

Approved: \_\_\_\_\_

Date

## MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 4:00 p.m. on April 7, 1994 in Room 519-S of the Capitol.

All members were present except: Senator Martin (excused)  
Senator Brady (excused)  
Senator Rock (excused)

Committee staff present: Mike Heim, Legislative Research Department  
Gordon Self, Revisor of Statutes  
Darlene Thomas, Committee Secretary

Conferees appearing before the committee:

Professor Dean Springs, Washburn University Law School  
Kyle Smith, Kansas Bureau of Investigation  
Donna Whiteman, Kansas Department of Social and Rehabilitation Services  
Richard Hayse, Attorney for Palmer Companies, Inc.

Others attending: See attached list

Chairman Moran said one of the joint rules of the Legislature was that any provision could be added to a conference committee report as long as that provision had passed one house. He said the House would like to have HB 2328 and HB 2423 included in a conference committee report, however, the Senate Judiciary Committee had not held hearings. He said there was a new approach to HB 2328 which originally dealt with "not guilty by reason of insanity", and he felt the Committee should hear from Professor Ray Spring, Washburn University Law School concerning this issue. HB 2423 which deals with civil forfeiture would be addressed by Kyle Smith, Kansas Bureau of Investigation.

### HB 2328--repealing not guilty by reason of insanity

Professor Ray Spring, Washburn University Law School testified in support of HB 2328. Professor Spring said in 1979 the state of Montana changed its law relating to the insanity defense and which in effect HB 2328 would do essentially the same thing as the Montana law. He said to say HB 2328 abolishes the insanity defense is inaccurate, what it really abolishes is the language of the insanity defense which eliminates some of the confusion about the insanity defense. He referred to New Section 1 of HB 2328 in regard to the term "mental state" which would result in the jury not being instructed separately on the issue of insanity. He said New Section 2 would institute the same dispositional features under the insanity defense statute. Professor Spring said the remainder of HB 2328 dealt with amendments to current law to conform it to the new language in Sections 1 and 2. He said HB 2328 would be an improvement in Kansas law.

Donna Whiteman, Kansas Department of Social and Rehabilitation Services provided written testimony in regard to HB 2328 (Attachment No. 1).

### HB 2423--civil forfeiture

Kyle Smith, Kansas Bureau of Investigation testified in support of HB 2423 and provided written testimony (Attachment No. 2). He said under current statutes there are no specific time type limits and there are no requirements that settlement of a forfeiture claim should be subject to review by the prosecutor or judge. Mr. Smith said the current law allows for abuse. He referred to problems with the current Kansas forfeiture law which have been addressed in HB 2423 and a section by section analysis (Attachment No. 2). He said the attorney general appointed a task force consisting of seven members in 1992 to study this problem and they did so extensively. A balloon to HB 2423 was suggested by Mr. Smith (Attachment No. 2).

## CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY, Room 519-S Statehouse, at 4:00 p.m. on April 7, 1994.

Richard F. Hayse, Attorney for Palmer Companies, Inc. testified in regard to HB 2423 and provided suggested amendments (Attachment No. 3). He suggested New Section 17(a)(1) be removed which allows the law enforcement agency to keep the proceeds of forfeiture and then on page 27 require those funds be expended by those agencies or departments at state, county or city level through normal appropriations.

A supplemental note on HB 2423 was distributed by staff (Attachment No. 4).

A motion was made by Senator Parkinson, seconded by Senator Ranson to recommend the inclusion of HB 2423 in a conference committee report. The motion failed.

A motion was made by Senator Vancrum, seconded by Senator Harris to recommend the inclusion of HB 2328 in a conference committee report and to include the word "shall". The motion failed.

A motion was made by Senator Ranson, seconded by Senator Vancrum to recommend the inclusion of HB 2423 with amendments and balloon in a conference committee report. The motion failed.

Senator Bond suggested the issue of "guilty by reason of insanity" be discussed during interim. Senator Emert agreed with the request by Senator Bond but would like to include and interim study on the civil forfeiture issue.

A motion was made by Senator Bond, seconded by Senator Oleen to approve the Senate Judiciary minutes for March 17 and March 18, 1994. The motion carried.

The meeting adjourned at 5:15 p.m.

## GUEST LIST

**COMMITTEE:**

## Senate Judiciary

**DATE:**

4/7/94

[illegible]



JOAN FINNEY, GOVERNOR OF THE STATE OF KANSAS

KANSAS DEPARTMENT OF SOCIAL  
AND REHABILITATION SERVICES

DONNA WHITEMAN, SECRETARY

**Mental Health & Retardation Services**

**Fifth Floor North**

**(913) 296-3536**

**TDD #: (913) 296-3471**

**FAX #: (913) 296-6142**

**April 1, 1993**

Ms. Gloria M. Timmer, Director  
Division of the Budget  
State Capitol Building, Rm. 152-E  
Topeka, Kansas 66612

Dear Ms. Timmer:

Senate Bill 10 now includes the provisions of House Bill 2328 which will create a plea of guilty but mentally ill (GBMI) for use in criminal cases. When this plea is used the defendant would be committed "to an appropriate state or local institution or facility" to serve a sentence similar in length to that of normal criminal convictions. The state institution would be the state security hospital at Larned.

The average daily cost for Larned State Hospital is estimated to be \$169.11 for FY 1994. This works out to an annual cost of \$61,725. According to the Department of Corrections, their average annual expenditure is \$20,397 per inmate. This is \$41,328 less than the estimated Larned expenditure per resident year. Using these figures we have provided the attached table showing the annual differences in the cost of care.

The attached table assumes annual cost increases of 3%. The estimate of 10 GBMI verdicts per year is based upon the experiences of Illinois and Michigan which had slightly more of these verdicts than acquitted by reason of insanity verdicts. Releases were based upon an average estimated sentence of 5 years, which was chosen after consultation with the Kansas Bar Association and legal staff at Larned State Hospital, as estimates were not available from either the Department of Corrections or the Sentencing Commission.

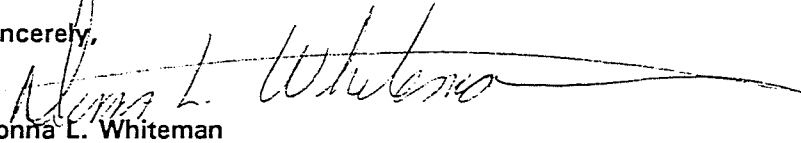
*Senate Judiciary*  
*4-1-94*  
*attachment 1-1*

Fiscal Note - SB 10  
April 1, 1993  
Page 2

In addition to the increased cost of care expenditures will be required to build an additional secure facility to handle the increased census. This cost will be from \$7 to 9 million for construction and equipment.

Please do not hesitate to contact George Vega at 296-3773 if you need any additional information.

Sincerely,



Donna L. Whiteman  
Secretary

DLW:DAJ:hb

cc: Rita L. Wolf, Director, Management Services  
George D. Vega, Commissioner, MH&RS  
Darvin Hirsch  
Randy Proctor  
Don Jordan

## Fiscal Note – SB 10

	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
LSH Annual Cost per Resident	61,725	63,577	65,484	67,449	69,472	71,556	73,703	75,914	78,191	80,537
DOC Annual Cost per Inmate	20,397	21,009	21,639	22,288	22,957	23,646	24,355	25,086	25,838	26,613
LSH Annual Cost	308,625	953,651	1,637,101	2,360,700	3,126,241	3,577,810	3,685,144	3,795,698	3,909,569	4,026,856
DOC Annual Cost	101,985	315,134	540,979	780,092	1,033,065	1,182,286	1,217,754	1,254,287	1,291,915	1,330,673
Annual Admissions	10	10	10	10	10	10	10	10	10	10
Annual Discharges	0	0	0	0	0	10	10	10	10	10
Beginning Census	0	10	20	30	40	50	50	50	50	50
Ending Census	10	20	30	40	50	50	50	50	50	50
Average Daily Census	5	15	25	35	45	50	50	50	50	50
Difference (LSH-DOC)	206,640	638,518	1,096,122	1,580,608	2,093,176	2,395,524	2,467,390	2,541,411	2,617,654	2,696,183

PROBLEMS WITH CURRENT KANSAS FORFEITURE LAW  
ADDRESSED IN HB 2423

	<u>Current Kansas Law</u>	<u>HB 2423</u>
Is there a standardized and clear procedure?	No	Yes
Are there specific time limits set?	No	Yes
Is there a procedure for quick judicial review of a seizure?	No	Yes
Are settlement agreements subject to review?	No	Yes
Are uncontested forfeitures expedited to reduce court congestion?	No	Yes
Can a claimant substitute a bond and regain use of the seized property?	No	Yes
Can valid claims be determined and released quickly in the case?	No	Yes
Are possessory liens by third parties protected?	No	Yes
Can depreciating property be sold to avoid waste?	No	Yes

*State Judiciary*  
*4-1-94*  
*attachment 2-1*



## HOUSE BILL 2423

### INTRODUCTION

The result of an Attorney General's Task Force that was formulated by Attorney General Robert Stephan in May 1992, they worked seven months and presented their report to the Joint Hearing in January 1993. The goals of the Task Force were to:

1. Standardize the various forfeiture procedures found in existing Kansas Law.
2. Reform the current law to provide more protection for legitimate claimants, owners and financial institutions with interests in the property while responding to changing fraudulent techniques used by criminals to hide assets.
3. Create clear and definite procedures and specific time frames so that law enforcement officers, attorneys and courts would have better guidance as to procedures involved in forfeiture.

