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TO: Chairman Swearingen and the Members of the Assembly Committee on State Affairs
FROM: Representative Gary Tauchen
DATE: February 20, 2018
RE: AB 122 Testimony

Good morning Chairman Swearingen and committee members, and thank you for hearing testimony on this important piece of legislation.

Civil Asset Forfeiture reform seeks to ensure Due Process protections remain in place, while allowing our justice system the opportunity to seek recourse from convicted criminals. State legislators across the country have enacted many common-sense reforms. Laws similar to Assembly Bill 122 have passed and have been enacted in New Mexico, Nebraska, North Carolina, Maryland, Florida, Minnesota, Montana, Michigan, New Hampshire, Georgia, Virginia, and Mississippi while other proposals have been introduced across the nation. On a national level Congressman Jim Sensenbrenner has introduced a bill that would reform the process as well, drawing strong praise from both sides of the aisle.

I would like to focus my testimony on Substitute Amendment 2 to AB 122. This amendment seeks to provide numerous safeguards to ensure due process, accessible data and reports, and property protections for Wisconsin citizens. Substitute Amendment 2 also provides clear rules that allow for law enforcement to use the forfeiture process to hold individuals convicted of a crime accountable. These protections and procedures include the following:

Criminal Conviction: Assembly Substitute Amendment 2 to AB 122 requires that a criminal conviction is required before a forfeiture proceeding can begin. The substitute amendment requires a higher threshold, moving from current law which "the state has the burden of satisfying or convincing to a reasonable certainty by the greater weight of the credible evidence", to a standard of "clear and convincing". To provide more flexibility to law enforcement agencies, no criminal conviction is required for forfeiture only under the following circumstances: death of the defendant, deportation, granted immunity for testimony, defendant has fled the jurisdiction after a warrant has been issued, property is contraband, or property has remained unclaimed for two years.

Proportionality: Substitute Amendment 2 to AB 122 allows for court proceedings to take into consideration the impact of the forfeiture of property on the owners and

their families. In determining the proportionality standards the court shall consider four factors which have been established by state and federal case law- the seriousness of the offense, the purpose of the statute authorizing the forfeiture, the maximum fine for the offense, and the harm that actually resulted from the defendants conduct.

Transparency: Substitute Amendment 2 to AB 122 improves transparency of the forfeiture process to provide easily accessible, and itemized reports. To receive a portion of the forfeiture proceeds law enforcement is required to send itemized reports to the Department of Administration to be made available on the DOA website. If law enforcement provides an itemized report on the forfeiture, they would be entitled to no more than 50% of the proceeds with the remainder going directly to the school fund.

Attorney Fees: Once amended AB 122 allows a person prevailing in a forfeiture action to recover reasonable attorney fees from the state only if a "court finds that the forfeiting agency or prosecuting attorney has arbitrarily and capriciously pursued the forfeiture action."

At the heart of this bi-partisan legislation is the issue of fairness. To protect the property rights of all Wisconsin residents' reforms like AB 122 must be enacted. This bill in no way impacts the ability of law enforcement to crack down on criminal activity. Once amended this legislation reaches an important balance between Constitutional concerns and providing tools for law enforcement to do their job. I'd like to personally thank Senator Craig for his efforts in helping reform Civil Asset Forfeiture in Wisconsin.

Again, I appreciate the opportunity to testify this morning and I look forward to answering any questions you may have.

DAVID CRAIG

STATE SENATOR

Assembly Committee on State Affairs
20 February 2018
Assembly Bill 122
Senator David Craig, 28th Senate District

Chairman Swearingen and Committee Members,

Thank you for hearing testimony on Assembly Bill 122. My testimony will focus on Substitute Amendment 2 and the simple Amendment to it.

The Fifth Amendment of the Constitution states that no person shall "be deprived of life, liberty, or property, without due process of law". However, modern processes of civil asset forfeiture ignore due process rights by allowing forfeiture of property absent criminal conviction. Wisconsin statutes dictate that in forfeiture cases, the burden of proof need only be: "satisfying or convincing to a reasonable certainty by the greater weight of the credible evidence that the property is subject to forfeiture" (961.555(3)) – a standard that falls far short of the standard needed to convict someone of a crime or even charge with wrongdoing.

