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Opposition Testimony to the House Judiciary Committee on SB458 March 12, 2024

Chairman Humphries, Vice Chair Lewis, Ranking Member Highberger, and members of the committee:

The Johnson County Sheriff's Office opposes SB458. This bill could severely hamper our ability to combat and change drug distribution, trafficking, and human trafficking, among other crimes. It exceeds the recommendations of the Judicial Council Civil Asset Forfeiture Advisory Committee by including recommendations that the advisory committee rejected.

There has been much work done on civil asset forfeiture in Kansas:

- In the 2015-2016 Kansas Legislative Session three bills were introduced: **HB2271**, **HB2638**, and **HB2699**.
- In 2016, there was a Legislative Post Audit Report on the topic.¹
- In 2017, eight bills were introduced in the Legislature. Five in the House and three in the Senate.
- In 2017, the Judicial Council took up the topic at the request of Representative Blaine Finch, and Senator Rick Wilborn. The Judicial Council created a new advisory committee to conduct the study. This advisory committee issued a report on December 21, 2017.²
- As a result of the advisory committee report, **HB2459** was introduced in 2018 and passed both chambers and became law. This bill included all the recommended actions by the advisory committee.
- In 2023, **HB2380** was introduced and had a hearing in House Judiciary.
- In 2023, Representative Fred Patton and Representative Stephen Owens requested the Judicial Council review **HB2380**, and they did so.
- In the Summer and Fall of 2023, the Judicial Council Advisory Council meet for four full-day sessions and one Zoom conference. The result of that work resulted in eight recommended actions.

¹ Seized and Forfeited Property: Evaluating Compliance with State Law and How Proceeds are Tracked, Used, and Reported Legislative Post Audit Report. Legislative Post Audit Committee. July 2016. Accessed March 1, 2024.

<https://www.kslpa.org/wp-content/uploads/2019/07/r-16-009.pdf>

² Report of the Judicial Council Civil Asset Forfeiture Advisory Committee, December 21, 2017. Accessed March 1, 2024.

<https://kansasjudicialcouncil.org/Documents/Studies%20and%20Reports/2017%20Reports/Civil%20Asset%20Forfeiture%20Report%20-%20Approved%20by%20JC.pdf>

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- Five days after the Judicial Council report was issued, the Special Committee on Asset Forfeiture met on December 6, 2023. The committee was authorized one day to meet. They issued a report of their recommendations, some of which agreed with the Judicial Council and some that did not.
- In 2024, two bills were introduced on civil asset forfeiture, **HB 2606** which includes all the recommended actions by the Judicial Council and **SB458**, which includes items the Judicial Council did not recommend.

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Some of the bills referenced were introduced when I was in the Legislature where I served as Senate Judiciary Vice Chair, and Chair of Senate Corrections and Juvenile Justice. Other bills came after I had left the Legislature and returned to law enforcement. Some we testified on and other we did not.

We did testify on **HB2459 Amending the Kansas standard asset seizure and forfeiture act and establishing the Kansas asset seizure and forfeiture repository** as a neutral conferee. We felt the changes, for the most part, made for a better system, particularly the reporting component.

The Johnson County Sheriff's Office did not testify on **HB2606** as we felt that testimony by the law enforcement associations and state law enforcement agencies encapsulated our positions and concerns. We did watch the hearing and found that to be true. **In this hearing there were 9 proponents, 1 neutral, and 6 opponent conferees. The Kansas Attorney General and Director of the Kansas Bureau of Investigation were proponents of this bill.**

I would also like to ask that the record be corrected on the House Judiciary Committee Early Release Testimony for 02/13/2024. Currie Myers is not the Sheriff of Johnson County and does not represent the views of the Johnson County Sheriff's Office. He is the former Sheriff of Johnson County.

We also did not testify on this bill in Senate Judiciary as we believed that the law enforcement associations and state law enforcement agencies would also mirror our position and concerns. We also monitored that hearing and believed there was overwhelming testimony to prevent the bill from moving without amendments.

We also watched the floor debate in the Senate and felt the carrier of the bill did not present all sides of the issue. While national studies from academia were presented there was **little to no presentation of the fact that opponents of the bill outnumbered proponents nearly 3 to 1. There was not a single**

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citizen of Kansas that appeared to testify about how asset forfeiture was wrongly used against them. We feel compelled to present testimony on **SB458** now.

To be frank, we feel that **HB2606** is the superior bill of the two asset forfeiture bills in the Legislature this year. Just as **HB2459** was a product of the Judicial Council Advisory Committee for the most part, so is **HB2606**, for the most part. However, we have not seen any indication that Senate Judiciary intends to take up **HB2606**. Given my experience in the Legislature, I understand that both bills could go to conference. But if **HB2606** is not heard in Senate Judiciary, the Johnson County Sheriff's Office would prefer **SB458** not be worked in the House Committee. Certain provisions in this bill are a "bridge too far." For that matter, we would prefer you not work **SB458** regardless of the outcome of **HB2606**, or amend **SB458** to mirror **HB2606**, with some possible amendments, which I will address later in my testimony.