The House Judiciary Committee has had numerous hearings in 1993 and 1994, intersession, and by both subcommittee and full committee. The originally proposed law has been amended to incorporate changes suggested by the President's Commission on Uniform State Drug Laws Report (CFRA), concerns of the Kansas Bar Association, Kansas Bank Association, savings and loans and others, as well as changes created by Kansas and U.S. Supreme Court decisions.

Probably all have heard of instances of abuse of the forfeiture proceedings and this legislation is vitally important - not to just keep such abuses from occurring in Kansas, but also to provide a powerful, yet safe, weapon against criminals.



## SECTION BY SECTION ANALYSIS

(Comments deal with changes from existing law only)

### SECTION 1:

#### TITLE

### SECTION 2:

#### DEFINITIONS

Uses various terms from the commercial world and the UCC, e.g. interest holder, which makes forfeiture easier to be understood by courts and counsel.

### SECTION 3:

#### JURISDICTION

Allows consolidation of venue so if assets are seized in several counties there could be just one trial.

### SECTION 4:

#### CONDUCT GIVING RISE TO FORFEITURE

This section consolidates the various statutes which now have separate forfeiture proceedings, into one list and procedure. This will hopefully simplify and improve the system and will allow future application of forfeiture proceedings to other crimes as seen fit by the legislature by simply listing the statute under this section. Existing forfeiture provisions in Kansas law that are included are those dealing with controlled substances and simulated controlled substances, cattling rustling, drive-by shootings and gambling. The only crime that has been added, which currently does not have a forfeiture provision is the recently created crime of money laundering, K.S.A. 65-4159. (This section also provides language to cover multi-state cases,

preparatory or attempted cases and crimes committed in furtherance of a listed crime. For example, the forfeiture of a bribe if bribery was used in a drug case.)

## SECTION 5:

### PROPERTY SUBJECT TO FORFEITURE

Consists of existing law with the following exceptions:

1. Incorporates federal and state case law that the whole track of land is forfeitable, not just the area immediately around the conduct giving rise to forfeiture, e.g. the land around each plant of marijuana.
2. Has provisions for forfeiture weapons that are possessed, used or available for use during conduct giving rise to forfeiture.

Homesteads are not forfeitable in accordance with the Kansas Supreme Court case In Re v. Braun unless the homesteads were purchased with the proceeds of criminal activity.

## SECTION 6:

### EXEMPTIONS

This section provides exemptions to protect non-negligent owners and legitimate interest holders.

1. No real property or conveyance can be forfeited unless the conduct giving rise to forfeiture is a felony.
2. Provides specific statutory protection for legitimate purchasers who bought property subject to forfeiture in good faith, not knowing it had been used illegally or was criminal proceeds.
3. Attorneys fees. If an attorney accepts payment for

services in good faith, believing the money was legitimate, the money is not forfeitable. This was requested by the Kansas Bar Association to reflect the unique situation that attorneys are in when they defend a person on a criminal drug charge with forfeiture aspects and so are likely to be asking questions that other merchants would not.

4. The language struck on page 5, lines 26 & 27 would allow joint tenants to claim innocent owner defense. This was a recommendation from the President's Report.
5. A provision was included regarding proportionality. The U.S. Supreme Court in Austin v. U.S. determined that the forfeiture proceeding must be proportional pursuant to the Eighth Amendment's prohibition of excessive fines. The language was from the National Conference of Commissioners on Uniform State Laws and provides guidance to law enforcement officers, prosecutors and judges in trying to implement the Austin decision.

## **SECTION 7:**

### **SEIZURE OF PROPERTY**

Section (a) augments the traditional search warrant statutes which have no provisions for seizing property that is not evidence. It also incorporates case law from the United States Supreme Court in 1993, U.S. v. James Good Real Property, which requires adversarial hearings before there be an actual physical seizure of real estate.

Subsection (c) encourages constructive seizures by filing liens and would apply to all real property seizures, not just residences (this is more restrictive than the President's Commission, which would only require adversarial hearings for residences).

Subsection (d) enhances the notice provision over current law by requiring notification of interest

holders of record at the time of seizure, not just when the action is filed. This is requested by the Kansas Banker's Association so that a legitimate interest holder will be advised what happened to their security, thus able to take appropriate actions to notify the seizing authority of their interest.

Subsection (e) provides immunity for persons acting in good faith who comply with either court orders or law enforcement officer's requests during the seizure of property, or for that matter when they decline to comply with the law enforcement officer's requests.

Subsection (g) sets out specific procedures and time frames for the law enforcement agency after seizing property for forfeiture requiring that the action be initiated within 45 days. Current law just says that the action be "promptly". The county or district attorney has 15 days to respond under HB 2423.

Subsection (k) requires that any settlements of forfeiture cases: 1. Be in writing; 2. Be approved by the county or district attorney or Attorney General's Office; and 3. Be approved by a judge. This will avoid some of the abuses that have occurred elsewhere.

Subsection (l) states that settlements of forfeiture claims under this act shall not be conditioned upon the disposition of criminal charges, which will avoid the appearance of a wealthy person being able to buy a reduction in charges by agreeing to the forfeiture of a certain amount of property.

## **SECTION 8:**

### **PROPERTY MANAGEMENT AND PRESERVATION**

Subsection (a) preservation of property is current law.

Subsection (b) provides an owner a means of obtaining release of the property by posting cash or a bond, unless the property is contraband, evidence or designed for illegal activity; for example, a truck with secret

compartments for smuggling drugs.

Subsection (c) authorizes custodial agreements to manage property in order to maintain the property's value. For example, after land is seized that also may have a legitimate crop on it, a custodial agreement can be entered into for the person to manage and harvest the crop so that the value is not diminished.

Subsection (d) requires the seizing agency to conduct a written inventory and assessment of the property's value.

Subsection (e) is another important improvement in that it allows seized property to be ordered sold by the court if the property is liable to perish, be significantly reduced in value, or to satisfy a major interest holder. The proceeds of the sale then become a property subject to forfeiture. Two examples I am aware of where this would have come in handy were a truckload of apples used to smuggle and disguise the smell of cocaine; and a case in Chicago where NBA playoff tickets were seized off of a drug dealer and obviously would have had limited value if they had been held until final judgement.

## SECTION 9:

### **COMMENCEMENT OF FORFEITURE PROCEEDINGS**

Section (a) (1) provides that a failure to timely file a forfeiture, within 90 days, releases the property to the owner pending further proceedings. If the action is not commenced within another 90 days the property is released to the owner.

Subsection (2) provides procedures to allow more time for parties to reach an agreement without wasting judicial resources where a valid exemption is likely.

Subsection (3) provides the notice procedures to be followed. Subsection (b) sets up procedures for using liens as opposed to actual possession, to preserve

property and avoid disruption caused by an actual physical seizure. Further, trustees are required to furnish information about the beneficiaries of the trust whose property is subject to forfeiture. This will allow law enforcement to pierce the front of phony or straw owners, and find the true owners of property.

#### SECTION 10:

##### RECOGNITION OF EXEMPTIONS

Allows for the rapid exit from a forfeiture action by legitimate commercial interests. Provides simplified procedures so financial institutions can use inhouse staff to file for recognition of exemptions instead of having to refer to an outside counsel.

