



Asset Forfeiture Guidebook

A Guide to Civil Asset Forfeiture in South Carolina

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Introduction to the Asset Forfeiture Guidebook

As the professional organization of South Carolina's 46 sheriffs, the South Carolina Sheriffs' Association (SCSA) has a long and prestigious history of working to strengthen the law enforcement services that Sheriffs' Offices across the state provide to the citizens of South Carolina.

SCSA acts as an advocate for Sheriffs' Offices around the state by monitoring the actions of the General Assembly, courts, and other government agencies that have an impact on the criminal justice system. The Association serves as the voice for all 46 sheriffs in South Carolina.

The Association is acutely aware of concerns regarding the process known as "Asset Forfeiture". Asset forfeiture is an invaluable tool that has been bestowed upon law enforcement and prosecution agencies throughout this State by the South Carolina General Assembly in an attempt to punish criminals, return assets to victims, deter illegal activity, remove tools of the trade, and protect the community. Regrettably, some have abused the asset forfeiture process in a manner that violates individuals' rights and erodes public trust.

In response, South Carolina's General Assembly is currently considering sweeping changes to the civil asset forfeiture processes that Sheriffs feel could negatively impact their ability to effectively fight crime and recover and return property to crime victims. Before the Association endorses wholesale reform, we believe a concerted focus should be placed on strict adherence to and enforcement of current laws. Therefore, it is the intent of the SCSA to provide all Sheriffs' Offices in our state with a fundamental understanding of the asset forfeiture process in South Carolina and the federal equitable sharing program.

The *Asset Forfeiture Guidebook* is designed to provide South Carolina's Sheriffs with an overview of the asset forfeiture statutes in our State and recommendations on how to comply with state and federal laws and jurisprudence on these topics. The *Asset Forfeiture Guidebook* will cover the Definition, Mission, and Purpose of Asset Forfeiture in Chapter 1, Seizures Pursuant to South Carolina Code of Laws in Chapter 2, Consent Orders in Chapter 3, Financial Accounts in Chapter 4, the Expenditure of Forfeited Funds in Chapter 5, and the Federal Equitable Sharing Program in Chapter 6.

The *Asset Forfeiture Guidebook* will underscore the notion that due process is and must remain at the very core of the asset forfeiture process in our state. Additionally, the *Asset Forfeiture Guidebook* will reinforce the belief that civil asset forfeiture should never be the focus of law enforcement activities, but rather the byproduct. If implemented statewide, the *Asset Forfeiture Guidebook* will assist the Sheriffs in their efforts to ensure the practice of civil

asset forfeiture is uniform, consistent, and fair throughout the state regardless of an agency's or judicial circuit's resources or experience.

The *Asset Forfeiture Guidebook* contains a compilation of applicable statutes, jurisprudence, and Attorney General Opinions relative to civil asset forfeiture. The *Asset Forfeiture Guidebook* may also contain recommendations and commentary but should not be interpreted as offering legal advice. Law enforcement agencies should always seek legal counsel for specific questions on civil asset forfeiture.

The South Carolina Sheriffs' Association does not render any legal or accounting services. South Carolina Sheriffs' Association publications are intended to provide current and accurate information about the subject matter covered and are designed to help Sheriffs maintain their professional competence. Sheriffs using South Carolina Sheriffs' Association publications in dealing with a specific matter should also research original sources of authority.

The authors have obtained information from sources believed to be reliable. However, because of human or mechanical error, neither the authors nor the South Carolina Sheriffs' Association guarantee the accuracy, adequacy or completeness of any information or forms and are not responsible for errors or omissions or for the results obtained from use of such information and/or forms contained in this publication.

Chapter 1:

Definition, Mission, and

Purpose of Asset Forfeiture

In This Chapter:

- ✓ Definition
- ✓ Mission
- ✓ Purpose

Definition

Asset forfeiture is the taking of property by the government, without compensation, because it was used or obtained in a manner contrary to the law. (Language taken directly from Money Laundering and Asset Recovery Section: Asset Forfeiture Process Handbook, Version 2.0, Section 2)

In South Carolina, asset forfeiture proceedings generally originate in the Court of Common Pleas (civil court) rather than the Court of General Sessions (criminal court) even though the property being seized has some nexus to criminal activity. Therefore, the Court of Common Pleas may, after finding an officer had probable cause to initiate the seizure in question and finding a preponderance of evidence that the property is subject to forfeiture, order the forfeiture of property. This civil process can be, and often is, carried out entirely separate from the underlying criminal charge. This is done in large part to prevent situations in which the defendant would receive a benefit in the form of a reduced charge or exposure at sentencing in exchange for the defendant voluntarily consenting to forfeit any seized property or asset in conjunction with that offense. Make no mistake, however, the lawful practice of asset forfeiture is entirely reliant upon due process.