We feel that there have been some misconceptions about the civil asset forfeiture process and that perhaps, even some misinformation has been brought up in previous committee hearings over the years. Our intent with this section of our testimony is to briefly outline the process, and address some of the concerns/misconceptions we have heard.

First, civil asset forfeiture is a court proceeding. It is a civil court proceeding, not a criminal proceeding. As with all civil court proceedings in Kansas the court is bound by the law on how to proceed.

Civil proceedings use the "preponderance of the evidence" standard to establish the prevailing party in a civil action. The federal Code of Federal Regulations defines preponderance of the evidence as "Preponderance of the evidence means proof by information that, compared with information opposing it, leads to the conclusion that the fact at issue is more probably true than not."³

Kansas uses this standard in many different areas of the law. A few examples are listed below:
Kansas Open Records Act
Sentencing Guidelines in Criminal Cases
Contract Law

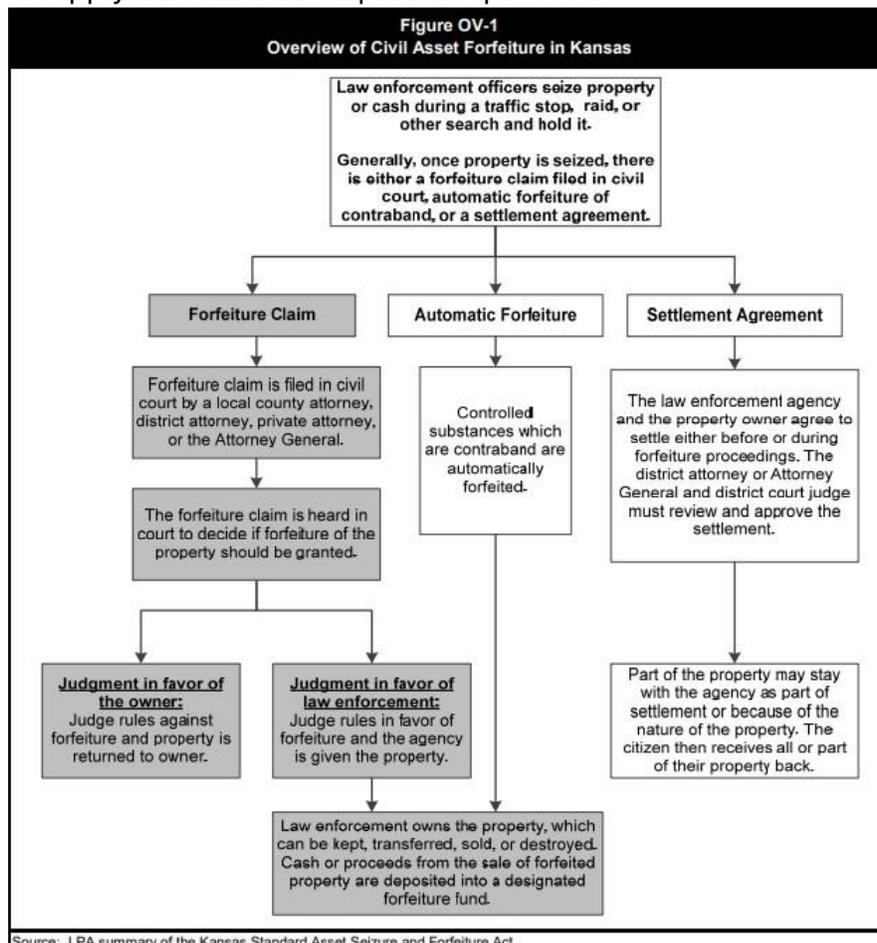
³ 2 CFR 180.990 "Preponderance of the evidence" Accessed March 1, 2024. <https://www.ecfr.gov/current/title-2/subtitle-A/chapter-1/part-180/subpart-1/section-180.990>



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Rather than try and explain the entire process, we will use the adage that “a picture is worth a thousand words” and supply a visual aid to explain the process.⁴



As you can see there are three possible outcomes in the process. Two of the three outcomes require judicial action. Automatic forfeiture is the exception, but this is proscribed in statute, as passed by the Legislature, and applies to contraband items that are illegal to have and since they are, a person cannot assert a legal interest in contraband.

⁴ Seized and Forfeited Property: Evaluating Compliance with State Law and How Proceeds are Tracked, Used, and Reported Legislative Post Audit Report, Page 6. Legislative Post Audit Committee. July 2016. Accessed March 1, 2024.