#### SECTION 11:

##### CLAIMS

Requires detailed sworn claims to avoid fraudulent attempts to hide real owners. These claims must be filed within 30 days with no extensions, except for good cause shown.

#### SECTION 12:

##### JUDICIAL PROCEEDINGS

This section creates broad authority in the courts to secure, maintain and preserve property, e.g. seizure warrants, restraining orders, authorizing custodians and receiverships.

Subsection (c) provides for a quick probable cause hearing to correct errors. This will require a court to determine whether there was probable cause for seizure within 30 days. Currently, there is no way for a claimant to challenge a law enforcement officer's determination that there was probable cause to seize it, until trial.

Subsection (e) provides for the payment of criminal defense costs, and for procedure for early determination that there is not probable cause that a particular asset is forfeitable so that it can be released and used for the defense. Such assets must be paid for actual legal services.

Subsection (p) provides for a procedure to stay forfeiture proceedings so that a criminal investigation won't be compromised by the discovery procedures in the civil suits. For example, the discovery of an informant.

### SECTION 13:

#### IN REM PROCEEDINGS

The act provides for both in rem actions (suits against the offending property); for example, against a truck used to haul drugs and in personam actions (see Section 14 below), an action against the driver of the truck. There is a substantial amount of language stricken here that dealt with requirement for posting a cost bond. This was requested by the Kansas Bar Association.

Subsection (g) creates one standard of proof, i.e. preponderance of the evidence, which is the same as other civil actions. This is in keeping with the President's Commission Report, but unlike current federal law, and the Model Asset Seizure and Forfeiture Act (MASFA), which only require probable cause.

### SECTION 14:

#### IN PERSONAM PROCEDURES

Provides for actions against the individuals who own the property and includes such things as temporary restraining orders to preserve property, which otherwise might disappear if a person were served with notice of a suit in the usual civil manner.



## SECTION 15:

### SUBSTITUTED ASSETS AND SUPPLEMENTAL REMEDIES

Under subsection (a) if property is forfeited but:

- (1) Cannot be located,
- (2) Has been transferred to legitimate third parties,
- (3) Is beyond the court's jurisdiction,
- (4) Has been substantially diminished in value while not in the custody of the state,
- (5) Has been too comingled with other property and cannot be readily divided, or
- (6) Is subject to an exempt interest;

then the act authorizes bringing action against the person who rendered the property unavailable and then getting them judgement up to the value of the property is no longer available. Which then can be executed against other assets of that individual.

Subsection (b) authorizes a separate civil cause of action against such persons.

## SECTION 16:

### JUDICIAL DISPOSITION OF PROPERTY

Under subsection (a) if it is uncontested forfeiture, in other words, no one claims, the court merely makes the appropriate findings and orders title transfer. This will minimize a court's involvement and the amount of court time needed. If it is an uncontested forfeiture under subsection (c), and there is a regulated interest holder who has a claim, for instance a bank that has a lien on a car, the prosecuting attorney can release the property to regulated interest holder so that they can sell it, and if any remainder exists, that is then given back to the law enforcement agencies involved.

## SECTION 17:

### DISPOSITION OF FORFEITED PROPERTY

It is essentially current law with the following exceptions:

Subsection (a) forfeited firearms can only be kept for use by law enforcement agencies, given to the KBI Firearms Lab, or destroyed. Real property may be sold through realtors as opposed to an auction in an attempt to obtain better prices.

Subsection (c) codifies that no employee of any law enforcement agency may purchase forfeited property. This section also sets a percentage of forfeiture that can go to the prosecuting attorney. It is the same under state law as federal to avoid forum shopping by law enforcement agencies.

## SECTION 18:

### POWERS OF ENFORCEMENT PERSONNEL

Provides that the county or district attorney or Attorney General's Office may conduct inquisition-like fact finding investigations comparable to powers of a state regulatory agency. This will allow them to subpoena witnesses and obtain records, such as from a bank, during complex financial investigations.

## SECTION 19:

### IMMUNITY ORDERS

Provides for immunity for persons testifying in inquisitions under Section 18, that might become defendants in criminal trials.

**SECTION 20:**

**STATUTE OF LIMITATIONS**

Creates a five year Statute of Limitations. (MASFA and CFRA recommend seven years.)

**SECTION 21:**

**SUMMARY FORFEITURE OF CONTRABAND CONTROLLED SUBSTANCES**

Allows the summary forfeiture of controlled substances which cannot legally be possessed.

**SECTION 22:**

**BAR TO COLLATERAL ACTIONS**

Provides that all interest in property under this act shall be litigated through this act.

**SECTION 23:**

**STATUTORY CONSTRUCTION**

This act shall be liberally construed to effectuate the remedial purposes of this act.

**SECTION 24:**

**UNIFORMITY OF APPLICATION**

Subsection (a) sets out that the policy and intent is that this act be uniformly applied.

Subsection (b) authorizes the Attorney General to enter into reciprocal agreements with other states with similar acts.

**SECTION 25:**

Severability clause

**SECTION 26:**

States that this will be part and supplemental to the code of civil procedure is additional language requested by the KBA clarifying that the rules of evidence do apply in these actions.

**SECTION 27:**

Amends K.S.A. 22-2512 to comply with changes in repealed statutes that this act would entail.

**SECTION 28:**

Merely repeals existing statutes.

**SECTION 29:**

Makes this act effective upon publication in the statute book.

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# Commission Forfeiture Reform Act (CFRA)

## Policy Statement

### HISTORY OF FORFEITURE

Exodus 21:28 states that "[i]f an ox gore a man or woman, that they die, then the ox shall be surely stoned; and his flesh shall not be eaten." So began the history of civil forfeiture.

The doctrine was continued during feudal times as the deodand. The object causing death to one of the King's subjects was forfeited to the Crown. Initially the object was sold and the proceeds used to pay Masses for the victim. Later in the Middle Ages the proceeds served as a source of revenue for the King.<sup>1</sup>

In the seventeenth century England enacted the Navigation Acts, the forerunners of modern civil forfeiture. The Acts required all goods and commodities shipped to the American colonies to be transported in English owned, built, and manned ships.<sup>2</sup> Violations resulted in forfeiture of the goods and the ship. Drawing upon the Navigation Acts, the First Continental Congress enacted legislation to forfeit vessels involved in customs offenses.<sup>3</sup> Since that time, Congress has enacted hundreds of federal forfeiture statutes. Every state has an in rem forfeiture statute, meaning the suit is brought against the illegally used property. Some jurisdictions have supplemented their in rem laws with forfeiture authority to sue the individual who committed the unlawful conduct, commonly known as in personam forfeiture.

Criminal forfeiture at common law was an automatic consequence of a felony conviction. The felony offended the King's peace and thus justified denial of the right to own property. Criminal forfeiture fell into great disfavor in the American colonies. In 1790, the first Congress abolished forfeiture of estate. Criminal forfeiture did not surface again in the United States until Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO) in 1970.<sup>4</sup>

For many years state and local enforcement focused on apprehending and punishing street level criminals. These were the criminals they commonly faced at that time. Drug abuse had yet to reach epidemic proportions. State civil forfeiture laws were dormant in many jurisdictions.

With the burgeoning of the drug problem came a new type of criminal - the mid-level drug dealer. The criminal who used drug money to expand a drug operation like any CEO. Criminal sanctions proved ineffective so law enforcement began to use civil forfeiture to fight the drug industry. Some states began to amend their forfeiture statutes to keep pace with the increasingly sophisticated and complex evasive techniques of drug dealers. The result was a wide disparity among state forfeiture provisions. Some were comprehensively tailored to economically attack the drug problem. Others remained simple statutes aimed at a simple drug problem reminiscent of the 1970s.

## MODEL/UNIFORM ACTS

Against the backdrop of such diversity, the Commission was charged with the responsibility of developing a model state forfeiture statute. There currently exist two forfeiture acts intended to guide states. The first is the forfeiture article of the Uniform Controlled Substances Act (UCSA) being drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL). NCCUSL began development of its forfeiture statute in 1988 and continues to draft and modify its language. The second is the Model Asset Seizure and Forfeiture Act (MASFA). MASFA is a product of a task force of prosecutors representing the National District Attorneys Association (NDAA), National Association of Attorneys General (NAAG), and the U.S. Department of Justice. Based on Arizona law, MASFA was promulgated in 1991 and has been enacted in various forms in Arkansas, Georgia, Hawaii, Louisiana, and Oregon.