To be clear, Assembly Bill 122 does not abolish the forfeiture of property used in illegal activity. If a person has been convicted of wrongdoing, it is proper and just to punish them by forfeiting the property used to conduct that illegal activity. However, forfeitures absent convictions lead to widespread and well documented abuse in the criminal justice system and are clearly antithetical to the due process clause. Recently, Supreme Court Justice Clarence Thomas stated: "I am skeptical that this historical practice is capable of sustaining, as a constitutional matter, the contours of modern practice . . ."

Substitute Amendment 2 requires a criminal conviction prior to the forfeiture of property while maintaining the tools law enforcement need to pursue criminal convictions. The substitute amendment would prevent forfeiture of property belonging to innocent owners – where the property owner is unaware of how another person (often a family member) is using property, codify current caselaw on proportionality to ensure that forfeitures are proportional to crime committed, raise the burden of proof in forfeiture cases to a "clear and convincing" standard, and require the return of property within 30 days of an acquittal or the dismissal of charges.

Additionally, the amendment would require that forfeiture funds returned to law enforcement agencies as part of the federal equitable sharing program be tied to a federal criminal conviction, allow law enforcement agencies to keep forfeited vehicles if 30% of the

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vehicle's value is paid to the Common School Fund, allow forfeiture proceedings to commence at the time of seizure but not conclude without a criminal conviction, and require forfeiture reporting to the Department of Administration. If reporting requirements are met, forfeiting agencies would be allowed to keep 50% of the actual forfeiture expenses of each forfeiture. The simple amendment would allow the recovery of attorney fees if the forfeiting agency has acted "arbitrarily and capriciously" ensuring that any abusive forfeiture actions would be remedied.

In recent years over a dozen states have reformed their civil asset forfeiture laws to restore constitutional protections, and federal reform legislation has been introduced by Congressman Jim Sensenbrenner with bipartisan support. These common sense compromises will maintain tools needed by law enforcement to protect our communities while ensuring that constitutional rights are protected in Wisconsin. It is time for Wisconsin to move forward and fix forfeiture.

Again, I appreciate your hearing of this bill today and I look forward to answering any questions you may have.

Testimony of Larry Gamble
to the Assembly Committee on State Affairs regarding AB122 – 20 February 2018

Chairman Swearingen and Representatives on the committee, thank you for the opportunity to speak in favor of AB122.

Let me preface my comments by stating that by supporting AB122, this is NOT calling for the elimination of Criminal asset forfeiture which is an extremely powerful and necessary tool in the fight against organized crime and our drug epidemic.

My support for AB122 stems from the abandonment of Due Process that permeates current Civil asset forfeiture procedures. Currently, law enforcement can deem a property is the proceeds of illicit activity. This can result in people losing their private property but never being criminally charged with crime or convicted of a crime with forfeiture as a penalty. That is a license to steal.

Effective and proper Asset forfeiture requires being criminally charged and getting convicted of a crime which carries a forfeiture penalty. Anything less is a violation of our 4th Amendment rights "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." Even the Fifth Amendment outlines a common sense constitutional limits on police procedure with the statement that innocent citizens shall not "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

How can the citizenry feel safe if government agents can seize their cash or property without being charged with a crime or have the property disposed of without being convicted of a crime?

The cornerstone of our judicial system is that people are innocent until proven guilty. If the evidence does not lead to charges and a conviction, then the person's seized property must be returned immediately and automatically. Anything less is an undue burden to the innocent property owner and if the property isn't returned then that is merely government sponsored theft.

The use of civil asset forfeiture, in the last several years, led to revenue sharing incentives that opened the public to abuses by federal, local, and state law enforcement because these departments stand to reap a financial windfall from the forfeiture process. The actions of many drug task force teams (TN, OK, & UT to list three), and other police agencies are well documented. The common term for it is "Policing for Profit" as titled by the Institute for Justice in a comprehensive report on the subject. The egregious use of forfeiture funds even got lambasted by late night comedians like John Oliver on his HBO show "Last Week Tonight." Moreover, abuses in civil forfeiture have been the targets of investigative reporters like John Stossel with his series on "A License to Steal" documenting government takings without charges or compensation.