<https://www.kslpa.org/wp-content/uploads/2019/07/r-16-009.pdf>

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There appears to be a near universal feeling that money, vehicles, property, and other items are simply taken by law enforcement agencies and that is the end of the asset forfeiture. As you can see, that is not the case.

Another misconception is the burden of proof needed to seize an asset. The current burden of proof to seize an asset is probable cause, the same burden of proof that is required to conduct a search or make an arrest.

There is also a feeling that the cost of going to court to get seized items back is not cost effective for those who have had assets seized. In other words, people do not show up for hearings and give up their property because they can't afford to go to court. For the most part, people willingly walk away from the property to avoid criminal prosecution.

The need for asset forfeiture is compelling. The time and resources needed to combat illicit drug manufacturing and distribution are extensive.

Asset forfeiture is a tool that can **help disrupt** major crime networks. Removing the assets (or tools) used to commit the crimes changes the ability of the networks to commit the crimes.

It can save taxpayers money. For example, funds that are seized can be used to work undercover operations. Often our undercover agents must make controlled buys of illegal drugs and/or items. Rather than use taxpayer funds, these funds can be money that was legally seized from other crime networks.

Overview Comparison of HB2606 to SB458

- | | |
|--|--------------|
| • Deleting Certain Crimes from the List of Covered Offenses and Conduct | Both |
| • Making Certain Property Ineligible for Forfeiture | Both |
| • Seizing Agency Must Return Property if Timelines are Not Met | Both |
| • Prohibiting Pre-Forfeiture Waivers of Rights in Property | Both |
| • Early Probable Cause Hearing | Both |
| • Proportionality Hearing May Be Requested at Any Time | Both |
| • Automatic Stay of Discovery | Both |
| • Fee-Shifting | Both |
| • Changing Burden of Proof | Both |
| • Providing Persons Involved in Forfeiture Proceedings the Ability to Request a Jury Trial | SB458 |
| • Requiring the Kansas Bureau of Investigation to Submit Forfeiture Fund Financial Reports | |

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to the Legislature

SB458

- Forbid State Agencies to Request Federal Adoption of State Seizures

SB458

Comparison of HB2606 and SB 458 to Judicial Council Recommendations⁵

Both bills have the eight provisions from the Judicial Council (highlighted in yellow on page 5).

Changing the burden of proof is not a recommendation from the Judicial Council. On page 12 of the report the advisory committee states while **HB2380** – the bill under study by the committee – had a provision for changing the burden of proof the committee “was unable to reach agreement.” Only four members of the committee voted in favor of this concept. **Both bills raise the burden of proof** from the standard “preponderance of the evidence” to “clear and convincing evidence.”

Right to a jury trial is not a recommendation from the Judicial Council. This was also contained in **HB2380** but was rejected by the committee. The report stated “a motion was made to recommend a right to a jury trial that only the claimant can invoke. The motion failed with 6 voting in favor and 8 opposed.” This can be found on page 13 of the report. **SB458 has this provision.**

We cannot understand why, if the goal is to get property returned to people as fast as possible, a jury trial would enter the mix. Our court system is working to rectify the backlog of jury trials due to the mandatory lockdowns that were in place not so long ago. They have yet to recover. This one provision would add months or more to a person getting property returned to them. Additionally, a jury trial costs more than a bench trial. This would add additionally expense to the person trying to get property returned.

Prohibiting Federal Adoptions of Seizures was also a topic of the committee and rejected. The committee report states “Investigating interstate criminal activity is very costly for Kansas law enforcement. If federal adoption is requested, federal resources are used to fund the investigation. Kansas law enforcement’s objective is to find out where the money came from and where it was going, and asking for federal assistance in an interstate investigation makes sense.” **SB458** prohibits a state, county, or local agency from requesting a federal adoption unless the case involves violation of federal law.

⁵ Report of the Judicial Council Civil Asset Forfeiture Advisory Committee. December 1, 2023. Accessed March 10, 2024. <https://www.kansasjudicialcouncil.org/Documents/Studies%20and%20Reports/2023%20Reports/Civil%20Asset%20Forfeiture%20Report-2023-Accepted%20by%20JC.pdf>

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Our agency has the Northeast Kansas Drug Task Force of which multiple counties, cities and even federal agencies are active in. This provision proves problematic and may prohibit us from even working with federal agencies in some circumstances.

Finally, our testimony will look at the Report of the Special Committee on Civil Asset Forfeiture to the 2024 Kansas Legislature.⁶ This special committee was directed to “Review current statutes and recommend possible changes concerning civil asset forfeitures. Such study will include a review of a report submitted by the Judicial Council on this matter.”

