Approved: 2-26-93
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairman, Representative Michael R. O' Neal at 3:30 p.m. on February 17, 1993 in room 313-S of the Statehouse.

All members were present.

Committee staff present:

Jerry Donaldson, Legislative Research
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the Committee:

Kyle Smith, Assistant Attorney General, KBI
Doug Roth, First Deputy, Sedgwick County District Attorney's Office
Kevin Fletcher, Reno County Attorney's Office
Helen Stephens, Kansas Peace Officers Association
Ron Smith, Kansas Bar Association
Garry Berges, Vice President, Kansas Crime Stoppers Association
Floyd Bradley, Special Agent Supervisor, KBI

Committee minutes for February 8, 9, 10 & 11 were distributed.

Hearings on HB 2009 were opened dealing with Proposal #14, Kansas homesteads not being subject to drug forfeiture.

Kyle Smith, Assistant Attorney General, KBI, testified that a Supreme Court ruling in the case Braun vs. A Track of Land held that homesteads are not subject to forfeiture. This bill strikes the provision in the law that they are.

Hearings on HB 2009 were closed.

Hearings on HB 2423 were opened dealing with the Kansas standard asset seizure and forfeiture act.

Kyle Smith, Assistant Attorney General, KBI, appeared before the committee as a proponent of the bill. He gave a recap of what the bill does. It protects the rights of people with an interest in the property, expedites uncontested forfeitures, clarifies the procedures for courts, counsel and law enforcement officers, and standardizes the five separate statutes into one standardized act. The second page of the attachment is a list of typographical errors in the bill draft. (Attachment #1)

Chairman O'Neal asked if there were any policy changes.

Smith stated that this bill includes money laundering. There is also a 5 year statute of limitations.

Doug Roth, First Deputy, Sedgwick County District Attorney's Office, appeared before the committee as a proponent of the bill. He stated that street dealers are the most dangerous and this bill targets them. The bond requirement is 10% of the value of the property that is seized. This bill expedites uncontested forfeitures which will reduce judicial time and expense. (Attachment #2)

Kevin Fletcher, Reno County Attorney's Office, appeared before the committee in support of the bill. He commented that with the passage of this bill it will strengthen the ability to target drug dealers and those involved in crime for economic gain. In Reno County, asset forfeiture has been successful. (Attachment #3)

Representative Rock questioned if this act is modeled after Florida's new act.

Fletcher stated no.

Helen Stephens, Kansas Peace Officers, appeared before the committee and stated that the Kansas Peace Officers Association is in support of the bill.

Ron Smith, Kansas Bar Association, appeared before the committee to provide information about the proposed bill and the Uniform Law Commission's draft proposal. He handed out a booklet that the KBA has put together, and briefed the committee on their views on HB 2423. (Attachment #4)

Hearings on HB 2423 were closed.

Hearings on HB 2448 were opened dealing with repayment out of restitution to the crime stoppers fund .

Kyle Smith, Assistant Attorney General, KBI, appeared before the committee in support of the bill. Crime stoppers is a very effective tool. This bill has two parts: rewards being paid for apprehension and conviction of the defendant, and allows the courts to order repayment of funds from the defendant. (Attachment #5)

Representative Garner questioned what the date, July 1, 1993 , on page 4, subsection (k) deals with.

Smith stated that this is a carry over from the sentencing guidelines.

Garry Berges, Vice President, Kansas Crime Stoppers Association, appeared before the committee in support of the bill. Kansas Crime Stoppers is funded jointly through news media, law enforcement and community leaders to deter crime. In 1992 the Topeka Crime Stoppers received 381 anonymous calls resulting in 57 arrests, 46 cases cleared and $237,934 in property and drugs recovered. $5,200 was paid out in rewards. (Attachment #6)

Floyd Bradley, Special Agent Supervisor, KBI, appeared before the committee in support of the bill. He stated that in most cases the prosecutor and the courts require a minimum of two separate drug purchases in order to bring the suspect to trial. In 1991 the narcotics division spent $83,000 in buy funds and in 1992 spent $125,000. Approximately $5,000 is needed per arrest. (Attachment #7)

Helen Stephens, Kansas Peace Officers Association, appeared before the committee and stated that the Kansas Peace Officers Association is in support of the bill.

Hearings on HB 2448 were closed.

Hearings on HB 2450 were opened dealing with the possession of controlled substance with the intent to deliver or distribute in public parks.

Kyle Smith, Assistant Attorney General, KBI, appeared before the committee as a proponent of the bill. The bill would amend the drug free school zone law to include public parks. The second change is in the from of clarification in K.S.A. 65-4127a and 65-4127b to say "possess with intent to sell, deliver or distribute". This would also prohibit contact. (Attachment #8)

Minutes of the House Committee on Judiciary, Room 313-S, Statehouse, at 3:30 p.m. on February 17, 1993.

Floyd Bradley, Special Agent Supervisor, KBI, appeared before the committee as a proponent of the bill. He stated that this will enhance the penalties for distributing drugs within 1,000 feet of a public park. (Attachment #9)

Chairman O'Neal asked what the difference will be in sentencing between the selling of drugs in school zones and a regular drug violation.

Smith stated that if it is a school zone it is bumped up one level on the grid.

Helen Stephens, Kansas Peace Officers Association, appeared before the committee and stated that the Kansas Peace Officers Association is in support of the bill.

Hearings on HB 2450 were closed.

The Committee adjourned at 5:00 p.m. The next Committee meeting is February 18, 1993 at 3:30 p.m. in room 313-S.

GUEST LIST

HOUSE JUDICIARY COMMITTEE

DATE FEBRUARY 17, 1993

NAME	ADDRESS	ORGANIZATION
Stacey Emerson	Lawrence	Intern
Jeanne Hathaway	Topeka	KPOA
Kathie Sparks	"	Div. of Budget
Debra Dickerson	Lyndon KS	
Vickie Gillespie	Lebo KS	
J.P. SMALL	PALMER, Co.s	TOPEKA
[illegible]	Topeka	
Susan Somers	Topeka	KSCPA
Ray Hauser	Topeka	Ks Crime Stoppers
Gary Berger	Junction City	Ks Crime Stoppers
Roger Prenzlow	Topeka	Ks Gov. Consulting
David Sim	TOPEKA	KBI
Floyd Bradley	Topeka	KBI
Chuck Myers	Topeka	KBI
Steve Tow	Topeka	KBI
Kevin C. Fletcher	Hutchinson	Reno Co. Atty's. office
Jack B Brow	TOPEKA	KHP
Colin D. Wood	Wichita	KBI
Douglas R. Roth	Wichita	D.A.'s Office
CLIFFORD E. HACKER	LYON COUNTY	SHERIFF
Helen Stephens	Topeka	KPOA

KANSAS BUREAU OF INVESTIGATION

DIVISION OF THE OFFICE OF ATTORNEY GENERAL
STATE OF KANSAS
1620 TYLER
TOPEKA, KANSAS 66612-1837
(913) 232-6000

ROBERT B. DAVENPORT
DIRECTOR

ROBERT T. STEPHAN
ATTORNEY GENERAL

TESTIMONY
KYLE G. SMITH, ASSISTANT ATTORNEY GENERAL
KANSAS BUREAU OF INVESTIGATION
BEFORE THE HOUSE JUDICIARY COMMITTEE
IN SUPPORT OF HOUSE BILL 2423
FEBRUARY 17, 1993

Mr. Chairman and Members of the Committee:

I am pleased to be here today supporting passage of House Bill 2423. As you may remember, I had the privilege of serving as chairman of the task force that worked six months in preparing this legislation. As I stated before, we have reviewed the federal statutes, the Model Asset Seizure and Forfeiture Act, statutes by numerous other states and spoken with individuals who have actually practiced under those statutes. Members of the task force include officers, prosecuting attorneys, an attorney who defends asset forfeiture cases and myself.

The report that we prepared and provided to the joint hearing committee last month contained an analysis section that went through the major changes and explained the reasons for those changes. Our goals were to protect the rights of people with interest in the property, expedite uncontested forfeitures, clarify the procedures for courts, counsel and law enforcement officers, and standardize the five separate statutes into one standardized act. I believe this bill accomplishes all those goals.

