money-motivated crimes.

Eliminating *in rem* forfeiture options will only serve to protect and promote the efforts of high-end criminal offenders to layer or to segment their criminal operations in order to avoid accountability for their criminal actions. These high-end offenders amass illicit profits in amounts that are so substantial that the offenders must devise ways to hide the dirty money, or to mask the dirty money by making it appear legitimate, with assistance from many third parties. The high-end offenders are able to create layers and to segment the information about the operation in such a way that it is nearly impossible to prove a direct connection between the third-party associate and the high-level offenders. When crimes are motivated by the desire for money, removing the money has a greater deterrent effect and may prevent future crimes.

In addition, the underground economy dulls the competitive edge for legitimate businesses, reduces tax revenues that support the public good, and increases the risk of physical harm to many people who are expected to remain silent about the criminal activities that victimize countless Americans. When investigators can follow the money, they are most likely to find the high-level offenders and dismantle complex criminal organizations. Civil asset forfeiture is an important tool in that endeavor, too.