

Written testimony on House Bill No. 2525, as amended (forfeiture reform)

Criminal Justice Subcommittee, Hearing of March 30, 2022

STATEMENT OF DAN GREENBERG, CEI Senior Attorney

House Bill No. 2525, as amended, will improve Tennessee’s justice system. I thank the Criminal Justice Subcommittee for allowing me to express my views about this pending legislation, and I submit the following for the Subcommittee’s consideration.

This bill is important because it ends Tennessee’s two-track process of separate criminal prosecutions of individuals and civil forfeitures of their property. The bill replaces this bifurcation with a streamlined one-track process of criminal prosecution/forfeiture.

This replacement provides a solution to the problem inherent in civil forfeiture – specifically, the extraordinarily high rate of default judgments in these matters. From a national perspective, around 80% of the owners of seized property never show up in court to contest the seizure, and this absence suggests a barrier to justice – or, in other words, a due process problem.

When Tennessee takes personal property, its owners face a one-two punch: they lose possession of their property through seizure, then they discover that they’ll have to pay for their own representation in order to recover it in civil court. When they discover that they must bear litigation costs that often are larger than the value of the property seized, and when they consider the odds that they might fail, they often give up. In other words, there are many instances of seizure and forfeiture in which no rational Tennessean would pursue recovery.

I want to emphasize this point by discussing the information that is available about seizure and forfeiture in Tennessee. Tennessee state government deserves to be commended for its openness and transparency in the area of seizure and forfeiture. I believe that, in addition to Tennessee, there are only six other states that make individualized data about instances of seizure and forfeiture available.

I looked at the available data on cash-only seizures in Tennessee – which originally came from the Tennessee Department of Safety and Homeland Security – and I ended up examining roughly 36,000 instances of recorded seizures from about the last five years. It appears that a reasonable estimate for the median size of cash-only seizures in this state is as follows: \$609 in 2017, \$707 in 2018, \$695 in 2019, and \$831 in 2020.

In other words, the data suggest that a typical cash forfeiture in Tennessee is somewhere around \$610 to \$830. I worry that some policymakers may have been led to believe that a typical cash seizure consists of hundreds of thousands of dollars, because that conclusion is very wrong. These figures are important for policymakers to see how seizure and forfeiture really work in Tennessee.

My estimate of the default judgment rate in Tennessee for those who are subjected to cash seizures is approximately 78 percent. There are some who suggest that the reason that these people don't show up in court is that they know that they would lose in court. But the evidence suggests there is a better explanation why these people default: the people we're talking about have realized that hiring a lawyer to get their stuff back is uneconomic. It is reasonable to estimate that a typical attorney fee to recover one's own property in a forfeiture action is likely to be in the neighborhood of \$3,000. There is no reason at all to pay an attorney thousands of dollars in order to recover hundreds of dollars. That is an important contributor to why we see this epidemic of default judgments.

I believe there is a second problem with seizure and forfeiture as it is practiced today: many of us have seen news accounts that suggest that the practice is pockmarked with evidence that revenue concerns drive the behavior of law enforcement officers and other government agents – thus distracting them from focusing on public safety and crime control. Forcing law enforcement officers to serve as their own revenue collectors creates troublesome pressures and incentives that are likely to distract them from their central mission.

Finally, there is a fundamental tension between the government's use of civil forfeiture and the property and due process rights of its citizens. Civil forfeiture allows police officers to seize property, and that seizure only requires probable cause to believe that the property is related to crime; prosecutors then can shift ownership of the property to the government through litigation in civil court, even if the property owner never faced criminal conviction or even criminal charges. The danger that civil forfeiture poses to property rights and due process raises significant questions about fundamental fairness.

I commend the authors and sponsors of this bill: House Bill No. 2525's proposed changes to state law would treat property owners much more fairly. It would give them procedural protections that are similar to those of criminal defendants: more precisely, it would require – in a single process – a criminal conviction of the property owner before forfeiture could occur. Substituting criminal forfeiture for Tennessee's bifurcated system would be a big step forward both for government efficiency and for citizen fairness. In my opinion, there are other advances that Tennessee could make in forfeiture reform – for instance, it could pass measures that would prevent the government from circumventing the protections that Tennessee has created for its citizens by limiting the use of state/federal joint task forces – but House Bill No. 2525 is nonetheless an excellent reform. Four states now rely on criminal forfeiture proceedings (Nebraska, North Carolina, New Mexico, and Maine), and the General Assembly can protect the rights of its constituents through House Bill No. 2525 by making Tennessee the fifth state to enact these reforms.

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