Today we have members of that task force present who wish to testify: Kevin Fletcher of the Reno County Attorney's Office; and Doug Roth, first deputy in the Sedgwick County District Attorney's Office. Inasmuch as I am regularly present before this committee, I would suggest at this time that they testify and then we would be happy to answer any questions of the committee.

I would note that we have found six typographical errors which I provided copies of to Jill Wolters, but don't believe they are of such a magnitude that they need to be discussed individually.

Thank you.

#097

HOUSE JUDICIARY
Attachment #1
02-17-93

KANSAS BUREAU OF INVESTIGATION

DIVISION OF THE OFFICE OF ATTORNEY GENERAL
STATE OF KANSAS
1620 TYLER
TOPEKA, KANSAS 66612-1837
(913) 232-6000

ROBERT B. DAVENPORT
DIRECTOR

ROBERT T. STEPHAN
ATTORNEY GENERAL

MEMORANDUM

DATE: February 17, 1993

TO: Kyle G. Smith, Assistant Attorney General

FROM: Colin D. Wood, Special Agent

RE: Typographical errors in HB 2423
Kansas Standard Asset Seizure and Forfeiture Act

Upon comparing the Task Force proposal and the typed House Bill 2423 I located the following typographical errors that you may wish to bring to the attention of the Revisor's Office prior to action by the House Committee on Judiciary:

Page 1, Line 24	"...section 3..."	should be
	"...section 4..."	
Page 6, Line 21	"...deliver the property..."	should be
	"...deliver the notice..."	
Page 15, Line 18	"...and is not necessary..."	should be
	"...and it is not necessary..."	
Page 15, Line 34	"...(a) K.S.A. 60-414..."	should be
	"...(a) of K.S.A. 60-414..."	
Page 27, Line 21	"The attorney shall..."	should be
	"The agency shall..."	

Should you need anything further, please advise.

Attachment #1 — 2
02-17-93

OFFICE OF THE DISTRICT ATTORNEY
EIGHTEENTH JUDICIAL DISTRICT
SEDGWICK COUNTY COURTHOUSE
535 N. MAIN
WICHITA, KANSAS 67203

NOLA FOULSTON
District Attorney

(316) 383-7281

TESTIMONY BEFORE THE COMMITTEE ON JUDICIARY
KANSAS HOUSE OF REPRESENTATIVES
HOUSE BILL 2423
by
Douglas R. Roth
First Deputy District Attorney
Eighteenth Judicial District
Wichita, Kansas

The value of asset forfeiture has previously been recognized in Kansas. The Kansas Legislature has made a strong policy statement against certain criminal acts through the establishment of asset forfeiture for violations of drug laws, drive-by shootings, and cattle rustling. Asset forfeiture assists society by removing the offending property, such as guns, motor vehicles, non-homestead real property, and cash and its equivalent. It helps fund law enforcement efforts against organized criminal activity. It also offers a deterrent in addition to incarceration, and reduces the corrupting influence on third parties.

The task force on asset forfeiture has prepared and proposed the Kansas Standard Asset Seizure and Forfeiture Act of 1993. This act will provide a standardized procedure which will assist law enforcement, prosecutors, defense attorneys, lending institutions, and innocent third parties. In order to take advantage of the

certainty offered by previous judicial opinions interpreting Kansas law, the task force has incorporated existing Kansas statutory provisions where practical. Those existing provisions include the "close proximity" presumption and the maintenance of forfeiture proceedings without the necessity of a criminal prosecution or conviction.

The proposed procedure provides safeguards to prevent abuses by law enforcement agencies, or their attorneys. The procedure allows a speedy probable cause determination by the courts, and establishes deadlines for institution of forfeiture proceedings. It thereby prevents the seizing and holding of assets for long periods of time without a judicial determination. It allows lien holders and innocent third parties to immediately seek recognition of their lien or interest, which minimizes the costs and delays related thereto. The procedure also has a mechanism which protects law enforcement agencies from dilatory prosecutors by providing a mechanism whereby other counsel can be obtained.

The Kansas Standard Asset Seizure and Forfeiture Act will provide a standard procedure to be used in all asset forfeitures. The Legislature can decide which type of criminal activity should trigger asset forfeiture and can add or delete the activities without affecting the procedure. The proposed act allows for uncontested forfeitures which will reduce judicial time and expense. It also allows for in personam forfeiture when appropriate.

The proposed Standard Asset Seizure and Forfeiture Act is a

culmination of considerable effort by law enforcement and attorneys to develop a procedure which will provide the necessary safeguards to minimize the potential for abuse, reduce judicial involvement in uncontested forfeitures, remove the profit for the targeted criminal activity, and provide additional deterrents to that criminal activity. This is done in a framework which will build on previous case law established by the Kansas Appellate Courts. I strongly support this legislation and urge its passage in the 1993 legislative session.

COUNTY ATTORNEY
Timothy J. Chambers

ASSISTANT COUNTY ATTORNEYS
Kevin C. Fletcher
Keith E. Schroeder
David B. Kurt - Juvenile

OFFICE OF THE RENO COUNTY ATTORNEY

The 27th Judicial District of Kansas

Law Enforcement Center
210 West First Ave.
Hutchinson, Kansas 67501
(316) 694-2715

Victim-Witness Service
(316) 694-2718

Diversion Coordinator
(316) 694-2716

February 17, 1993

Chairman O'Neal and Judiciary Committee Members:

Due to personal commitments in Hutchinson I will be unable to testify in person before the Judiciary Committee concerning the adoption of the proposed Kansas Standard Asset Seizure and Forfeiture Act. I commend the efforts of Attorney General Stephan's Task Force on Asset Forfeiture and urge the Committee to give favorable consideration to this valuable proposed legislation.

The last few years have seen asset forfeiture become a valuable tool in law enforcement's arsenal to fight the rising problems of drugs and violence in Kansas. The time has now come to recognize the success of asset forfeiture and to solidify and strengthen this positive law enforcement tool.

The adoption of the Kansas Standard Asset Seizure and Forfeiture Act will strengthen the ability to attack the drug dealer and those involved in crime for economic gain where it affects them the most, their pocketbooks. Just as important is the public relations aspect of asset forfeiture. We can now show our children that crime does not pay. The D.A.R.E. vehicles of the Hutchinson Police Department and the Reno County Sheriff's Department show the children of Hutchinson and Reno County that law enforcement can successfully fight the drug dealer by taking their vehicles and ill-gotten gains.

Just as important, the Kansas Standard Asset Seizure and Forfeiture Act will simplify and streamline legal procedures. Also, greater protections are provided for innocent property owners and their property rights. Asset

forfeiture has been a success in Reno County. That is not to say that improvements are not necessary or desirable. By adopting this proposed legislation, we can take another step forward in the war on drugs.

Sincerely,

Timothy J. Chambers

TIMOTHY J. CHAMBERS
Reno County Attorney

TJC:mb

KANSAS BAR ASSOCIATION

Legislative Information for the Kansas Legislature

TO: Members, House Judiciary Com.
FROM: Ron Smith, KBA General Counsel
SUBJ: HB 2423, the Standard Asset Seizure and Forfeiture Act
DATE: February 17, 1993

PURPOSE

The purpose of this document is to compare the Attorney General/KBI's new forfeiture bill, HB 2423, with the Uniform Laws Commission's suggested new draft of a law relating to drug forfeitures. HB 2423 and the ULC bill have common ancestry. The Model Asset Seizure and Forfeiture Law is a prosecutorial offshoot response to the 1989 ULC efforts at crafting a uniform law on this topic. In many ways they are similar, but where appropriate, public policy questions raised by the differences in the two bills are noted.

The Kansas Bar Association suggests lawmakers review forfeiture from its overall public policy impact, especially its impact on the Judicial system. If a significant number of new civil cases enter the system — especially if HB 2423 spawns a great number of "civil" cases for each criminal arrest and prosecution — that has a fiscal impact on the system. When courts are hearing forfeiture cases, there is less time available to hear other criminal matters or civil cases — absent, of course, appropriations for new judges. We have no way of knowing how much impact this legislation might have on the judicial branch and would defer to their judgment in that regard.

HB 2423

HB 2423 is a rework of the Model Asset Seizure and Forfeiture Act (MASFA) promulgated in 1991 by the National Drug Prosecution Center. We shall refer to the Section numbers of HB 2423 for analysis.