This maligned reputation stems from the differences in personal rights and property rights; and how our modern judicial process separates people from their property and forces each into its own channel in the judicial process. A person is entitled to certain constitutional protections like access to public defenders. But, property must be defended at your own cost. The stark reality is this; when it comes to cash, the police merely need to have a suspicion that somehow your cash is involved with or is the proceeds of illicit activity, and they can seize it. Specifically, with regards to carrying cash; this turns innocent people into suspected criminals just because they happen to carry what a police officer may subjectively determine is a large amount of cash. Independent studies by the FBI and Federal Bureau of Engraving have shown most paper currency in circulation will have trace amounts of drug residue; this means K-9 units have unfair advantage when encountering cash. Yet, an alert by a police dog can be the only supporting reason for the officer to suspect illicit activity and seize your savings, or just hard earned money.

Yet, you don't need to be part of the drug culture to have tainted money on you. Repeated studies show that paper money in circulation for less than 90 days will have enough residue to cause a trained service animal to alert on it. A 2015 study by the ACLU found that cash seizures in Philadelphia were for "amounts of less than $250." Somehow, through Civil Asset Forfeiture, carrying legal tender has become a quasi-illegal act.

The egregious reputation of modern civil asset forfeiture lies in the way it is applied, or perceived to be miss applied when dealing with people carrying cash.

In recent years, New Mexico and Wyoming passed sweeping reforms. At the end of 2017, a dozen states have pending legislation regarding Civil Asset Forfeiture. A lesson learned in previous efforts to improve the civil forfeiture process is that it must be inclusive as laid out in AB122 or it may not be effective.

After passing initial legislation, both New Mexico and Wyoming still had problems breaking the cycle of civil asset forfeiture abuse. Wyoming introduced a new bill to strengthen the requirement for a criminal conviction while New Mexico had to resort to suing the city of Albuquerque for failing to follow the new law.

The abuses are so bad that they overshadow the good police work and the real Criminal seizures founded on thorough investigations resulting in a righteous bust by our dedicated law enforcement personnel. Additionally, due to the expense of defending your seized property, it's not uncommon for the victim to forfeit the property rather incur the expense of defending the it despite statutory protections for innocent third-party property owners. The result is that it is easier to surrender and lose your property than fight for it. Two cases from southeast Wisconsin

relating to UW-Whitewater students gained infamy when their story hit the media as did the Brown county bail money seizure that made national headlines.

Civil asset forfeiture is branded with the nicknamed, "Policing for Profit" and several news team investigations revealed the outrageous acts of "Drug Enforcement" Task Forces most notably in Tennessee and Oklahoma. In various interviews, law enforcement leaders have called the funds from Civil Asset Forfeiture "pennies from heaven" since it helps make up budgetary shortfalls as elected officials trim police budgets to spend those funds elsewhere. If money flows from heaven, how is that tracked and recorded?

That brings me to my final and equally important point regarding Wisconsin's civil forfeiture statues and the current failure to require transparency in the process by tracking and reporting the asset forfeiture actions and final disposition.

The lack of mandatory tracking and reporting requirements makes it extremely difficult for citizens or citizens groups to uncover or understand the amount of funding being generated "off the official budget" via civil forfeiture. Michigan had to passed 8 bills to bring transparency, auditability, and a conviction requirement to that state's civil asset forfeiture processes.

AB122 addresses these critically needed improvements to Civil forfeiture and it is a bi-partisan issue that needs to be passed this session. This is a common ground. It is how constitutional rights groups like Wisconsin GrandSons of Liberty and the Wisconsin chapter of the ACLU came together to work together to support this much-needed reform along with a means for public oversight or accounting.

As it is, Assembly Bill 122 is a good bill that will improve Wisconsin's Civil Asset Forfeiture statutes. It preserves the means for law enforcement to reap the proceeds from good police work and solid convictions of real criminals in the Criminal forfeiture process. It addresses the need for a criminal conviction to validate the process and it adds a mechanism for transparency that should help document what the various levels of government are doing in the war on crime.