The Commission examined MASFA and the NCCUSL article, and heard from these statutes' respective drafters. The NCCUSL language has changed frequently with no plan of its finality in the near future. The Commission therefore chose to use MASFA as the foundation from which to craft its model act. Throughout the development process, the Commission remained mindful of the deeply felt concerns surrounding the implementation of forfeiture. Several months of review, discussion, and redrafting culminated in the "Commission Forfeiture Reform Act (CFRA)". CFRA incorporates statutory principles which (1) guide the exercise of discretion; (2) minimize opportunities for abuse; (3) close loopholes which permit escape from forfeiture; (4) provide timely, efficient procedures; and (5) safeguard the legitimate interests of third parties. CFRA's provisions reflecting these principles are a combination of language from existing state and model or uniform forfeiture acts; recommendations of those testifying before the Commission; and the Economic Remedies Task Force proposals responding to concerns about the application of forfeiture.

## KEY POLICY ISSUES

During the drafting of CFRA, the Commission addressed several key policy issues involving forfeiture. The following discussion identifies those issues and explains the Commission's rationale and resolution of each one.

## I. CRIMINAL VS. CIVIL FORFEITURE

**Commission Recommendation:** Civil in rem (against the property) forfeiture.

**Commission Recommendation:** Civil in personam (against the person) forfeiture.

Forfeiture operates in the context of existing legal principles. A criminal action fixes moral culpability and penalizes an individual for breaking society's rules. Punishment is imposed in accordance with a person's determined degree of badness (guilt). The many gradations of badness (guilt) are assigned corresponding punishment options. Triggering the appropriate level of punishment requires identification of a person's level of goodness (innocence) or badness (guilt). A criminal verdict is designed to provide that identification. Because criminal law is punitive, the Constitution guarantees a criminal defendant certain rights. Among these are the right to counsel; the right against self-incrimination; and the right to cross-examine witnesses.

While a civil action may apply to the same conduct, its purpose is remedial. Civil law attaches financial liability for the economic damage suffered due to the conduct. The individuals held liable are in the best position to know about and/or deter the activity.

Criminal and civil actions are complementary yet neither depends on the pursuit or outcome of the other in order to proceed. The good or bad label in a criminal proceeding is of little or no value in deciding a person's economic liability. A very bad person, e.g., a murderer, can cause negligible financial damage. The adverse economic impact caused by a good person, one acquitted of criminal charges, may be significant. Often the result is the attachment of financial responsibility in circumstances where there is no criminal accountability. For example, a manufacturer of a defective product can be held financially liable even though there is no conviction. A landlord who knowingly hires, as a security guard, a parolee who has a history of violence cannot be held criminally liable to tenants harmed by the guard. However, he may be held financially liable. Exxon was found financially liable for the economic damage caused by the oil spill in Alaska even though the captain was acquitted of the criminal charges.

This criminal-civil distinction also exists in forfeiture law. Criminal forfeiture punishes an individual for illegal conduct while civil forfeiture addresses the attendant economic consequences.

Some people argue that civil forfeiture in drug cases is actually a penalty cloaked in remedial language. They contend that, unlike other civil actions, a civil drug forfeiture proceeding compensates no victim. They further state that a person whose property is forfeited recognizes the forfeiture action as a penalty.

It is true there is no one particular individual who receives compensation in a forfeiture proceeding. This is because more than one individual suffers economically from a drug offense. We all suffer when a junkie robs a store to get enough cash for his next hit; a woman smokes crack during her pregnancy; or a bus driver snorts cocaine before work. The costs of the resulting increase in crime and violence; increase in necessary care for drug-affected infants; and decrease in safety and productivity in the workplace must be borne by all of us. The American people are collectively the victims who seek financial redress through civil forfeiture.

It is also undoubtedly true that any individual whose car is seized, whose home has a lien placed on it, or whose bank account is frozen will feel he is being punished. However, the purpose of civil forfeiture is not defined by the subjective reaction of a single person but the legitimate, rational goals of society. Those goals are threefold. First, to remove the financial incentive to engage in drug activity. Second, to restore economic integrity to the marketplace. Third, to compensate society for economic damages by rededicating forfeited property to socially beneficial uses. All of these goals are remedial goals.

While civil forfeiture is sound in theory its application has generated claims of abuse. The National Association of Criminal Defense Lawyers (NACDL) testified that there is a tide of abuse sweeping the nation. In support of this allegation the NACDL representative cited television and newspaper articles, most notably a series of articles published by the Pittsburgh Press in August, 1991. Shortly after the articles ran, several newspapers across the country reported portions of the series. The public is understandably alarmed at what they have read. The Pittsburgh Press series claimed there is a nationwide movement by enforcement officials to routinely deprive people of their property rights. Upon closer scrutiny, however, the articles fail to support this contention.



At a minimum the reliability of the information reported by the Pittsburgh Press is questionable. For example, the authors reported that forfeiture has "surfaced only twice in the United States."<sup>5</sup> In fact, there are over 200 federal statutes that authorize forfeiture.<sup>6</sup> The authors further claimed that 80% of the people whose property was forfeited by the federal government are never charged with an offense.<sup>7</sup> The correct information is that 80% of federal seizures are processed through civil forfeiture. Many of the owners are criminally prosecuted independent of the civil case.<sup>8</sup> These are but a few of the misleading statements made by the authors of the series. Moreover, the case descriptions as reported were often incomplete, omitting key facts used to determine the appropriateness of forfeiture in a specific case.<sup>9</sup>

Even assuming the information is credible, a tide of abuse fails to emerge. The authors reviewed a Drug Enforcement Administration (DEA) printout which summarized the facts of 25,000 seizures.<sup>10</sup> Of these, the authors examined court documents of 510 cases, 2% of the total, which they claimed involved innocent people or people possessing a small amount of drugs.<sup>11</sup> Notably the authors failed to define their use of "innocent" or "small amount". As a result it is impossible to determine whether reasonable minds would agree with the categorization of the 510 cases. This alleged 2% of abuses, they argue, is an impermissible cost to society which justifies the requirement of a conviction in all forfeiture cases.

Such a requirement, however, carries with it countervailing costs which often go unspoken but are nonetheless real. A drug dealer who flees the country can continue to run his operation from abroad. A fugitive cannot be prosecuted while out of the country. Reaching high level leaders in the illegal drug industry requires plea bargaining with lower level employees. To obtain testimony against drug bosses, the state sometimes drops the charges against a boss' employee. In this situation there is no conviction so the employee can keep his property even though admitting it was all obtained through drug dealing. Juveniles in the criminal justice system are adjudged delinquent which does not equate with a conviction. Because juveniles are immune from forfeiture, drug traffickers increase recruitment of minors as drug dealers.

The Commission is asked to destroy an effective enforcement weapon and place our children at greater risk of involvement in drugs to possibly avoid an alleged 2% of abuses. This tradeoff is unsound and the Commission recommends civil forfeiture as one of its model financial remedies laws.

The Commission makes no guarantee that the Act it proposes will never be abused. The only law with no risk of abuse is one which is never enforced. The Commission clearly hopes that its model laws will be used to dismantle the economic foundation of the drug industry and drive away its service providers. Civil forfeiture is an important tool designed to help accomplish that objective. The Commission has drafted CFRA's language to create a balance between its law enforcement objectives and protections for third party interests. This balance preserves civil forfeiture's effectiveness and eliminates the unnecessary risk of unfair forfeitures.

## II. RELATION BACK DOCTRINE

**Commission Recommendation:** Inclusion of relation back with an explicit statement that the doctrine is inapplicable to interests found exempt under the Act.

Relation back is a historical but sometimes controversial doctrine regarding the state's title to for-

edge or reason to know that the conduct giving rise to property's forfeiture had occurred or was likely to occur, if the:

(1) Owner or interest holder holds the property jointly with a person whose conduct gave rise to the property's forfeiture;

(2) (1) person whose conduct gave rise to the property's forfeiture had authority to convey the property of the person claiming the exemption to a good faith purchaser for value at the time of the conduct;

(3) (2) owner or interest holder is criminally responsible for the conduct giving rise to the property's forfeiture, whether or not there is a prosecution or conviction; or

(4) (3) owner or interest holder acquired the property with notice of the property's actual or constructive seizure for forfeiture under this act, or with reason to believe that the property was subject to forfeiture under this act.