The special committee met for one day. Some of the committee members were on both the Judicial Council Advisory Committee and the Legislature Special Committee. The Special Committee made the following recommendations: **(Bold print recommendations do not agree with the Judicial Council recommendations)**

- Deleting offenses involving controlled substances that apply primarily to a “user” from the list of offenses giving rise to forfeiture.
- Requiring seizing agencies to return property if certain timelines are not met to engage an attorney or otherwise move the case forward.
- Prohibiting pre-forfeiture waivers of rights in property.
- Allowing a proportionality hearing to be requested at any time.
- Requiring a judge to determine whether there is probable cause supporting forfeiture as a preliminary matter.
- Requiring an automatic stay of discovery in the forfeiture proceeding during a criminal proceeding alleging the same conduct.
- Establishing that a seizing agency can be ordered to pay a prevailing claimant’s attorneys’ fees; and
- **Requiring the State to prove property is subject to forfeiture by a “clear and convincing.” standard.**

⁶ Report of the Special Committee on Civil Asset Forfeiture to the 2024 Kansas Legislature. Special Committee on Civil Asset Forfeiture to the 2024 Legislature. Kansas Legislative Research Department. 2024. Accessed March 8, 2024.
https://kslegislature.org/li/b2023_24/measures/documents/ctte_spc_2023_special_committee_on_civil_asset_f_1_2024_interim_ctte_report.pdf

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Furthermore, the special committee recommended the following items be further studied by a standing committee of the Legislature in 2024:

- Transfers and federal adoptions;
- The right to a jury trial in forfeiture proceedings;
- The right to counsel in forfeiture proceedings; and
- Where forfeiture proceeds should be directed.

Lastly, **the special committee did not propose any legislation.**

The committee did take testimony but due to time constraints it was limited in nature. A complete list of conferees is listed but the proponents listed as stakeholders were the Kansas Justice Institute (KJI) and Americans for Prosperity (AFP).

KJI, according to their website, is “a public-interest litigation firm protecting the freedoms guaranteed by the Kansas and United States Constitutions through cutting-edge litigation.”⁷ Additionally, an “Impact Map” on the website shows they have only interacted with 14 of the 105 Kansas Counties.

Americans for Prosperity is a national organization. They do have a state chapter in Kansas. According to their website “Americans for Prosperity believes freedom and opportunity are the keys to unleashing prosperity for all.”⁸

Neutral testimony was provided by Director Mattivi of the Kansas Bureau of Investigation (KBI). The director was also a member of the Judicial Council Advisory Committee. His testimony supported the recommendations of the advisory committee.

John Goodyear of the League of Kansas Municipalities also was a neutral conferee and asked the Legislature to consider the change in threshold amounts subject to forfeiture and the fee shifting scheme.

⁷ Kansas Justice Institute Website. KJI. Accessed March 10, 2024. <https://kansasjusticeinstitute.org/?location=ks-an>

⁸ Americans for Prosperity Website, Kansas as the selected state. AFP. Accessed March 10, 2024. https://americansforprosperity.org/?utm_source=google&utm_medium=paid-search&utm_campaign=AFPROS_36_2024_NA_GG_TRAFFIC_Brand&utm_content=LINK_comp_V1_TXT&utm_term&gclid=CjwKCAiA0bWvBhBjEiwAtEsoWyP7gtOY7T4UaXhL9sl22sjNj22-zpaHwj33ndjMxvis7BXf4M9VBoCq0UQAvD_BwE

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Opponent conferees were Superintendent Smith of the Kansas Highway Patrol (KHP), a representative from the city of Overland Park, a representative of the Kansas Association of Chiefs of Police, a representative from the Kansas Peace Officers Association and the Kansas Narcotics Officer Association, and Sheriff Easter from the Kansas Sheriffs Association. None of the opponents were in total opposition to the Judicial Council report.

The Johnson County Sheriff's Office opposes SB458 unless the bill is amended to match the recommendations of the advisory committee. While we do have some concerns with HB2606, it most closely follows the advisory committee recommendations.

Lastly, over the last eight years or so, there has been much activity on civil asset forfeiture, and there have been changes that make the system more transparent.

We have repeatedly heard of the repeated misuse and/or abuse of the system by law enforcement. Any system or law can be abused. And, as with anything, there have undoubtedly been isolated incidents that should not have occurred. There is not a systemic culture in Kansas law enforcement of wrongly taking property from innocent citizens. If that were happening, I can assure you that law enforcement agencies would not stand idly by and do nothing. Nobody hates a "crooked" cop more than other cops. Civil asset forfeiture is not a system in Kansas that is rife with abuse.

It is a tool in our toolbox that is used to combat criminal enterprise. Passage of SB 458 would cause harm to the criminal justice system for both citizens and law enforcement.

We ask this committee to not work SB458 or amend SB458 to match the recommendations of the advisory committee.

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