Bottom line: AB122 does the right things. It protects the constitutional rights of innocent citizens and it preserves the dignity of our law enforcement officers. These are the reasons I support the bill and ask that this committee vote AB122 out of committee to a floor vote.

Once again, Representatives, thank you for the opportunity to address you today.

Testimony of Larry Gamble
to the Assembly Committee on State Affairs regarding AB122 – 20 February 2018

Additional Information:

2017 - Fourteen States: AK, CT, HI, IL, IN, MI, MN, ND, NE, OK, TX, UT, WA & WI

In 2015, Whitewater, WI; law enforcement lost an appeal regarding the forfeiture of an innocent third party's vehicle when the owner's grandson used the vehicle to travel to on three occasions to make a drug deal with undercover police officers. While the potential penalty for this young man was $10,000 per offense, the final penalty was roughly $3,000 dollars yet the Whitewater Police seized and forfeited a vehicle valued at over $20,000 dollars. This highlights two major problems with Wisconsin's Civil Asset Forfeiture statutes. First, this case shows the lack of proportionality in the final penalty versus the forfeited property value. Secondly, the court ignored Wisconsin's Innocent Third Party provisions to hold that the vehicle user held an untitled ownership interest in the property. At the risk of sound trite, I think we would be hard pressed to find anyone who would give their family member a vehicle to use at college and sent them off with the encouragement to "go to college, have fun, and use some drugs, and earn a degree while you are there."

In 2012, Brown County made national news because of the way law enforcement parlayed bail money into a civil forfeiture seizure. This mother's money was seized, no criminal charges were filed, and it took going to court to get their money back four months later. This was a national embarrassment for Wisconsin. Yet, this is one most often repeated events feeding the Civil Asset Forfeiture reform movement burning across the country. Nationwide, there are numerous news reports of Civil Asset Forfeiture abuse by law enforcement, district attorneys, Attorneys General, and the governments who employee them.

Between the year 2000 and 2013, Wisconsin ranked 28th nationally for federal "Equitable Sharing" proceeds of $51 Million dollars… of which 80% can go to local agencies as opposed to the state requirement for 50%.

Milwaukee's Journal Sentinel newspaper ran an article in 2012 on uses of the civil asset forfeiture proceeds by the Milwaukee Sheriff Department. The Fox Valley "Metro Enforcement Group" netted $394,000 dollars in 2012. In a newspaper article from 2014, St. Croix County announced they were going to step up efforts to keep confiscated cash.

Institute for Justice report:
"Policing for Profit" Report - http://bit.ly/2oig6HB
Legislative Highlights 2017 - http://bit.ly/2olwmY2

JOHN OLIVER "Policing for Profit"
https://youtu.be/3kEpZWGgJks

JOHN STOSSEL "Policing for Profit"
https://youtu.be/xy16X7B0atU

Testimony Before the Wisconsin State Affairs Committee
Forfeiture of Property Seized in Relation to a Crime
Lindsey Stroud, State Government Relations Manager, The Heartland Institute
Tuesday, February 20, 2018

Chairman Swearingen and members of the committee, thank you for giving me the opportunity to provide testimony today.

My name is Lindsey Stroud. I am a state government relations manager at The Heartland Institute, a 34-year-old national nonprofit research and education organization. Heartland's mission is to discover, develop, and promote free-market solutions in several issue areas, including budget and taxes, energy and environment, education, health care, and constitutional reform. Our organization is headquartered in Illinois and focuses on providing national, state, and local elected officials with reliable and timely research and analyses.

Civil asset forfeiture, also known as civil judicial forfeiture, is a controversial legal process used by law enforcement agencies to seize personal assets from individuals and groups suspected of a crime or illegal activity.

Currently, suspected persons in Wisconsin need not be convicted of a crime to have their personal property forfeited to law enforcement. The proposed legislation would require a conviction for property to be seized, thereby eliminating the chance people in Wisconsin will have their property unjustly taken.