(c) Prior to final judgment in a judicial forfeiture proceeding, a court shall limit the scope of a proposed forfeiture to the extent the court finds the effect of the forfeiture is grossly disproportionate to the nature and severity of the owner's conduct including, but not limited to, a consideration of any of the following factors:

(1) The gain received or expected to be received by an owner from conduct that allows forfeiture;

(2) the value of the property subject to forfeiture;

(3) the impact of the forfeiture upon any dependents of an owner ← the extent to which the property actually facilitated the criminal conduct;

~~(4) the nature of the owner's interest in the property and the extent to which the owner gave value to obtain an interest in the property;~~

(4) (5) the nature and extent of the owner's knowledge of the role of others in the conduct that allows forfeiture of the property and efforts of the owner to prevent the conduct; and

(5) (6) the totality of the circumstances regarding the investigation.

New Sec. 7. (a) Property may be seized for forfeiture by a law enforcement officer upon process issued by the district court. The court may issue a seizure warrant on an affidavit under oath demonstrating that probable cause exists for the property's forfeiture or that the property has been the subject of a previous final judgment of forfeiture in the courts of any state or of the United States. The court may order that the property be seized on such terms and conditions as are reasonable in the discretion of the court. The order may be made on or in connection with a search warrant. All real property is to be seized constructively or pursuant to a preseizure adversarial judicial determination of probable cause, except that

(requested by KBA reflects new NUCCSL language)

6-19

1 on motion of the plaintiff's attorney, and may be consolidated on  
2 motion of an owner or interest holder.

3 (s) There shall be a rebuttable presumption, in the manner pro-  
4 vided in subsection (a) of K.S.A. 60-414, and amendments thereto,  
5 that any property in or upon which controlled substances are located  
6 at the time of seizure, was being used or intended for use to facilitate  
7 an act giving rise to forfeiture.

8 New Sec. 13. (a) A judicial *in rem* forfeiture proceeding brought  
9 by the plaintiff's attorney pursuant to a notice of pending forfeiture  
10 or verified complaint for forfeiture is also subject to the provisions  
11 of this section. If a forfeiture is authorized by this act, it shall be  
12 ordered by the court in the *in rem* action. petition

(clean-up)

13 (b) An action *in rem* may be brought by the plaintiff's attorney  
14 in addition to, or in lieu of, civil *in personam* forfeiture procedures.  
15 The seizing agency may serve the complaint in the manner provided  
16 by subsection (a)(3) of section 9, or as provided by the rules of civil  
17 procedure.

18 (c) Only an owner of or an interest holder in the property who  
19 has timely filed a proper claim may file an answer in an action *in*  
20 *rem*. For the purposes of this section, an owner of or interest holder  
21 in property who has filed a claim and answer shall be referred to  
22 as a claimant.

23 (d) The answer shall be in affidavit form, signed by the claimant  
24 under oath, and sworn to by the affiant before one who has authority  
25 to administer the oath, under penalty of perjury, K.S.A. 21-3805,  
26 and amendments thereto, or making a false writing, K.S.A. 21-3711,  
27 and amendments thereto, and shall otherwise be in accordance with  
28 the rules of civil procedure on answers and shall also set forth all  
29 of the following:

30 (1) The caption of the proceedings and identifying number, if  
31 any, as set forth on the notice of pending forfeiture or complaint  
32 and the name of the claimant.

33 (2) The address where the claimant will accept mail.

34 (3) The nature and extent of the claimant's interest in the prop-  
35 erty.

36 (4) The date, the identity of the transferor, and the detailed  
37 description of the circumstances of the claimant's acquisition of the  
38 interest in the property.

39 (5) The specific provision of this act relied on in asserting that  
40 such property is not subject to forfeiture.

41 (6) All essential facts supporting each assertion.

42 The specific relief sought.

43 The answer shall be filed within 20 days after service of the

2-20

1 fund report to the legislature on or before February 1 of each year.  
2 Such report shall include, but not be limited to: (1) The fund balance  
3 on December 1; (2) the deposits and expenditures for the previous  
4 12-month period ending December 1. Upon the effective date of  
5 this act, the director of accounts and reports is directed to transfer  
6 each agency's balance in the state special asset forfeiture fund to the  
7 agency's new, state forfeiture fund. All liabilities of the state special  
8 asset forfeiture fund existing prior to such date are hereby imposed  
9 on the Kansas bureau of investigation state forfeiture fund, Kansas  
10 highway patrol state forfeiture fund and the Kansas department of  
11 corrections state forfeiture fund. The state special asset forfeiture  
12 fund is hereby abolished.

13 (2) If the law enforcement agency is a city or county agency, the  
14 entire amount shall be deposited in such city or county treasury and  
15 credited to a special law enforcement trust fund. Each agency shall  
16 compile and submit annually a special law enforcement trust fund  
17 report to the entity which has budgetary authority over such agency  
18 and such report shall specify, for such period, the type and ap-  
19 proximate value of the forfeited property received, the amount of  
20 any forfeiture proceeds received, and how any of those proceeds  
21 were expended.

22 (3) Moneys in the Kansas bureau of investigation state forfeiture  
23 fund, Kansas highway patrol state forfeiture fund, Kansas department  
24 of corrections state forfeiture fund and the special law enforcement  
25 trust funds shall not be considered a source of revenue to meet  
26 normal operating expenses. Such funds shall be expended by the  
27 agencies or departments through the normal city, county or state  
28 appropriation system and shall be used for such special, additional  
29 law enforcement purposes as the law enforcement agency head deems  
30 appropriate. Neither future forfeitures nor the proceeds therefrom  
31 shall be used in planning or adopting a law enforcement agency's  
32 budget.

33 New Sec. 18. (a) A county attorney, district attorney, the attor-  
34 ney general, ~~other plaintiff's attorney~~ or such attorney's designee  
35 may conduct an investigation of alleged conduct in violation of this  
36 act. Such ~~plaintiff's~~ attorney is authorized, before commencement of  
37 any civil proceeding or action under this act, to subpoena witnesses,  
38 compel such attendance, examine witnesses under oath, and require  
39 the production of documentary evidence for inspection, reproducing  
40 or copying. Except as otherwise provided by this section, such plain-  
41 tiff's attorney shall proceed under this subsection with the same  
42 powers and limitations, and judicial oversight and enforcement, and  
43 in the manner provided by this act and by K.S.A. 22-3101 *et seq.*,

\*(clean-up)

1 and amendments thereto.

2 (b) The examination of all witnesses under this section shall be  
3 conducted by the plaintiff's attorney or such attorney's designee  
4 before a person authorized to administer oaths. The testimony shall  
5 be taken stenographically or by a sound recording device and may —\*(clean-up)  
6 be transcribed. The ~~plaintiff's~~ attorney shall exclude from the place  
7 where the examination is held all persons except the person being  
8 examined, such person's counsel, if any, the authorized individual  
9 or individuals before whom the testimony is to be taken, law en-  
10 forcement officials and any stenographer taking such testimony. Prior  
11 to oral examination, the person shall be advised of such person's  
12 right to refuse to answer any questions on the basis of the privilege  
13 against self-incrimination. The examination shall be conducted in a  
14 manner consistent with the taking of depositions under the code of  
15 civil procedure.

16 (c) Except as otherwise provided in this act, no documentary  
17 material, transcripts, oral testimony or copies of it in the possession  
18 of the plaintiff's attorney shall be available, prior to the filing of a  
19 civil or criminal proceeding or action relating to it, for examination  
20 by any individual other than a law enforcement officer or agent of  
21 such officer without the consent of the person who produced the  
22 material or transcripts.

23 (d) No person, with intent to avoid, evade, prevent, or obstruct  
24 compliance in whole or in part by any person with any duly served —\*(clean-up)  
25 subpoena of the plaintiff's attorney under this section, shall knowingly  
26 remove from any place, conceal, withhold, destroy, mutilate any  
27 documentary material that is the subject of a subpoena. A violation  
28 of this subsection shall be a class B nonperson misdemeanor.

29 (e) Acts or omissions by the attorneys for the seizing agencies in  
30 the course of the attorney's duties in the enforcement of any of the  
31 provisions of this act, including provision of any legal services prior  
32 to charging, complaint or seizure, are prosecutorial and shall not  
33 subject the attorneys or the attorney's principals to civil liability.