ULC/USCACF

We shall comparing HB 2423 to the Uniform Laws Commission's most recent "discussion" amendments to the Uniform Controlled Substances Act, Article V, Civil Forfeiture (hereafter ULC/USCACF), a process of discussion begun in December, 1992. It is important to note that the ULC draft is just that, a draft. But it refers to federal law and MASFA and thus is good for analysis of competing ideas. ULC/USCACF uses Section numbering 501 through 521.

Policy Decisions

Forfeiture is a legitimate tool for law enforcement. It takes the profit out of crime. Persons who engage in unlawful conduct have no legitimate claim to the proceeds they derive from such crime. The rest of society pays for law enforcement, the harm to victims of

This legislative analysis is provided in a format easily inserted into bill books. We hope you find this convenient.

HOUSE JUDICIARY
Attachment #4
02-17-93

crime, the cost of representing the indigent defendant and the collateral violence spawned by these activities.

There is, however, no true single road to forfeiture fairness. The main policy positions are:

1. **Which crimes should be subject to forfeiture?**

The 1992 Kansas legislature began an expansion of forfeiture law to non-drug crime areas: cattle rustling and drive-by shootings. The 1993 legislature continues that trend with introduction of legislation to allow vehicle forfeiture for habitual DUI cases and prostitution. Expansion is not without eventual fiscal consequences on court costs and available tax dollars.

2. **How well have previous forfeiture laws worked in Kansas?**

The purpose of our current drug forfeiture law was to get at the "thoroughbreds" of organized drug crimes, not the "mules." Have we sought property from the thoroughbreds, or the mules? We suspect no one knows for sure. Nationally, the Drug Enforcement Agency reports that 80% of federal forfeitures in the late 1980s were for properties of $50,000 or less. Thus the kingpins with expensive homes and automobiles are the targets of forfeiture only a small part of the time in the federal system. It is the federal system where all the kingpin drug dealers are prosecuted. The small fry are the usual state target.

We suggest an audit of previous Kansas forfeiture proceedings be part of your policy considerations here. If Kansas forfeitures have not obtained major proceeds from true "kingpins," then the legislature must think long and hard whether it wants an elaborate "big-time" forfeiture provisions for what amounts to small-time asset hunting.

3. **Should the proceeds and profits from forfeiture of nonexempt assets or cash be controlled by police and prosecutors or public officials responsible for their budgets?**

When eliminating Kansas drug activity was the primary focus of forfeiture law (prior to 1992), the proceeds and profits from drug crime-related forfeitures went to police departments and prosecutor budgets. Now forfeiture is being broadened.

HB 2423 Section 17 (page 23) covers allocation of forfeited property. The law enforcement agency may keep seized property "for official use" or transfer the property to other agencies, destroy the contraband or sell it to the public. HB 2423 Section 17(b) on page 24 allocates proceeds of any sale to (1) a court's security interest or lien, (2) payment of proper expenses of the proceedings for forfeiture; (3) reasonable attorney fees to the "plaintiff's attorney" e.g. 15% if the county attorney or district attorney, and if the "plaintiff's attorney" is a private attorney, a price to be negotiated by the "employing law enforcement agency;" (4) repayment of law enforcement 'buy' monies; (5) to state or local general fund "trust funds" established by section 17(c). Section 17 continues current law regarding drug forfeiture proceeds.

Law enforcement argues they take all the risks to set up the arrests by which funds are made available through forfeiture; if they don't get to control the funds they won't make the arrests in the future. It is precisely that thinking that has led to law enforcement abuse of forfeiture in other states. If Kansas law enforcement maintains such a position, that says much about the true purpose of forfeiture as far as local governments are concerned — local fund-raising for law enforcement rather than public safety and crime deterrence.

The ULC/USCACF suggests that forfeiture proceeds be placed in the general funds of the governments that seize the assets, and be subject to the regular appropriations process of the governing body. Comment to the ULC/USCACF draft believes that forfeiture laws which give seizing agencies

direct financial incentives in forfeiture is "an unsound policy that risks skewing law enforcement priorities to those activities which produce forfeited property," not general crime prevention as a whole. Newspapers have used another critical term for this situation: bounty hunting. The U.S. Supreme Court indirectly agreed in a similar non-forfeiture issue: in *Connally v. Georgia,* 429 U.S. 245 (1977) the Court declared unconstitutional a system whereby unsalaried justices of the peace received $5 for each issued search warrant, but nothing for refusing to issue a warrant.

SECTION BY SECTION ANALYSIS

Generally, HB 2423, based on the Model Asset Seizure a Forfeiture Act, tends to lay the concept of "fairness" of forfeiture at the desk of the attorney representing the seizing entity, e.g. the county or district attorney. It is that person's prosecutorial "discretion" that decides how the act works in various situations involving fairness, such as whether to forfeit an expensive car if a small amount of marijuana was found in the seat. MASFA tends to view forfeiture as a governmental right and thus crafts a forfeiture act where the procedure involved strongly favors the government's position and, with its emphasis on cost shifting in the later sections of the bill, strongly discourages others of property from fighting the government over forfeiture.

The ULC/USCACF tends to put the concept of fairness in the hands of the presiding judge or jury. It uses the given state's own civil procedure rules, this putting the plaintiff and defendant on a more even footing. It views forfeiture as another civil action which can be successfully prosecuted by the government, but also defended. ULC/USCACF also introduces a concept of "proportionality."

Both acts, however, are complex.

Generally, the ULC/USCACF committee indicates the Model Asset Seizure and Forfeiture Act has some drafting imperfections — a conclusion with which MASFA proponents may disagree. The MASFA proponents, obviously, thought ULC/USCACF was too lenient owners of forfeited property. Both documents contain common definitions and structure.

Section 2 - Definitions

The HB 2423 definitions are not much different than under ULC/USCACF. ULC/USCACF defines owner in a simpler fashion as one who has a recognizable legal or equitable interest in property. It also defines a secured interest holder according to the UCC 84-9-105. Federal law has held that "owner" has been construed not to include the interests of an unsecured creditor.

HB 2423 defines "plaintiff attorney" as the county or district attorneys or attorneys general, or any attorney hired by a law enforcement agency. (Page, line 27) **ULC/USCACF defines the term as meaning the elected county or district attorneys or the AG.** The difference means forfeiture under HB 2423 can be handled by any attorney representing a government or police department. ULC/USCACF tends to prefer elected officials conduct forfeiture proceedings.

HB 2423 does not define what constitutes "willful blindness" on the part of an innocent owners. By not defining the term, attorneys representing seizing agencies can rely on prosecutorial discretion when deciding upon which property to seek forfeiture. **ULC/USCACF defines that term, thus making such determination a matter of evidence.**

Section 3. Jurisdiction and Venue

HB 2423 establishes jurisdiction in Kansas for illegality in other states. It also allows consolidation of either in rem or in personam jurisdiction. It also allows venue to proceed wherever ANY of the forfeitable property is found. Since the "seizing agency" may exist in any county with forfeitable property, conceivably two or more "plaintiff"

seizing law enforcement agencies could initiate two or more separate actions in different counties over the same property. Some sort of consolidation action would then be necessary.

ULC/USCACF does not get into jurisdiction and venue matters. It presumes the civil procedure code will decide whether there is jurisdiction and proper venue for a forfeiture proceeding.

Section 4 — Conduct Giving Rise To Forfeiture

HB 2423 includes all the previous Kansas crimes which give rise to forfeiture. The right to forfeiture exists only when there is conduct giving rise to forfeiture. The conduct does not need to occur within Kansas; it may occur elsewhere, provided it would be subject to prosecution where it occurred.

Prosecution is not a prerequisite to a forfeiture proceeding. However HB 2423 goes further than ULC/USCACF in that it is not limited to felonies. Gambling and prostitution, if you expand forfeiture as suggested, are misdemeanors, although later on the act indicates forfeiture of real property and "conveyances" should not take place absent activity which could be a felony.

A solicitation or conspiracy to gamble or engage in prostitution is also is conduct giving rise to forfeiture. Thus if Kansas makes forfeiture available for gambling, illegal gambling in Missouri can result in forfeiture of that Missourian's Kansas property.