In 2015, the Institute for Justice gave Wisconsin a "B" grade in its civil asset forfeiture report card. Although Wisconsin's asset forfeiture laws are not the nation's worst, IJ cited multiple problems with the state's laws, including the current equitable sharing arrangement between the U.S. Department of Justice and Wisconsin. These arrangements allow law enforcement officials to circumvent state law by working under federal law. Federal agencies often prefer states use equitable sharing agreements because federal law enforcement are then granted some of the seized assets. IJ ranked Wisconsin **"28th for federal forfeiture, with over $51 million in [DOJ] equitable sharing proceeds from 2000 to 2013."**

Another issue noted in the 2015 IJ study is Wisconsin does not have a strong standard of proof required for seizure. Current law states law enforcement agents must have "reasonable certainty by the greater weight of credible evidence" that property is related to a crime in order to seize it, a standard of proof IJ equates to the preponderance of the evidence standard used in civil law cases.

IJ argues Wisconsin's civil asset forfeiture laws are also flawed because innocent property owners are required to demonstrate their noninvolvement with the illegal use of their property to reclaim it. In other words, citizens whose property has been seized are not considered innocent until proven guilty.

Further, Wisconsin's current civil asset forfeiture laws lack transparency mechanisms that keep seizures in check. Law enforcement agents are not required to track or report forfeitures. The lack of transparency makes it difficult to determine if law enforcement officials are abusing seizure laws. **The Wisconsin Institute for Law and Liberty (WILL) examined how local law enforcement officials track and report their civil asset forfeitures.** WILL sent open-records requests to eight law enforcement agencies in Wisconsin and received only four responses. In those four responses, WILL found inconsistent reporting practices and concluded agencies in Wisconsin "rarely have [in their possession] any document related to civil forfeiture," unless the property was seized through an equitable sharing agreement with the federal government. The current proposal would rectify this problem by mandating the creation and maintenance of a database to track forfeitures.

Without practices in place restricting and monitoring forfeiture, abuses will undoubtedly continue. Critics of civil asset forfeiture have cited numerous examples of forfeiture abuse in Wisconsin, including the seizure of property valued disproportionately to the committee crime. **The American Civil Liberties union cites a 2013 case** in which Wisconsin law enforcement seized a vehicle valued at $26,000 because the vehicle's driver had committed a small drug solicitation offense. The driver was never charged with a crime and the value of the drugs in that case did not exceed $250. The legislation now under consideration would address this issue by including a detailed list of factors that must be used when determining the difference between appropriate and excessive seizures.

In addition to these concerns, it's important proceeds from seized property are spent according to existing law. Currently, Wisconsin's laws require 50 percent of proceeds from crime-related forfeitures to go to the state's school fund. However, the MacIver Institute found the Wisconsin State Patrol, despite having taken more than $50,000 in non-federal forfeitures, **"has turned over very little – or none … to the state's Common School Fund."** The legislation now under consideration would continue to permit law enforcement agencies to retain 50 percent of seizure proceeds, but strict requirements would also be enacted to ensure monies are distributed properly.

Wisconsin lawmakers should continue to reform civil asset forfeiture laws by removing incentives for police to seize assets and require a conviction before property is taken. Such reform will help Wisconsin lead the nation in criminal justice reform and serve as an important example for other states to follow when considering and implementing similar reforms.

Thank you for your time today.

For more information about The Heartland Institute's work, please visit our website at www.heartland.org, or contact Lindsey Stroud by phone at 757/354-8170 or by email at lstroud@heartland.org.

POLICY

POLICY ANALYSIS FROM THE HEARTLAND INSTITUTE

February 5, 2018

States Should Limit Civil Asset Forfeiture

Problem

Civil asset forfeiture, also known as civil judicial forfeiture, is a controversial legal process in which law enforcement agencies take personal assets from individuals or groups suspected of a crime or illegal activity. This can be done without bringing criminal charges against those whose assets are seized. The standards of proof allowing seizure differ from state to state.