34 (f) During the investigation of real property and upon probable  
35 cause to believe the real property is in violation of this act, but  
36 before any liens or other proceedings are initiated under this act, a  
37 seizing agency may place a notice of potential claim with the register  
38 of deeds in the county in which such real property is located as  
39 notification that a forfeiture investigation is in progress and that a  
40 forfeiture proceeding against such real property may be initiated by  
41 the seizing agency. Such notice shall automatically expire 180 days  
42 after filing, unless renewed, and shall contain such real property's  
43 legal description, the date the investigation began, and the name,

9-64  
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1 position, agency, business address, and business telephone number  
2 of the person filing such notice of potential claim. The notice shall  
3 be sworn to and verified in the manner provided for in the filing  
4 of *lis pendens*. The attorney agency shall not be charged a filing or  
5 release fee.

6 New Sec. 19. (a) If a person is or may be called to produce  
7 evidence at a deposition, hearing or trial under this act or at an \*(clean-up)  
8 investigation brought by the plaintiff's attorney under section 18, the  
9 district court for the county in which the deposition, hearing, trial,  
10 investigation is or may be held, upon certification in writing of  
11 a request of the county or district attorney for the county, shall issue  
12 an order, ex parte or after a hearing, requiring the person to produce  
13 evidence, notwithstanding that person's refusal to do so on the basis  
14 of the privilege against self-incrimination.

15 (b) The county or district attorney may certify in writing a request  
16 for an ex parte order under this section if in such county or district  
17 attorney's judgment:

18 (1) The production of the evidence may be necessary to the public  
19 interest; and

20 (2) the person has refused or is likely to refuse to produce ev-  
21 idence on the basis of such person's privilege against self-incrimi-  
22 nation.

23 (c) If a person refuses, on the basis of such person's privilege  
24 against self-incrimination, to produce evidence in any proceeding  
25 described in this act, and the presiding officer informs the person  
26 of an order issued under this section, the person may not refuse to  
27 comply with the order. The person may be compelled or punished  
28 by the district court issuing an order for civil or criminal contempt.

29 (d) The production of evidence compelled by order issued under  
30 this section, and any information directly or indirectly derived from  
31 such evidence, may not be used against the person in a subsequent  
32 criminal case, except in a prosecution for perjury, K.S.A. 21-3805,  
33 and amendments thereto, making false writing, K.S.A. 21-3711, and  
34 amendments thereto, or an offense otherwise involving a failure to  
35 comply with the order. Nothing in this subsection shall be inter-  
36 preted as preventing the use in a criminal action any evidence law-  
37 fully obtained independently of these procedures.

38 New Sec. 20. A civil action under this act shall be commenced  
39 within five years after the last conduct giving rise to forfeiture or  
40 the cause of action became known or should have become known,  
41 excluding any time during which either the property or defendant  
42 of the state or in confinement, or during which criminal  
43 proceedings relating to the same conduct are pending.

2293

prosecution of any indictment or information, the court which has jurisdiction of such property may transfer the same to the jurisdiction of any other court, including courts of another state or federal courts, where it is shown to the satisfaction of the court that such property is required as evidence in any prosecution in such other court.

(2) When property seized is no longer required as evidence, it shall be disposed of as follows:

(a) Property stolen, embezzled, obtained by false pretenses, or otherwise obtained unlawfully from the rightful owner thereof shall be restored to the owner;

(b) money shall be restored to the owner unless such money was contained in a slot machine or otherwise used in unlawful gambling or lotteries, in which case it shall be forfeited, and shall be paid to the state treasurer pursuant to K.S.A. 20-2801, and amendments thereto;

(c) property which is unclaimed or the ownership of which is unknown shall be sold at public auction to be held by the sheriff and the proceeds, less the cost of sale and any storage charges incurred in preserving such property, shall be paid to the state treasurer pursuant to K.S.A. 20-2801, and amendments thereto;

(d) articles of contraband shall be destroyed, except that any such articles the disposition of which is otherwise provided by law shall be dealt with as so provided and any such articles the disposition of which is not otherwise provided by law and which may be capable of innocent use may in the discretion of the court be sold and the proceeds disposed of as provided in subsection (1)(b) (2)(b);

firearms, ammunition, explosives, bombs and like devices, which have been used in the commission of crime, may be returned to the rightful owner, ~~destroyed or sold in the discretion of the court having jurisdiction of the property, and the sale and distribution of the proceeds shall be as provided in K.S.A. 21-4206, and amendments thereto;~~

(f) controlled substances forfeited under the uniform controlled substances act shall be dealt with as provided under K.S.A. 65-4135 sections 1 through 26, and amendments thereto;

(g) unless otherwise provided by law, all other property shall be disposed of in such manner as the court in its the court's sound discretion shall direct.

Sec. 28. K.S.A. 22-2512, 65-4135, 65-4136, 65-4156, 65-4171, 65-4172, 65-4173, 65-4174 and 65-4175 and K.S.A. 1992 Supp. 22-4801, 22-4802, 22-4803, 22-4804, 22-4805, 22-4806, 22-4807, 22-4808, 22-4810, 22-4811 and 22-4812 are hereby repealed.

or in the discretion of the court having jurisdiction of the property,

forfeited to the Kansas bureau of investigation

(language taken from SB 551 Rep. Garner's proposal)



# 3

TESTIMONY ON BEHALF OF  
PALMER COMPANIES, INC  
ON HB 2423  
Senate Judiciary Committee  
April 7, 1994

1. HB 2423, Civil Asset Forfeiture, is much improved from the initial proposal, thanks to the joint efforts of the parties who have studied this complex bill.

2. Asset forfeiture is a civil adjunct to criminal penalties, the purpose of which is to punish wrongdoers and deter prohibited acts.

3. Because such forfeitures are civil proceedings they lack the safeguards of the criminal justice system.

4. Experience has shown that it is extremely dangerous to allow asset forfeitures to serve as a direct revenue-generating system for law enforcement agencies.

5. Repeatedly documented abuses of forfeiture in other jurisdictions arise from the bounty-hunter environment when law enforcers keep the assets they seize.

6. HB 2423 allows the law enforcement agency to keep forfeited property, but contains (a) no requirement for a prior criminal conviction, trial or even indictment or charges before forfeiture is justified, nor (b) any provision for an award of attorneys fees to a citizen whose property may be wrongly seized.

7. Thus, there is a built-in incentive for abuse, and no counter-incentive; there is no internal check and balance against the possibility of abuse.

8. Two possible solutions:

(a) require the filing of criminal charges (at a minimum) before any seizures, and allow the recovery of legal defense costs if a seizure is not justified; or

(b) require all seized property to be sold and the proceeds subjected to usual government appropriation procedures before they are available to the seizing agency (if not junk, contraband or weapons).

9. The attached amendments reflect a way to accomplish the second alternative.

- Richard F. Hayse

*Senate Judiciary*  
*4-12-94*  
*attachment 3-1*

1 security agreements of record prior to the forfeiture held by an  
 2 interest holder and the title shall be recognized by all courts, by  
 3 this state, and by all agencies of and any political subdivision. Like-  
 4 wise on entry of judgment in favor of a person claiming an interest  
 5 in the property that is subject to proceedings to forfeit property  
 6 under this act, the court shall enter an order that the property or  
 7 interest in property shall be released or delivered promptly to that  
 8 person free of liens and encumbrances under this act and the person's  
 9 cost bond shall be discharged.

10 (e) Upon motion by the plaintiff's attorney, if it appears after a  
 11 hearing there was reasonable cause for the seizure for forfeiture or  
 12 for the filing of the notice of pending forfeiture or complaint, the  
 13 court shall cause a finding to be entered that reasonable cause ex-  
 14 isted, or that any such action was taken under a reasonable good  
 15 faith belief that it was proper, and the claimant is not entitled to  
 16 costs or damages, and the person or seizing agency who made the  
 17 seizure, and the plaintiff's attorney, are not liable to suit or judgment  
 18 on account of the seizure, suit or prosecution.