NOTE: HB 2423 suffers from the same imprecision as does MASFA. MASFA permits reliance on acts which took place outside the state to support forfeiture, but for some reason does not allow reliance on attempts that take place outside Kansas. New Section 4(h) and (4)(i) discusses any "solicitation or conspiracy to commit any act or omission described in this section;" presumably it allows forfeiture only when the attempt or conspiracy takes place in Kansas even if the crime itself, if committed elsewhere, does not give rise to forfeiture. *Example: Two Kansans discuss a desire to steal Missouri cattle. Their "conspiracy" takes place in Kansas. Yet cattle rustling in Missouri does not give rise to forfeiture there, although it does here. But no theft took place in Kansas. Does Section 4(h) or 4(i) allow forfeiture here?*

Since ULC/USCACF deals only with drug offenses, it requires the conduct be punishable by "confinement for more than one year under this act;" thus it does not get into discussing the forfeiture property for misdemeanors.

Section 5. — Property Subject to Forfeiture

The difficulty about this section is that it is quite important under both HB 2423 and ULC/USCACF. Both provisions are similar in the two acts. HB 2423 includes all property, but handles "proceeds" of forfeitable property differently. Section 5(c) allows all "proceeds of any conduct giving rise to forfeiture" to be subject to forfeiture.

ULC/USCACF Section 503 discusses "proceeds traceable to property furnished in an exchange that constitutes conduct giving rise to forfeiture."

Just because property is "subject to forfeiture" does not mean that every interest in the property ultimately will be forfeited. Section 504 of ULC/USCACF identifies which property "subject to forfeiture" is nevertheless "exempt" from forfeiture. Only in cases where property is "subject to forfeiture" need an innocent owner establish the applicability of an exemption. The role of Section 503 is to specify the showing necessary for the government to forfeit property if no evidence of exemption is shown, and incidentally to identify when innocent owners must present proof of their entitlement to the exemption.

Thus, under ULC/USCACF security interests are "forfeitable" when the security is used to facilitate a violation of the controlled substances act. If a car is used in a drug transaction, not only is the offender's interest in the car forfeited, but also is a lender's security

interest in the car. Although forfeitable, the lender's interest may be exempt from forfeiture under Section 504.

HB 2423 Section 5 operates in much the same way as ULC/USCACF Section 503. Many of the provisions of both HB 2423 Section 4 and ULC/USCACF Section 503 are drawn from 21 U.S.C. @881(a)

Both HB 2423 Section 5(b)(2) and ULC/USCACF Section 503(a)(2)(ii) allow forfeiture of property which is used to "facilitate conduct giving rise to forfeiture." HB 2423 Section 2(d) defines facilitate "broadly." In fact it could not be more broadly defined. Thus any use or intended use of property probably "facilities" conduct giving rise to forfeiture. *ULC/USCACF does not define "facilitate," instead relying on federal interpretations.*

If you define facilitate, by the act of inclusion in the definition, you exclude other facilitations. There is a long line of federal cases discussing when property "facilitates" drug trafficking; e.g. United States v. One 1979 Porsche Coupe, 709 F.2d 1424 (11th Cir. 1983). However, when does property "facilitate" cattle rustling? Or gambling? **Are we sure the HB 2423 definition of facilitate is correct for the other types of crime?** Under facilitation rules applied to drug crimes, Courts have upheld forfeiture not only of cars used to transport illegal drugs to the scene of a drug transaction but also cars that were used merely to commute to the scene of a drug transaction. (*U.S. v. Real Property and Residence at 3097 SW 111th Ave., Miami*, 921 F.2d. 1551 (11th Cir. 1991). **Does that mean that automobiles used to drive to a tavern where someone inquires about illegal bookmaking or prostitution are subject to forfeiture as it "facilitates" the activity?** That could result under HB 2423 because that act contains no proportionality. Again, if the legislature does not define these issues, case law will.

Under HB 2423 there is no limit on what property is forfeitable, except the limit of prosecutorial discretion. *ULC/USCACF contains a "proportionality rule," meaning the forfeited property must approximate the harm to society caused by the illegal activity. See ante.*

Weapons. HB 2423 Section 5(b)(2) allows forfeiture of any property "used or intended to be used in any manner" to facilitate conduct giving rise, etc. ULC/USCACF is similar. Both acts expand on federal forfeiture law. Weapons are personal property which obviously might promote conduct giving rise to forfeiture. **Proceeds traceable to forfeitable firearms also is forfeitable. See HB 2423 Section 5(c) and (d).**

By use of the "traceable proceeds" provisions of HB 2423 Section 5(c) and similar provisions in ULC/USCACF Sec. 503(a)(2)(iii), the old "relation back" theory is unnecessary in order establish a law enforcement "right" in the property.

Substitute Property. These sections also handle the issue of substitute property. HB 2423 does not deal with substitute property in Section 5, rather it discusses substitute property in Section 15. The ULC/USCACF deals with substitute property in Section 503(a)(6). *Both laws allow the state to pursue forfeiture of substitute property in an amount equal to the value of defendant's interest in the principal property.*

However, HB 2423 Section 15 handles substitute property differently than ULC/USCACF. HB 2423 indicates a wrongdoer who used leased equipment is subject to forfeiture for substitute assets equal in value not to the wrongdoer's lease but rather to the fair market value of the leased equipment.

Ex.1: a drug dealer uses a $500,000 airplane but leases it for $5000 per month and in one month is arrested for drug smuggling. Instead of forfeiting substitute property worth $5000, substitute assets of $500,000 can be forfeited under HB 2423 Section 15.

Ex.2: Tavern owner has the tavern mortgaged to the bank. Bookmaking takes place in the tavern, allegedly with owner's permission although the police cannot prove it. The tavern is

exempt because the bank holds a valid "innocent owner" security interest in the place. Section 15(a)(6) allows the police to seek property of the tavern owner that is nonexempt, in value equal to the entire value of the exempt tavern, not just the owner's equity interest in the tavern — and they can seek this substitute property even though the substitute property was not used to facilitate the bookmaking operation.

This provision is especially important because HB 2423 Section 15(a)(6) marks a substantial and, according to the ULC/USCACF, an "unjustifiable expansion of the forfeiture remedy" from tainted property to untainted property. HB 2423 Section 15(a)(6) and (a)(7) permits forfeiture of substitute property when the principle property is subject to any exempt interest — presumably including a constitutional protection of the Kansas homestead.

The provision in MASFA and HB 2423 is not found in the ULC/USCACF version nor in the federal criminal forfeiture statutes. It raises interesting questions of public policy:

Example: a person uses $10,000 of illegally laundered money with a lawful $90,000 inheritance to purchase a $100,000 home. Three years later the house is sold for $110,000 and a new home is purchased as part of a divorce settlement, and purchased in the wife's name only. If the government cannot forfeit the homestead rights in the home, should they have a right to forfeit substitute personal property in the value of $10,000 (the original proceeds of the crime), or the $110,000 value of the exempt home?

HB 2423 Section 15(a)(6) appears to allow forfeiture of substitute assets equal to the $110,000 home — even though the "innocent" wife owns the house.

ULC/USCACF allows forfeiture of substitute property only when the predicate activity for such forfeiture is demonstrated by clear and convincing evidence. HB 2423 imposes no such burden of proof. Moreover, ULC/USCACF's version has a proportionality provision, Section 504(b), which HB 2423 entirely lacks.

Enterprise Forfeitures. ULC-/USCACF allows "enterprise forfeitures" under Section 503(a)(5), which is patterned somewhat after RICO cases. The state can gain control over assets arguably not actually used to facilitate drug activity — if the enterprise owning the assets falls within the ambit of that provision.

Example: an illegal activity's acquisition of stock in a corporation. 503(a)(5) requires a "substantial" criminal conduct be connected with the enterprise. This is analogous to the requirement of a "pattern of racketeering activity" under RICO and a "continuing criminal enterprise" under the Comprehensive Drug Abuse Prevention and Control Act. Such enterprise forfeitures, however, are subject to proportionality review under Section 504(b).

HB 2423 allows enterprise forfeitures too, but lacks many of the proportionality protections of ULC/USCACF. Nor does HB 2423 require the offending conduct be "substantial", thus cutting HB 2423 loose from the restraints even required under Federal RICO actions.

Section 6 — Exemptions from Forfeiture

This section identifies the interests in property which are exempt from forfeiture notwithstanding some interest in the property might be forfeited. The claimant has the burden to show by a preponderance of evidence of any applicable exemptions, which are set forth in the statute.