Critics of the process note it gives government officials economic incentives to seize property, corrupting law enforcement agencies and penalizing innocent property owners. Many states impose no penalties on law enforcement for wrongful seizures, and when property is deemed to have been taken illegally, taxpayers usually have to pay for the assets to be returned.

Property owners are typically given very few opportunities to challenge seizures, and when given the chance to challenge a seizure, the process is expensive for those whose property has been taken.

Many local police agencies work with federal authorities to sidestep restrictions through so-called "equitable sharing agreements," in which both parties agree to classify the suspected criminal activity as a federal crime, allowing them to divide the seized assets between federal and local officials. The federal agencies often receive 10–20 percent of the value of the seized assets, and the local police get the remainder. This troubling arrangement allows local law enforcement agencies to ignore state law and circumvent the will of state legislatures and citizens.

* * *

For more information, contact The Heartland Institute at 312/377-4000 or by email at governmentrelations@heartland.org, or visit our website at www.heartland.org.

Policy Solution

In several states, the government is required to demonstrate seized property is directly related to criminal activity using a standard equal to the preponderance of the evidence standard that applies in in civil lawsuits. This lower standard gives law enforcement agencies a wider scope for seizure; requiring a conviction would ensure only those proven to commit crimes can have their property seized. Since 2014, 24 states have comprehensively reformed their forfeiture laws. Fourteen states now require a criminal conviction before assets can be seized.

Scott Bullock, senior attorney at the Institute for Justice, offers five recommendations for states not willing to halt all forfeitures: (1) place seized revenues in neutral funds, (2) increase the standard of proof for seizure to require "clear and convincing evidence" of a crime, (3) move the burden of proof to the government, (4) make the tracking of seized assets more transparent, and (5) eliminate equitable sharing arrangements.

Policy Message

- Lax civil asset forfeiture laws provide an incentive to seize for law enforcement agencies.
- States should strengthen the standard for seizure in court from the preponderance of the evidence to either clear and convincing evidence or a conviction.
- Transparency is key. States should require law enforcement agencies to track how and why they seize property, along with the value of what is seized.
- Funds generated from seizures should be placed in neutral funds, not simply given to law enforcement agencies.
- States should avoid equitable sharing agreements; they allow state law enforcement agencies to bypass state laws limiting seizures.

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February 20, 2018

Chairman Swearingen and members of the Committee on State Affairs,

My name is Collin Roth, a Research Fellow with the Wisconsin Institute for Law & Liberty (WILL), a nonpartisan law and policy center located in Milwaukee. I appreciate the opportunity to testify this morning on AB 122.

Civil asset forfeiture, or simply civil forfeiture, is a procedure whereby a law enforcement agency can seize, litigate, and retain certain assets, like cash or a car, without a criminal conviction. The practice of civil forfeiture has earned increasing scrutiny as a result of attention to nationwide abuses whereby citizens that were not convicted have been faced with the costly prospect of fighting in court for the return of property. In many cases, the fight is an uphill one, requiring significant legal fees and other costs that many innocent individuals can ill afford.

There are three fundamental problems with the current Wisconsin law.

Wisconsin does not require a criminal charge, much less a criminal conviction prior to initiating a civil forfeiture proceeding. In addition, current law does not specifically require a court to return property in the case of an acquittal or dismissal of charges. Therefore, it is difficult to determine just how many people never claim their property due to the prohibitive cost of fighting in court. According to the Wisconsin Justice Initiative, 30 out of 43 civil forfeiture cases in Milwaukee County during 2015 resulted in default judgments. A default judgment means that no one showed up to contest the seizure of property. Just 4 cases out of 43 had someone show up to contest, and in 3 of those cases at least some property was returned.

Wisconsin's civil forfeiture proceedings are subject to a low burden of proof. Forfeiture proceedings are required to satisfy the lowest burden of proof – a preponderance of evidence that property was used in service of a crime. This stands at odds with criminal proceedings that require proving guilt beyond a reasonable doubt. This creates an obvious tension whereby the burdens of proof are different for an individual suspected of committing a crime versus the property seized.