19 (f) The court shall order a claimant who fails to establish that a  
 20 substantial portion of the claimant's interest is exempt from forfeiture  
 21 under section 5 to pay the reasonable costs and expenses of any  
 22 claimant who established such claimant's interest is exempt from  
 23 forfeiture under section 5 and to pay the reasonable costs and ex-  
 24 penses of the seizing agency for the investigation and litigation of  
 25 the matter, including reasonable attorney fees, in connection with  
 26 that claimant.

27 (g) If more than one law enforcement agency is substantially  
 28 involved in effecting a forfeiture pursuant to this act, and no inter-  
 29 agency agreement exists, the court shall equitably distribute the  
 30 proceeds among such agencies.

shall, subject to any lien  
 preserved by the court:

31 New Sec. 17. (a) When property is forfeited under this act, the  
 32 law enforcement agency may:

33 ~~(1) Retain such property for official use or transfer the custody~~  
 34 ~~or ownership to any local, state or federal agency, subject to any~~  
 35 ~~lien preserved by the court;~~

1 36 (2) destroy or use for investigative or training purposes, any il-  
 37 legal or controlled substances and equipment or other contraband,  
 38 provided that materials necessary as evidence shall be preserved;

2 39 (3) sell property which is not required by law to be destroyed  
 40 and which is not harmful to the public:  
 41 (A) All property, except real property, designated by the seizing  
 42 agency to be sold shall be sold at public sale to the highest bidder  
 43 for cash without appraisal. The seizing agency shall first cause notice

1 of the sale to be made by publication at least once in an official  
 2 county newspaper as defined by K.S.A. 64-101, and amendments  
 3 thereto. Such notice shall include the time, place, and conditions of  
 4 the sale and description of the property to be sold. Nothing in this  
 5 subsection shall prevent a state agency from using the state surplus  
 6 property system and such system's procedures shall be sufficient to  
 7 meet the requirements of this subsection.

8 (B) Real property may be sold pursuant to subsection (A), or the  
 9 seizing agency may contract with a real estate company, licensed in  
 10 this state, to list, advertise and sell such real property in a com-  
 11 mercially reasonable manner.

12 (C) No employee or public official of any agency involved in the  
 13 investigation, seizure or forfeiture of seized property may purchase  
 14 or attempt to purchase such property; or

3 15 (4) salvage the property, ~~subject to any lien preserved by the~~  
 16 ~~court; or.~~

17 (5) dispose of firearms, when forfeited, which can be law-  
 18 fully possessed or sold under federal and state law, in the  
 19 following manner, at the discretion of the seizing agency:

20 (A) Be destroyed;

21 (B) used for official purposes; or

22 (C) be sold. Such firearms shall be sold only to a federally  
 23 licensed, registered firearms dealer at auction, by sealed bid,  
 24 or in trade.

25 (b) When firearms are forfeited under this act, the firearms in  
 26 the discretion of the seizing agency, shall be destroyed, used within  
 27 the seizing agency for official purposes, traded to another law en-  
 28 forcement agency for use within such agency or given to the Kansas  
 29 bureau of investigation for law enforcement, testing, comparison  
 30 or destruction by the Kansas bureau of investigation forensic lab-  
 31 oratory.

32 (b) (c) The proceeds of any sale shall be distributed in the fol-  
 33 lowing order of priority:

34 (1) For satisfaction of any court preserved security interest or  
 35 lien;

36 (2) thereafter, for payment of all proper expenses of the pro-  
 37 ceedings for forfeiture and disposition, including expenses of seizure,  
 38 inventory, appraisal, maintenance of custody, preservation of avail-  
 39 ability, advertising, service of process, sale and court costs;

40 (3) reasonable attorney fees:

41 (A) If the plaintiff's attorney is a county or district attorney, an  
 42 assistant, or another governmental agency's attorney, fees shall not  
 43 exceed 15% of the total proceeds, less the amounts of subsection

1 (b) (c)(1) and (2), in an uncontested forfeiture nor 20% of the total  
 2 proceeds, less the amounts of subsection (b) (c)(1) and (2), in a  
 3 contested forfeiture. Such fees shall be deposited in the county or  
 4 city treasury and credited to the special prosecutor's trust fund.  
 5 Moneys in such fund shall not be considered a source of revenue  
 6 to meet normal operating expenditures, including salary enhance-  
 7 ment. Such fund shall be expended by the county or district attorney,  
 8 or other governmental agency's attorney through the normal county  
 9 or city appropriation system and shall be used for such additional  
 10 law enforcement and prosecutorial purposes as the county or district  
 11 attorney or other governmental agency's attorney deems appropriate,  
 12 including educational purposes. All moneys derived from past or  
 13 pending forfeitures shall be expended pursuant to this act. The board  
 14 of county commissioners shall provide adequate funding to the county  
 15 or district attorney's office to enable such office to enforce this act.  
 16 Neither future forfeitures nor the proceeds therefrom shall be used  
 17 in planning or adopting a county or district attorney's budget; or  
 18 (B) if the plaintiff's attorney is a private attorney, such reasonable  
 19 fees shall be negotiated by the employing law enforcement agency;  
 20 (4) repayment of law enforcement funds expended in purchasing  
 21 of contraband or controlled substances, subject to any interagency  
 22 agreement.  
 23 (e) (d) Any proceeds remaining shall be credited as follows,  
 24 subject to any interagency agreement:  
 25 (1) If the law enforcement agency is a state agency, the entire  
 26 amount shall be deposited in the state treasury and credited to such  
 27 agency's state forfeiture fund. There is hereby established in the  
 28 state treasury the following state funds: Kansas bureau of investi-  
 29 gation state forfeiture fund, Kansas highway patrol state forfeiture  
 30 fund and Kansas department of corrections state forfeiture fund.  
 31 Expenditures from the Kansas bureau of investigation state forfeiture  
 32 fund shall be made upon warrants of the director of accounts and  
 33 reports issued pursuant to vouchers approved by the attorney general  
 34 or by a person or persons designated by the attorney general. Ex-  
 35 penditures from the Kansas highway patrol state forfeiture fund shall  
 36 be made upon warrants of the director of accounts and reports issued  
 37 pursuant to vouchers approved by the superintendent of the highway  
 38 patrol or by a person or persons designated by the superintendent.  
 39 Expenditures from the Kansas department of corrections state for-  
 40 feiture fund shall be made upon warrants of the director of accounts  
 41 and reports issued pursuant to vouchers approved by the secretary  
 42 of the department of corrections or by a person or persons designated  
 43 by the secretary. Each agency shall compile and submit a forfeiture

1 fund report to the legislature on or before February 1 of each year.  
 2 Such report shall include, but not be limited to: (1) The fund balance  
 3 on December 1; (2) the deposits and expenditures for the previous  
 4 12-month period ending December 1. Upon the effective date of  
 5 this act, the director of accounts and reports is directed to transfer  
 6 each agency's balance in the state special asset forfeiture fund to the  
 7 agency's new, state forfeiture fund. All liabilities of the state special  
 8 asset forfeiture fund existing prior to such date are hereby imposed  
 9 on the Kansas bureau of investigation state forfeiture fund, Kansas  
 10 highway patrol state forfeiture fund and the Kansas department of  
 11 corrections state forfeiture fund. The state special asset forfeiture  
 12 fund is hereby abolished.

13 (2) If the law enforcement agency is a city or county agency, the  
 14 entire amount shall be deposited in such city or county treasury and  
 15 credited to a special law enforcement trust fund. Each agency shall  
 16 compile and submit annually a special law enforcement trust fund  
 17 report to the entity which has budgetary authority over such agency  
 18 and such report shall specify, for such period, the type and ap-  
 19 proximate value of the forfeited property received, the amount of  
 20 any forfeiture proceeds received, and how any of those proceeds  
 21 were expended.

22 (3) Moneys in the Kansas bureau of investigation state forfeiture  
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 27 agencies or departments through the normal city, county or state  
 28 appropriation system and shall be used for such special, additional  
 29 law enforcement purposes as the law enforcement agency head deems  
 30 appropriate. Neither future forfeitures nor the proceeds therefrom  
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 32 budget.