ULC/USCACF simply states that owners or interest holders do not lose their interest in property if they "did not know" that the property was being used for illegal purposes, or if he did know, he acted "reasonably" to prevent the property from being used for illegal purposes. HB 2423 Section 6(a)(3) is similar.

Innocent Owners Both Section 6 of HB 2423 and the ULC/USCACF provide for innocent owner defenses. Yet HB

2423 introduces an additional negligence standard. Section 6(a)(1)(i) removes the innocent owner defense for the owner who could "reasonably have known" that the conduct was likely to occur. In other words if the owner was negligent in not finding out about illegal activity, the innocent owner defense is unavailable. The standards for proving innocence will vary under HB 2423 Section 6 depending on when the owner acquired the interest in property. The analysis of this section by the AG's Task Force does not explain why this language is used.

ULC/USCACF section 504 better utilizes the "actual knowledge" test, since ULC/USCACF Section 501 defines "knowledge" and what constitutes "willful blindness" to what is going on.

Good Faith Purchasers Both bills also provide for "good faith purchaser's for value" defenses. Donees, however, may not benefit from the innocent owner defense in either bill. Thus spouses who receive mink coats purchased with drug money will see it forfeited since they did not purchase the coat themselves without knowledge of its original source. This is true even if the spouse did not suspect the other spouse's involvement with illegal activities.

HB 2423 has an odd choice of words, however. The bill requires the bonafide purchaser must acquire the property in good faith, "for value, and was not knowingly taking part in an illegal transaction." Yet Section 6(b)(4) withdraws BFP protections from the purchaser if they were negligent in acquiring the property (the language is "reason to believe the property was subject to forfeiture under this act." (P. 5, lines 28-31).

Joint Tenancy. HB 2423 Section 6(b)(1) holds that exemptions do not apply in four instances. One is joint ownership of the property. Joint owners cannot raise the innocent owner defense in HB 2423.

This would appear to reverse the recent Kansas Supreme Court case of *Braun v. One Tract of land in Ellis County,* where a wife successfully argued that she tried to stop her husband from dealing drugs from their house, thus protecting her homestead provision. This joint property exclusion is not found in federal law. While these cases are likely to be few in number, this committee should know up front what this provision does.

ULC/USCACF does not bar joint tenants from raising an innocent owner defense. The burden of proof is theirs, however.

Proportionality. Proportionality is simply the concept of let the punishment fit the crime. HB 2423 does not contain wording concerning proportionality. It leaves it to the prosecutor as to how much property to seek as being "subject to forfeiture." Obviously if you are a prosecutor, this is the preferred system. But "fairness" will differ from county to county and prosecutor to prosecutor.

ULC/USCACF proportionality limits the scope of forfeiture. Without such limits relatively minor conduct can result in great property loss. Without proportionality, forfeiture becomes less a civil remedy and more in the nature of a large and possibly disproportionate "fine."

Proportionality is found in some state laws and in federal obscenity statutes involving forfeiture. 18 U.S.C. @ 1467(a)(3). More important, HB 2423 recognizes the issue of proportionality, in that no real property or conveyance can be forfeited unless the activity giving rise to forfeiture constitutes a felony. Section 6(a)(1)) does not contain a separate proportionality clause.

Section 504(b) of ULC/USCACF treats unfairness as "exempt" property. Whether property should be forfeited depends on (1) the profit or gain from the crime, and (2) the actual conduct of the person giving rise to the forfeiture. A simple possessor of marijuana and the drug dealer may both drive the same expensive automobile, but under proportionality, the latter may have his car forfeited since he profits handsomely from the crime, while the simple possessor may

not have the car forfeited. The Court, not a jury, decides proportionality. That portion of property which is subject to forfeiture which the Court declares is "nonproportionate" to the activity involved is considered exempt property under 504(b). The ULC/USCACF treats proportionality the same way the UCC treats the term "unconscionability": as a matter of law for the courts.

Attorneys Fees. *In Caplin & Drysdale v. U.S.*, the U.S. Supreme Court holds the Sixth Amendment effective assistance of counsel clause does not require that all persons get to use whatever funds are available to hire counsel; all the Sixth Amendment does is assure an attorney is available if necessary. *Caplin* is decided on federal forfeiture law, but seems to invite states making different provisions regarding such law if the states so desire.

HB 2423 Section 6 does not discuss attorneys fees and whether such fees are exempt from, or subject to, forfeiture. In fact the explanation argues that attorneys fees have "no part in this debate over exemptions." Perhaps assuming the an attorneys fee exemption may be considered here, the Task Force's explanation of Section 6 (pp. 8-10) argues providing some of the property for attorneys fees "disserve important social values," accusing the attorney who takes a fee from drug dealers as engaging in "blood money." Hyperbole aside, the analysis draws the uniquely prosecutorial conclusion that all persons charged with a crime who happen to have property should first be pauperized before prosecution, then seek the help of the public defender's office. All this forgets, of course, that it is taxpayers who pay public defenders.

Three problems are present with the Task Force's analysis: (1) neither prosecutions nor convictions are required as a prerequisite for forfeiture under HB 2423, (2) the innocent owner defense will not qualify an attorney, since the "negligence" of the attorney for not asking where the fee money came precludes the innocent owner exemption, and (3) HB 2423 is not just about forfeiture of proceeds for drug crimes; there are seven other categories of crimes which make property subject to forfeiture. The Task Force's report does not even recognize the scope of their own bill.

ULC/USCACF Section 504 has two alternative provisions for a "reasonable" attorneys fee exemption:

*"the owner or secured interest holder is a lawyer who acquired the interest as payment for legal services or expenses related to legal services ((**or "payment for reasonably required legal services"**)) in a criminal matter and who did not have actual knowledge, at the time the interest was acquired, that the conduct making the property subject to forfeiture had occurred but the interest is exempt only to the extent the payment or reimbursement was reasonable and was earned before the lawyer learned of a judicial determination of probable cause that the property is subject to forfeiture."*

This language does not recognize a right of any attorney to be paid from tainted funds the attorney knows at the time he takes them that they are tainted. That practice has long been forbidden by the Model Rules of Professional Conduct. This language would strengthen that enforcement tool.

We hope the legislature recognizes that attorneys have a unique role in our system. Rules exempting the interests of innocent owners may not be adequate by themselves to resolve problems raised by the provision of fees to attorneys. Requiring attorneys to prove they were not "willfully blind" respecting whether their fees have been paid by property subject to forfeiture might deter them from accepting criminal drug cases. In representing the client the attorney's job requires him or her to seek exactly the kind of information that might reveal facts that could be argued to establish the attorney's willful blindness and thus cost him or her a fee. A desire to protect fees might impel attorneys to

demand proof of a legitimate source for a fee, which of course frustrates the attorney-client relationship.

The United State's Attorneys' Manual Sec. 9-111.230 (19yyy) requires an attorney to prove lack of reasonable cause to suspect forfeitability of the fee, and acknowledges that such "may prevent the free and open exchange of information between an attorney and a client." While federal law does not embrace a special exemption for attorneys fees, these concerns are reflected in the official DOJ policy manual, which preclude any forfeiture of attorney fees already paid in a criminal case if the attorney lacked "actual knowledge" the fee was forfeitable. (DOJ Manual, Sec. 9-111.300.430).

The alternative language above embraces the same actual knowledge standard applied by DOJ. Thus if an attorney takes an advanced fee with an understanding that the attorney will use the retainer when services are rendered, federal practice dictates that forfeitability turns on the attorney's mental state as the fee is earned; thus if the attorney comes to possess actual knowledge that the advance payment was forfeitable, the attorney who continues to work on the case works at the risk that only the fee earned up to the point of the attorney's acquisition of actual knowledge will be immune from forfeiture. Federal practice forbids compelling confidential communications from the attorney to establish the forfeitability of the attorneys' fee. (DOJ Manual Sec. 9-111.610).

Under this rule, the client who plunks down a wad of cash while admitting that the money came from dealing drugs, or gambling, or selling stolen cattle, has tainted the whole amount. The attorney cannot use any of the money.

The Task Force analysis argues the state should get all the proceeds of drug forfeiture and none should be shared with anyone else. What that conveniently forgets is that taxpayers, not police, pay for law enforcement and the criminal justice system. Police and prosecutors work for society, not themselves. They are not bounty hunters.