Current law does not require uniform tracking and reporting of civil forfeiture. This obscures the public's ability to ascertain the full extent of civil forfeiture by Wisconsin law enforcement and whether the process is abused or conducted properly within the scope of the law. WILL sent eight open records requests to law enforcement agencies in 2017 throughout the state of Wisconsin, including the Wisconsin State Patrol, and found that only half were able to produce the information in a transparent manner.

In its current form, AB 122 addresses the three most troublesome aspects of the current civil forfeiture law.

> **Criminal Forfeiture** – AB 122 prohibits property forfeiture without a criminal conviction for a crime which served as the basis for seizure. The bill lays out six exceptions for the conviction requirement that include if the defendant has died, been deported, fled the jurisdiction, or been granted immunity. AB 122 requires the court to return any property subject to forfeiture within 30 days of acquittal or dismissal of charges.
>
> **Raises the Burden of Proof** – AB 122 requires the state to prove with clear and convincing evidence that property is subject to forfeiture.
>
> **Uniform and Consistent Transparency** – AB 122 requires itemized reporting of forfeiture expenses for property taken under the Controlled Substance Act, non-drug related crimes, as well as federal forfeiture proceedings. All forfeiture expenses will be reported and submitted to the Wisconsin Department of Administration and available on the DOA website.

Moving Wisconsin from a state with civil forfeiture to criminal forfeiture, raising the burdens of proof for forfeiture, and creating a mandatory reporting system will better safeguard civil liberties in the Badger State, without altogether eliminating a program that law enforcement agencies endorse.

Thank you for your time and consideration.

COLLIN ROTH
Research Fellow

To: Members, Assembly Committee on State Affairs
From: Badger State Sheriffs' Association (BSSA)
Wisconsin Sheriffs and Deputy Sheriffs Association (WS&DSA)
Date: February 20, 2018
RE: Statement on Assembly Bill 122 – For Information Only

While our organizations, Badger State Sheriffs' Association (BSSA) and the Wisconsin Sheriffs and Deputy Sheriffs Association (WS&DSA), were opposed to the original bill, we have spent the last year discussing the legislation with the authors. We understand the authors' intent and have worked to find a balance between a reasonable reform and the preservation of civil asset forfeiture, which we believe is a valuable tool for law enforcement to use to cut criminals off from assets gained while committing crimes.

With the adoption of Assembly Substitute Amendment 2 and Assembly Amendment 2 to Substitute Amendment 2, BSSA/WS&DSA will be neutral on the bill. The changes included in these amendments address many of our concerns with the original bill.

Concerns with Original Bill

As introduced, the legislation contained several provisions that were problematic for law enforcement, including:

- **Conviction Requirement and Exceptions:** The original bill prohibits an item from being subject to forfeiture unless a person is convicted of a criminal offense that was the basis of the forfeiture. A court may waive the conviction requirement, upon a motion from the prosecuting attorney, if the prosecuting attorney shows by clear and convincing evidence that one of the following exceptions applies: (1) the defendant has died; (2) the defendant was deported by the U.S. government; (3) the defendant has been granted immunity in exchange for testifying or otherwise assisting law enforcement investigation or prosecution; (4)the defendant fled the jurisdiction after being arrested, charged with a crime that includes the forfeiture of property, and released on bail.

  Our organizations felt that additional exceptions were needed to address common scenarios.

- **Limitations on federal asset program participation:** The original bill prohibits state and local participation in the federal asset forfeiture program unless one of the following situations applies: (1) the seized property is more than $50K or (2) the property may be forfeited only under federal law.

  Our organizations opposed the limitations on the federal program, which is important that in complex cases, like drug trafficking.

- **Percent of Proceeds to the School Fund.** The original bill eliminates use of forfeited vehicles for official use. The original bill directs that 100 percent of proceeds from the sale of forfeitures are deposited in the school fund. (Current law requires 50 percent of proceeds to be deposited into the school fund).

  Our organizations requested that current law be maintained for the distribution of proceeds.

- **Attorney Fees:** The original bill requires that a person who prevails in an action to return property subject to forfeiture be awarded reasonable attorney fees.