33 New Sec. 18. (a) A county attorney, district attorney, the attor-  
 34 ney general, ~~other plaintiff's attorney~~ or such attorney's designee  
 35 may conduct an investigation of alleged conduct in violation of this  
 36 act. Such plaintiff's attorney is authorized, before commencement of  
 37 any civil proceeding or action under this act, to subpoena witnesses,  
 38 compel such attendance, examine witnesses under oath, and require  
 39 the production of documentary evidence for inspection, reproducing  
 40 or copying. Except as otherwise provided by this section, such plain-  
 41 tiff's attorney shall proceed under this subsection with the same  
 42 powers and limitations, and judicial oversight and enforcement, and  
 43 in the manner provided by this act and by K.S.A. 22-3101 *et seq.*,

may

Mike Kucin  
4  
COPY

SESSION OF 1994

**SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2423**

As Recommended by House Committee on  
Judiciary

**Brief\***

H.B. 2423 establishes the Kansas Standard Asset Seizure and Forfeiture Act. Among the main provisions of the bill are the following:

1. **Conduct Giving Rise to Forfeiture.** Conduct and offenses giving rise to forfeiture, whether or not there is a prosecution or conviction are:
  - a. all offenses which authorize forfeiture (under current law this includes provisions in the Controlled Substances and Simulated Controlled Substances Law, Cattle Rustling Law, drive by shootings, and gambling);
  - b. violations of the Uniform Controlled Substances Act;
  - c. theft of livestock which is classified as a felony;
  - d. unlawful discharge of a firearm;
  - e. money laundering;
  - f. gambling and commercial gambling;

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\* Supplemental Notes are prepared by the Legislative Research Department and do not express legislative intent.

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Senate Judiciary  
4-1-94  
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- g. an act or omission occurring outside Kansas which, if committed in Kansas, would be included herein, whether prosecuted or not;
- h. an act or omission committed in furtherance of any act or omission described herein including any inchoate or preparatory offense, whether or not there is a prosecution or conviction; and
- i. any solicitation or conspiracy to commit any act or omission described herein whether or not there is a prosecution or conviction.

2. **Property Subject to Forfeiture.** The following property is subject to forfeiture subject to all mortgages, deeds of trust, financing statements, or security agreements recorded prior to the forfeiture held by an interest holder.

- a. property described in specific statutes;
- b. all property, including the whole of a tract of land and any appurtenances to real property that is furnished in an exchange that constitutes conduct giving rise to forfeiture or used in any manner to facilitate conduct giving rise to forfeiture;
- c. all proceeds of any conduct giving rise to forfeiture;
- d. any property derived from any proceeds obtained from the commission of an offense listed above;
- e. all weapons possessed, used, or available for use in any manner to facilitate conduct giving rise to forfeiture;

- f. homestead property to the extent the homestead was acquired with proceeds from conduct giving rise to forfeiture;
  - g. contraband; and
  - h. all controlled substances that have been manufactured, distributed, dispensed, possessed, or acquired in violation of a statute.
- 3. **Other Property.** The Court can order the forfeiture of any other property, up to the value of the defendant's property subject to forfeiture under the following conditions:
  - a. the defendant's property cannot be located;
  - b. the property has been transferred, conveyed, sold, or deposited with a third party;
  - c. the property is beyond the jurisdiction of the court;
  - d. the property has been substantially diminished in value while not in custody;
  - e. the property has been commingled with other property and cannot be easily divided;
  - f. the property is subject to any interest of another person and this interest is exempt from forfeiture; or
  - g. the property is exempt due to a constitutional or statutory provision.

4. **Exemptions.** Exemptions to property subjected to forfeiture includes the following:
- a. no real property or conveyance can be forfeited unless the underlying conduct was a felony;
  - b. no common carrier conveyances can be forfeited unless the owner or person in charge of the conveyance is a consenting party or privy to a listed violation;
  - c. property acquired by the owner or interest holder before or during conduct giving rise to forfeiture and the owner or interest holder did not know or could not reasonably have known of the act that was likely to occur or acted reasonably to prevent such conduct;
  - d. property acquired after the conduct giving rise to forfeiture and the acquisition was in good faith for value and the acquirer was not knowingly taking part in an illegal transaction; and
  - e. attorney fees which include an interest in property acquired in good faith to compensate for representation in criminal matters under this Act (if an attorney knew of a judicial determination the property is subject to forfeiture, there is no exemption).
5. **Proportionality.** The court is required to limit the scope of a proposed forfeiture to the extent the court finds the effects of the forfeiture is grossly disproportionate to the nature and severity of the owner's conduct. Factors to be considered include, but are not limited to:

- a. the gain received;
- b. the value of the property involved;
- c. the impact on any dependents of an owner;
- d. the nature of the owner's interest in the property; and
- e. the nature and extent of the owner's knowledge of the role of others in the conduct giving rise to forfeiture and the efforts of the owner to prevent such conduct.

6. **Seizure.**

- a. Property may be seized, upon process, by means of a search warrant issued by the district court upon a showing, under oath, that probable cause exists or the property has been ordered forfeited by another state or the United States. Real property must be seized constructively or by a preseizure adversarial determination of probable cause.
- b. Property can be seized, without process, if there is probable cause to believe the property is subject to forfeiture.
- c. Notice provisions for seizure are included in the bill.

7. **Bond.** An owner of property seized for forfeiture can obtain release of the property by posting a surety bond or cash in an amount equal to the full market value of the property as determined by the plaintiff's attorney. The seizing agency may refuse to release the property if the



bond is inadequate, if the property is retained as contraband or evidence or if the property is particularly altered or designed for use in conduct giving rise to forfeiture. If bond is posted and the property is forfeited the bond or surety cash must be returned.

8. **Commencement of Forfeiture Proceedings.** Forfeiture proceedings either *in rem* or *in personam* must be initiated within 90 days of seizure. If the owner claimant files a petition for exemption the filing of the proceeding may be delayed for a total of 180 days.
9. **Liens.** The bill creates a procedure which allows for filing a lien on property upon the commencement of any civil or criminal proceedings that pertain to conduct that might initiate a forfeiture proceeding. The filing of a lien will constitute notice to any person claiming an interest in the property. Under these provisions a trustee, with notice, has 15 days to furnish the following information:
  - a. the name and address for each person or entity for whom the property is held;
  - b. the description of all other property being held for the named person; and
  - c. a copy of the applicable trust agreement or other instrument under which the trustee appears as record owner.

Failure to comply with the above requirements will subject the trustee to a \$100 fine for each day of noncompliance. Failure of a trustee to comply with general lien provisions is a class B nonperson misdemeanor.

10. **Disposal.** A law enforcement agency may dispose of forfeited property by the following:

- a. retain the property for official use or transfer to any local, state, or federal agency, subject to any lien;
- b. destroy or use for investigative or training purposes; and
- c. sell any property not required to be destroyed or which is not harmful to the public.

Firearms shall be destroyed unless used for official purposes, traded to another law enforcement agency, or given to the KBI for official use or destruction.

Proceeds of any sale shall be distributed as follows:

- a. for the satisfaction of any court preserved security interest or lien;
- b. for payment of proper expenses of the forfeiture proceedings; and
- c. reasonable attorney fees to go to the Special Prosecutors Trust Fund to be used for additional law enforcement and prosecutorial purposes.

11. **Funds.** The bill establishes in the State Treasury the Kansas Bureau of Investigation State Forfeiture Fund, the Kansas Highway Patrol State Forfeiture Fund, and the Kansas Department of Corrections State Forfeiture Fund. Expenditures from each of the funds, respectively, is subject to approval from the Attorney General, the Superintendent of the Highway Patrol, and the Secretary of Corrections. The State Special Asset Forfeiture Fund will be abolished.

## **Background**

The issue of forfeiture was the subject of a 1993 interim study conducted by the House Judiciary standing committee. Proponents of the measure include the Attorney General and the Kansas Bureau of Investigation. Opposition and concern were generally expressed by the delegate from the Uniforms Law Commission's Committee on Forfeiture and the Kansas Bar Association.

KANSAS SENATE

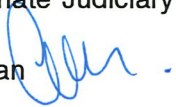
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NESS, PAWNEE, ROOKS,  
AND RUSH COUNTIES

OFFICE OF THE VICE-PRESIDENT  
STATE CAPITOL  
TOPEKA, KANSAS 66612-1504

DATE: April 30, 1994  
TO: Members of the Senate Judiciary Committee  
FROM: Senator Jerry Moran   
RE: Minutes of Senate Judiciary Committee

Attached are minutes of the Senate Judiciary Committee for April 29, 1994 for your approval. Please contact Darlene Thomas, Committee Secretary at 7383 today if you are not in agreement with these minutes. If she has not heard from you today, we will consider them approved.