Either alternative language under ULC/USCACF limits the exemption for attorneys fees to "reasonable" fees. A judge would determine reasonableness out of the forfeited funds held by the attorney. That eliminates collusive fee arrangements

Section 7 - Seizure of Property by Law Enforcement

Section 7 of HB 2423 and Sec. 505 of ULC/USCACF discuss the means by which law enforcement seizes and preserves property for eventual forfeiture proceedings. HB 2423 and ULC/USCACF are very similar in this regard. ULC/USCACF Sec. 505 requires a warrant or legal process in the absence of "exigent circumstances" for seizure. Federal law is split over whether there can be warrantless seizure of property.

The major difference between HB 2423 and ULC/USCACF is the ability to evade state law by requesting "federal adoption," and how the inventory of the property is handled.

HB 2423 Section 7(j) on page 7 allows a seizing agency to do all the leg work but if they run into a snag, they can allow the federal government to step in and take over by releasing the seized property to a federal agency.

There has been abuse of this under current forfeiture law. For example, when a state court signs an order denying forfeiture of property, by immediately filing to "adopt out" the property to the federal government, the municipality can avoid returning the property to its owners. Federal law allows sharing of proceeds of federal forfeiture with participating state agencies. State officials have an incentive to transfer property to the federal government when it would not be forfeitable under the state act, or when state constitutional "homestead" provisions or other state law bars the state forfeiture. Section 7(j) is unbridled authority to transfer a proceeding from state to federal jurisdiction.

It seems axiomatic, but if we are

taking the time to enact all the policy in HB 2423, then law enforcement should take the good with the bad; they ought not be able to rely on the act for forfeiture so long as they actually succeed in forfeiture, but also "sell" the marginal forfeiture proceedings to the federal government and avoid their obligations to return property to its owner under the state "civil forfeiture" system.

Amendment If you adopt the general policy that forfeited proceeds of forfeiture go to the state or county general funds rather than to the use of law enforcement, there will be no incentive to "adopt out" a forfeiture to the feds. If you do not adopt this policy change, ***we suggest you amend subsection 7(j) — that if the local governments elect to "adopt out" the forfeited property, there can be no financial gain or benefit to the local government by way of the agreement with the federal government.*** If they adopt out, the feds should keep all the proceeds.

Inventory Post-seizure inventories are useful to keep all parties square on what was taken, its condition, and value. This is especially true when cash is confiscated. ULC/USCACF requires a "probable cause" hearing under Sec. 508 be used when real property can be seized. ULC/USCACF requires an inventory be prepared by the seizing agency. HB 2423 section 7(d) requires a general description of the property seized, but does not require a formal inventory. The Task Force's analysis of Section 7(d) indicates that the "estimate" required in the subsection "is not an appraisal and contemplates no expertise beyond that of the seizing agent." Since substitute property may be sold to satisfy the forfeiture, undervaluation of property means more property may be sold than is needed to satisfy the substitution provision.

Lack of an inventory procedure would allow, for example, a police officer to take a roll of cash from a suspect, argue that it is drug buy money, confiscate it and never report it. If it is true drug money the "owner" will not claim it, either. (I am not alleging this happens; but it could happen). Detailed inventory procedures prevent police from being tempted.

Settling Claims. Subsection 7(k) on page 7 allows the "plaintiff's attorney" to settle an alleged forfeiture claim. While settlements must be in writing, this subsection could lead to abuse. Subsection 7(a) allows nearly unlimited "transfer" of property to other agencies or the federal government. This allows prosecutorial discretion again to surface — except that "plaintiff" attorney under HB 2423 is not isolated to county and district attorneys. It includes police department attorneys.

One policy consideration you might make in this situation is that the subsection bar use of civil settlements in exchange for no criminal prosecution. No one should have to pay a "fee" to a prosecutor or criminal justice agency in order to avoid prosecution, unless it is done as part of a valid diversion agreement. The potential for abuse in this section is obvious.

Section 8 - Effect of Seizure

This section discusses how liens are filed on the property, and how owners can get the liens removed. HB 2423 and ULC/USCACF are similar in this regard. Both laws recognize the harm that can be done to a party's interests when property is held pending final disposition in a forfeiture case. Interim release of property often benefits not only interest holders in seized property, but also the state, relieving it of the responsibility to store and secure the property pending a final order. But each bill handles this issue differently.

ULC/USCACF Section 8 permits affected parties to insist on a prompt post-seizure adversarial judicial proceeding addressing two issues: (1) an interim process to protest whether probable cause exists for forfeiture; and (2) cash or cash bond substitutes for the value of the property being seized.

HB 2423 Sec. 8(e) conditions a hearing on whether the interest holder has filed a proper claim, or the plaintiff's attorney has stipulated the property is exempt from forfeiture. Without those conditions, no hearing is allowed. The Task Force Analysis indicates that Section 8 allows secured ownership interests to put up a bond or cash in the amount of the full fair market value of the property "as determined by the plaintiff's attorney."

Section 508 of ULC/USCACF permits the owner to petition for release if the state lacked probable cause for forfeiture of the property, or the interest is exempt from forfeiture. Thus the interim hearing under 508 is a probable cause hearing held with 30 days of filing. The state bears the burden of proving probable cause. The burden is satisfied by evidence of a prior judicial determination binding on the petitioner (e.g. a search warrant for petitioner's property). The petitioner then bears the burden of showing it is likely to prevail at trial in showing the interest is exempt. The judge then makes a decision.

If the judge decides probable cause does not exist, it can order the property and all liens released. Or, the judge can decide that the property is needed to pay reasonable legal expenses in the criminal matter, or pay for reasonable living expenses for petitioner's dependents, and order the property exempt from forfeiture to the extent the property is used to pay for such expenses.

ULC/USCACF allows a court to release seized property to the owner in an appropriate case if the owner posts a bond sufficient to cover the potential forfeitable interest in the property. HB 2423 section 12(c) is similar.

The ULC/USCACF provision seems less structured and possibly more appropriate. **Once the police have seized real or personal property and placed liens against it, the right to be heard as a predicate to the extended loss of the use of property deserves protection simply as a matter of state law.** As a matter of law, what is the difference whether an owner forfeits a BMW worth $30,000 or a cash bond in the same amount?

Section 9 -
Initiating Forfeiture Proceedings

HB 2423 Section 9 and ULC-/USCACF's Section 509 are similar. Both have a 90 day limiting statute in which the seizing agency must initiate forfeiture proceedings or forfeit the right to proceed.

HB 2423 Section 9(a)(2) allows the "interest of the petitioner" to be recognized only to the "extent of documented outstanding principle plus interest at the contract rate." (p. 9, lines 21-24). There may some situations where the contract between a secured lender and the consumer who later causes a forfeiture proceeding might contain an attorneys fee reimbursement clause, where the lender is to get principle, interest and reasonable attorneys fees.

Section 9(a)(2) would not allow such a fee to the lender, except through the grace of the plaintiff's attorney. While fees of this nature have not been generally recoverable in federal administrative forfeitures (the circuits are split; 4th Circuit allow such recoveries; the Illinois federal courts do not), it raises the question that if the consumer causes the lender to incur attorneys fee costs because of conduct giving rise to the forfeiture and the costs are necessary to preserve lender's valid interest in the property, why not let the lender recover those additional costs?

Section 10 - Administrative Exemptions and Forfeitures

HB 2423 Section 10(c) on page 13, line 14, provides that if no proper petition for recognition of an exemption or claim is filed, then the plaintiff's attorney proceeds to forfeit the property pursuant to Sections 16 and 17. This is the so-called administrative forfeiture proceeding. Page 21, lines 39-42, establish that court orders are required to complete the uncontested forfeiture.

Our only point on this is why

involve a court to forfeit administratively real or personal property that no one is contesting?

Under Section 17 of HB 2423 a hierarchy of allocation for forfeited property is listed. This gets back to our fundamental consideration of where do forfeited proceeds go — to state and local general fund budgets, or to law enforcement?