  Our organizations were concerned the chance to be awarded attorney's fees would incentivize more challenges to forfeitures and require more law enforcement time in the courtroom as these cases are prosecuted.

- **Legal Representation Paid by Proceeds:** The original bill modifies the timeline for the person to have his or her property returned and provided that the court must order that the property be returned if certain conditions apply. One of those conditions allows for the return of the property if it is the only reasonable way for the defendant to pay for legal representation in the forfeiture or criminal proceeding, as long the property is not needed to be held for other investigatory reasons. This provision provides for accounting to ensure only the funds or property is returned to allow for legal representation.

  Our organizations were concerned that there could be an opportunity for funds or property derived from criminal activity to be used for legal representation.

Changes to the Bill

After the Senate public hearing last May, our organizations agreed to work with the authors over the summer on additional changes to address the above concerns. In September, the authors introduced a substitute amendment, Substitute Amendment 2. The Substitute Amendment ("sub") makes several changes to the original bill to specifically address several issues raised by law enforcement. This includes:

- **Conviction Requirement and Exceptions:** The sub adds to exception requirements included in the original bill. In addition to the four exceptions listed above, the court may waive the conviction requirement if (5) the property has been unclaimed for a period of at least nine months; or (6) The property is contraband that is subject to forfeiture. The sub also clarifies exception (4) above to simply be "the defendant has fled."

  Our organizations agree these exceptions capture common scenarios.

- **Limitations on federal asset program participation:** The limitations in the original bill were deleted. The sub generally does *not* limit a state or local law enforcement to enter an agreement or transfer property as part of the federal asset forfeiture program. The sub does require state or local law enforcement to complete and submit an itemized report to

DOA. The sub also requires a state or local law enforcement may accept proceeds only if there is a state or federal criminal conviction for the crime that was the basis for the seizure. In addition, the exceptions included under the state asset forfeiture program apply to the federal conviction requirement.

Our organization agree that the same exceptions as for a state conviction apply for the federal conviction requirement.

- **Percent of Proceeds to the School Fund:** For vehicles, the sub allows law enforcement to retain a vehicle for one year, then, after one year, 30 percent of the value of the vehicle, as determined by state Department of Revenue, would need to be deposited into the school fund if the vehicle is retained longer. If the vehicle is sold after one year (or sooner), then 50 percent of the proceeds would be deposited into the school fund. For proceeds from property, the sub allows for law enforcement to retain a portion, not to exceed 50 percent for administrative expenses defined in current law. However, law enforcement must produce an itemized report of actual forfeiture expenses and submit it to the Department of Administration.

  Our organizations discussed these changes with the authors and compromised on this approach for how proceeds and vehicles are treated under asset forfeiture.

- **Attorney Fees:** The attorney fees provision remains in the sub. Just like the original bill, the sub allows that a person who prevails in an action to return property subject to forfeiture to be awarded reasonable attorney fees.

  This provision continued to be an item of concern in the substitute amendment.

- **Legal Representation Paid by Proceeds:** The sub amends this provision by adding to the conditions, so that the property can be used for legal representation, only if the property is not likely needed for victim compensation, or as evidence or for other investigatory reasons. The sub also adds that the condition that the property is not *reasonably* needed as evidence or for other investigatory reasons.

  Our organizations support these clarifications.

After reviewing the sub, the remaining issue of concern for our organizations was the inclusion of the attorney fees provision in the bill. Recently, the bill's authors provided us with Assembly Amendment 2 to Assembly Substitute Amendment 2. This simple amendment revises the bill to allow for attorney fees to be awarded "if the court finds that the forfeiting agency or prosecuting attorney has arbitrarily and capriciously pursued a forfeiture action."

Our organizations believe that this is a high legal standard for the awarding of attorney fees. To date, our organizations are unaware of any abuses under Wisconsin's civil asset forfeiture process and therefore are comfortable with establishing such a standard for attorney fees to be awarded.

We appreciate the time and effort spent by the authors to work through our concerns. Should this bill move forward, we urge the committee to adopt Assembly Substitute Amendment 2 and Assembly Amendment 2 to Assembly Substitute Amendment 2.