ULC/USCACF section 510 is their administrative forfeiture procedure. It places no limits on how much can be forfeited under uncontested forfeiture proceedings. It also does not require judicial orders, thus expediting the process. Under Section 511 of ULC/USCACF, an interest holder can obtain a formal commitment from law enforcement that their interests will be protected if forfeiture proceeds. HB 2423 is silent on this matter, apparently allowing unstructured bargaining between interest holders and seizing agencies on what issues will or will not be preserved during formal forfeiture proceedings. Administrative forfeiture under ULC/USCACF Sec. 510 appears to be more workable for law enforcement than their own MASFA or HB 2423.

Section 11 — Filing a Claim

HB 2423 Section 11 is a procedure section for filing a claim. It is similar to ULC/USCACF Sec. 512. HB 2423 imposes significant filing burdens on claimants. If Section 11 procedure is not followed, the claim is disallowed. Section 11(b)(4) through (b)(6) require a lengthy and specific document be filed. The information must be filed under penalty of perjury, and require "all essential facts supporting each assertion." If defendants comply with it, their Fifth Amendment protections go out the window.

HB 2423 Section 11 is one-sided in favor of the state. While the defendant must "tell all," Section 12(p) allows the state (and only the state) to file a motion staying all discovery in the civil proceeding while the criminal matter is pending. This is to prevent under the guise of the civil forfeiture matter, the request for information on informant identities.

Yet Section 11, in order to preserve a defendant's claim in property, the defendant must tell all essential facts supporting ownership or the claimed exemption, and in the case of criminal matters where no informant is involved, discovery can proceed from the state against the defendant's interest without the defendant being able to stay the civil proceeding until the criminal matter is concluded.

All that is really needed here is a general fact pleading. ULC/USCACF contemplates such. No good reason justifies requiring a claimant to provide a detailed written defense in a forfeiture proceeding in order to impose an obligation on the state to file a judicial complaint. Civil litigants are not required to make such detailed written statements. Before being compelled to plead a claimant should be able to require the prosecutor to file a complaint pleading facts capable of withstanding a motion to dismiss and sufficiently capable of proof so as to meet the prosecutor's ethical and legal obligation not to take frivolous litigation positions. A simple fact pleading by both parties will do, then if the civil matter needs to be stayed until the criminal matter is over, it can be done that way.

Section 12 - Judicial Proceedings

This is similar to ULC/USCACF Section 513. Under Section 513, however, subsection (a) makes the judicial forfeiture proceeding subject to the rules of civil procedure for our jurisdiction. Further, *a jury trial can be requested under the ULC act.*

Subsection 12(j) states that money, negotiable instruments, precious metals, communication devices and weapons are found "in close proximity" to contraband or an instrumentality of conduct giving rise to forfeiture creates a rebuttable presumption under KSA 60-414, that such items are proceeds

from conduct giving rise to forfeiture was used or intended to facilitate conduct.

ULC/USCACF Sec. 514(a) also creates presumptions that money or negotiable instruments was the proceeds of conduct giving rise to forfeiture or was used or intended to be used to "facilitate conduct" IF there is proof that the money was found "in proximity to contraband, drug paraphernalia, structures or conveyances primarily intended or designed to transport, manufacture, or conceal controlled substances or records thereof..."

The section requires the prosecutor at least show probable cause for the forfeiture of the seized property. Without that showing, the property is ordered returned to the owner without need of them proving their exemptions. After the threshold showing of forfeitability the interest holders bear the burden of showing, by preponderance, of their exemptions.

The state's interest in forfeiture is no greater than a private citizen's whose claims are injured by the defendant's actions; if a private citizen must prove a superior right to property by a preponderance, the state should too. Yet HB 2423 section 12 does not allow ordinary rules of civil procedure to take precedence and subsection 12(i) allows hearsay evidence from probable cause hearings or search warrant summons to be introduced into evidence to make this probable cause hearing.

Suggestion: If you tie down the fact that under Section 12 the Kansas Rules of Civil Procedure apply, then not only do you preclude frivolous claims (by allowing judicial sanctions) but you also set a preponderance of evidence standard.

Section 13 -
In Rem Forfeitures;
Bonding Requirements

HB 2423 Section 13(e) takes the view that all answers in these civil proceedings must be accompanied by a bond to the court in the amount of 10% of the estimated value of the property, or $1,000. This is a form of automatic sanction for a frivolous pleading, I guess.

ULC/USCACF adopts the position that ordinary civil procedure rules should apply to these proceedings. In such proceedings, no bonding is required by defendants to protect their interest in property. The state should simply prove its case, get a judgment against the property and forfeit it without bonding requirements. Especially when cash or cash bonds are used in lieu of the actual property, then foreclosure is relatively simple. Once forfeiture is granted, the entity seeking forfeiture has title to it and exerts custody.

HB 2423 requires an elaborate bonding procedure. Bonding is not a common feature of civil litigation. Supersedeas bonding is required only on appeal, after a tribunal has made an initial decision on liability. To require a bond may force people to forego a claim for the property. Even claimants who are successful in getting their property back from the government nevertheless bear the burden of securing and posting a bond.

The bond requirement in Section 13 is even more onerous than federal law. Federal law imposes a bond requirement of 10% of the value of the property or $5000 whichever is lower, but with a minimum bond of $250. HB 2423's requirement is more onerous. The bond itself is 10% of the value of the property or $2,500 whichever is greater, with a maximum permissible bond of $250,000.

While it is styled a "cost bond," (p. 18, line 2), actually the bond covers a range of costs and expenses of the proceedings — far broader than that imposed on most losing civil litigants. Claimants must pay not only what is typically regarded as costs, but also the state's expenses of investigation, potentially a huge amount.

HB 2423 does not grant costs to the claimant if the claimant is successful.

Further, note that Section 16(f) on page 23 requires that courts impose an attorneys fee "shift" from the claimants who "lose" to those who establish their exempt interests under forfeiture. This means that a consumer who loses a forfeiture action might have to pay the attorneys fees of the bank which preserved its security interest in the loan on a car — in addition to paying the investigation fees and attorney fees of the seizing agency.

This means the bill imposes an "American Rule" of cost shifting when claimants are successful, but an "English Fee" rule on claimants when the state is successful. At the least the cost-shifting portion of the bill should be standardized for all parties.

All this obviously is meant to discourage persons from fighting civil forfeiture proceedings. It hardly creates a level playing field for "civil procedure-like" determination of interests in property.

Section 17 - Disposition of Property

HB 2423 Section 17 sets up a list of who gets the property. Obviously its purposes is to keep the proceeds of forfeiture in the hands of law enforcement, not the elected persons who make law enforcement budgets.

This gets back to our major policy issue of where should proceeds go?

ULC/USCACF puts proceeds of forfeited property in the general treasury of the entity doing the forfeiture — city, county or state government. There, it is subject to ordinary legislative appropriation.

The section also requires sale of the forfeited property. *Is the sale under HB 2423 Section 17 a "commercially reasonable sale?"* All that is required is that non-real estate property be sold "at public sale to the highest bidder for cash without appraisal." Real property must be sold in a "commercially reasonable manner." For non-real estate, selling to the public for the highest bidder is not necessarily a commercially reasonable sale. A car might be appraised at $20,000 but the highest bid is $4,000. If the county or state general fund is to benefit from the forfeiture proceeds, then the taxpayer has a right to ask the law insure the sale nets the highest amounts possible.

Law Enforcement sales. HB 2423 section 17(a)(3)(C) prevents employees or public officials with any agency involved in the investigation, seizure or forfeiture to purchase or attempt to purchase such property. *Shouldn't this ban also apply to the immediate family of such persons?* Otherwise an officer's spouse could bid and acquire for the beneficial use of the public official or employees who was involved in the seizure and otherwise prohibited from the acquisition.

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KANSAS BUREAU OF INVESTIGATION

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TESTIMONY
KYLE G. SMITH, ASSISTANT ATTORNEY GENERAL
KANSAS BUREAU OF INVESTIGATION
BEFORE THE HOUSE JUDICIARY COMMITTEE
IN SUPPORT OF HOUSE BILL 2448
FEBRUARY 17, 1993

Mr. Chairman and Members of the Committee:

The standing cliche is that a criminal "owes a debt to society." House Bill 2448 creates the opportunity for courts to make defendants really pay a portion of that debt. What this bill does is create an option for courts at sentencing to order convicted criminals repay society for some of the extraordinary costs expended during the investigation. I would note that this authorizes the courts to consider this option, it does not mandate such an order.

Essentially this bill has two parts. The first section deals with rewards, whether offered by a Crime Stoppers chapter, individual or governmental agency. If such a reward was paid and the reward materially aided in the apprehension or conviction of the defendant, the court may in appropriate cases order the defendant to repay the entity that paid the reward.

There are other representatives here from Crime Stoppers chapters who can speak better than I as to the effectiveness of this wonderful program. However, they are dependant on private donations for their reward money. Reimbursing these funds at no expense to the Kansas taxpayers may be the best investment this committee can make towards criminal justice.

The second portion of this amendment similarly authorizes the court to order the repayment of any buy funds that were expended during the course of an investigation that lead to a drug dealers conviction. It is a frequent practice of law enforcement agencies to make several smaller purchases in an attempt to either gain the trust of a drug dealer and effectuate a larger purchase or to follow the dealer back to his wholesale source. Given the cost of narcotics, these preliminary transactions run into thousands of dollars, and when the arrest is finally made, the 'buy' money can no longer be located. A 1987 Court of Appeals case held that when the state is the victim, investigatory expenses were not intended by the legislature to be recovered. This bill would allow the court in such cases to order repayment of such funds, funds the defendant had already received, thus allowing law enforcement agencies to reapply them to a new investigation.

I would be happy to answer any questions.

#093

HOUSE JUDICIARY
Attachment #5
02-17-93

JUNCTION CITY-GEARY COUNTY
CRIME STOPPERS
P.O. Box 1321
Junction City, Kansas 66441

762-TIPS
Confidential • Cash Rewards to $1,000

TESTIMONY
GARRY BERGES, VICE PRESIDENT
KANSAS CRIME STOPPERS ASSOCIATION
BEFORE THE HOUSE JUDICIARY COMMITTEE
REGARDING HOUSE BILL 2448
FEBRUARY 17, 1993

Mr. Chairman and Members of the Committee:

As the Crime Stoppers representative for over thirty-five law enforcement coordinators across the State of Kansas, and as the Co-coordinator for the Junction City Geary County Crime Stoppers, I strongly urge your support of House Bill 2448.

Since childhood, we have been told that criminals are held responsible and must repay society and their victims for their wrongdoings. This repayment often includes financial restitution.

Your support of House Bill 2448 will make it possible for Crime Stoppers organizations across Kansas to recoup the money which is paid out to those individuals who assist in solving crimes, and to help Crime Stoppers continue to be a vital support in the war against crime.

HOUSE JUDICIARY
Attachment #6
02-17-93

KANSAS BUREAU OF INVESTIGATION

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TESTIMONY
FLOYD BRADLEY, SPECIAL AGENT SUPERVISOR
KANSAS BUREAU OF INVESTIGATION
BEFORE THE HOUSE JUDICIARY COMMITTEE
IN SUPPORT OF HOUSE BILL 2448
FEBRUARY 17, 1993

Mr. Chairman and Members of the Committee:

My name is Floyd Bradley. I am the undercover narcotics supervisor for the Kansas Bureau of Investigation (KBI). Over the past 28 years I have been involved in hundreds of narcotic investigations. In 95% of those investigations state or local funds have been expended in order to purchase illegal drugs. In most cases the prosecutor and the court are required a minimum of two separate drug purchases in order to bring the suspect to trial. In cases the KBI is involved in, we will make more than the required two purchases in order to learn the identity of the suspect's drug supplier.

The purchases of illegal drugs result in the expenditure of large sums of money and therefore is a large budget item. In FY 91 the KBI narcotics division spent $83,000 in buy funds, and in FY 92 the narcotics division expended $125,000. Since 1989 the 14 agent undercover unit has recorded 250 narcotic convictions throughout the State of Kansas. Since the inception, the KBI 15 agent strike force has had 100 convictions. Marijuana costs $1,200 to $3,600 per pound and cocaine costs $1,200 to $2,000 per ounce. The KBI strives to investigate and arrest the mid-level dealers. Approximately $5,000 is needed to be expended per arrest.

Most prosecutors will negotiate the charges filed on a defendant. If a defendant is charged with three counts of sale of narcotics they will usually plead to two or less counts. In approximately 10% of the cases, the court will order restitution only on those counts the defendant is convicted of. This bill would permit the KBI and local agencies an opportunity to recoup at least a portion of the money expended for narcotics investigations.

I would be happy to answer any questions

#095

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TESTIMONY
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KANSAS BUREAU OF INVESTIGATION
BEFORE THE HOUSE JUDICIARY COMMITTEE
IN SUPPORT OF HOUSE BILL 2450
FEBRUARY 17, 1993

Mr. Chairman and Members of the Committee:

Let me first explain what House Bill 2450 is not. 97% of what you see in italics or in stricken language is already the law, being amendments to K.S.A. 65-4127a and 65-4127b contained in the Sentencing Guidelines, last year's Senate Bill 479. Due to the mystic rules of bill drafting, they need to be repeated in House Bill 2450.

What the Kansas Bureau of Investigation (KBI) has requested by HB 2450 are an addition to the statutes, and a clarification. The addition appears in two places, on page 2, line 31; and on page 5, line 12. This is an addition to the 'drug free school zone' provision of the statute which enhances the penalty for drug trafficking offenses occurring within 1,000 feet of school property. The purpose of the drug free school zone was to discourage dealers from plying their dangerous trade around school properties where children congregate, thereby reducing children's access to drug dealers and exposure to the inherent violence that is engendered by that particular occupation. The purpose is not just to provide enhanced penalties to lock dealers in those locations away for a longer time, but to provide a substantial incentive for them to take their trade away from our children.

Agents in the undercover division of the KBI brought it to my attention that on a number of occasions they had been requested by drug dealers to consummate narcotics transactions at public parks. These locations apparently providing drug traffickers an open area where they feel free of close surveillance, have numerous escape routes, as well as not subjecting their own property to forfeiture.

Thus, at the two locations I have indicated we have suggested adding the term "public parks" to the drug free school zone, thus providing for enhanced penalties for drug trafficking offenses occurring within 1,000 feet of a public park. As noted, the purpose is to discourage dealers from hanging around locations where children congregate, certainly public parks are just such a location.

The second request is in the form of a clarification. Currently, both K.S.A. 65-4127a and 65-4127b make illegal to "possess with the intent to sell, offer with the intent to sell, offer for sale, sell, prescribe, administer, deliver, distribute..."

There is some confusion among two courts as to whether possession with the intent to distribute or deliver is prohibited by a strict reading

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of that language. In a typical situation a 'mule' or person hauling dope for another may be pulled over with a vehicle full of drugs and freely admit that he was paid to deliver the load to another individual. He is not, in fact, selling the drugs, but merely delivering them. It is certainly a reasonable inference that such a person is aiding and abetting a sale, but a reasonable inference does not prove that beyond a reasonable doubt.

Therefore, we have requested language in both of these statutes which clarifies that, not only does possess with intent to sell, but possess with intent to sell, deliver or distribute would also prohibit contact.

I hope I have made myself clear. I would be happy to answer any questions.

#094

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KANSAS BUREAU OF INVESTIGATION
BEFORE THE HOUSE JUDICIARY COMMITTEE
IN SUPPORT OF HOUSE BILL 2450
FEBRUARY 17, 1993

Mr. Chairman and Members of the Committee:

My name is Floyd Bradley. I am the undercover narcotics supervisor for the Kansas Bureau of Investigation (KBI). I have been involved in several hundred narcotic investigations during my 28 year law enforcement career.

Two years ago the legislature passed a much needed law enhancing the penalties for distributing drugs within 1,000 feet of a school. Today we are here to ask that the legislature expand that law to include enhancing the penalty for distributing drugs within 1,000 feet of a public park.

Several times a year my undercover agents will puchase illegal substances in public parks. Drug dealers today are more likely to use public parks in order to facilitate their drug activities. Counter surveillance is more easily used in parks as a dealer can observe police surveillance because parks are normally more open. Also, children are less likely to report suspicious activity. 30% of the drugs buys made by the KBI undercover agents are made in parks.

Drug dealers today have become more violent and often carry weapons. They are more likely to become more aggressive with their weapons if they are in the open, in an attempt to effect their escape. Therefore, children in a public park are at risk.

Drug users tend to congregate in parks to use drugs. Children are naturally curious and are likely to accept drugs from people who are around them in a play area.

I would be happy to answer any questions.

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