Mission

To use asset forfeiture consistently and strategically to disrupt and dismantle criminal enterprises, deprive wrongdoers of the fruits and instrumentalities of criminal activity, deter crime, and restore property to crime victims while protecting individual rights. (Language taken directly from Money Laundering and Asset Recovery Section: Asset Forfeiture Process Handbook, Version 2.0, Section 2)

Purpose

The purpose of asset forfeiture is to:

- Punish criminals;
- Return assets to victims;
- Deter illegal activity;
- Remove tools of the trade,
- Disrupt criminal organizations; and
- Protect the community.

(Language taken directly from Money Laundering and Asset Recovery Section: Asset Forfeiture Process Handbook, Version 2.0, Section 2)

Chapter 2:

Seizures Pursuant to South Carolina Code of Laws

In This Chapter:

- ✓ Seizures Pursuant to South Carolina Code of Laws
- ✓ Statutory Seizures

Seizures Pursuant to South Carolina Code of Laws

A law enforcement officer's authority to seize property is derived from either the Fourth Amendment to the United States Constitution or specific state statutes. The ability to seize property that is evidence of a crime is based upon authority described in the Fourth Amendment and its jurisprudence. These evidentiary seizures can be made either with or without a warrant. S.C. Code Ann. § 17-13-140 describes the types of property that officers may seize with a warrant.

South Carolina law authorizes law enforcement officers and other state actors to seize property as a result of various forms of specific unlawful or criminal conduct. Conduct giving rise to these types of seizures runs the gamut from gambling and operating chop shops to human trafficking and illegal hunting. This chapter will focus on the more common types of seizures that sheriff's offices will encounter.

It is important to note that there is a distinction between the seizure of property and forfeiture of that property. The seizure of property refers to taking that property into custody so that it is no longer in the owner's possession. The forfeiture of property refers to the termination of an owner's right to the seized property. All of the seizures discussed in this Chapter will be subject to forfeiture, but the forfeiture process will be discussed in later Chapters.

Statutory Seizures

S.C. Code Ann. § 12-21-2712 – Unlawful Gaming Machines and Devices

South Carolina law provides that “[a]ny machine, board, or other device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before

any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if satisfied that it is in violation of Section 12-21-2710 or any other law of this State, direct that it be immediately destroyed."

The South Carolina Supreme Court has found that "the magistrate's examination of the seized machines under § 12-21-2712 must include an opportunity for the owner of the machines to be heard concerning their legality." State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 196, 525 S.E.2d 872, 883 (2000). However, the Court also found that the "most due process requires is a post-seizure opportunity for an innocent owner 'to come forward and show, if he can, why the *res* [the seized machines or devices] should not be forfeited and disposed of as provided for by law.'" *Id.* at 176.

S.C. Code Ann. § 16-3-2090 – Human Trafficking

The human trafficking statutes allow for the seizure and forfeiture of money used or intended to be used in human trafficking and all property purchased with the cash proceeds of human trafficking. Any property, including vehicles, used or intended to be used to facilitate human trafficking is also subject to seizure and forfeiture.

Property associated with human trafficking may be seized pursuant to a warrant describing the property sought. Additionally, a warrantless seizure is permissible where "the investigating agency has probable cause to believe that the property was used or is intended to be used in violation of" human trafficking laws. S.C. Code § 16-3-2020.

If a seizure is made pursuant to S.C. Code § 16-3-2020, proceedings regarding "forfeiture and disposition must be instituted within a reasonable time."

Storage of Seized Property. Law enforcement agencies must take reasonable steps to maintain seized property. Money that is seized must be deposited in an interest bearing account, unless the bills have evidentiary value themselves.

Seizure Report. Within 10 days of the seizure, or a reasonable period of time after the seizure, the seizing agency shall submit a report to the solicitor's office that contains the following information: 1) description of seized property – including make, model & year, if a vehicle; 2) circumstances of seizure; 3) present location of seized property; 4) owner's name; 5) lienholder(s); 6) seizing agency.

Public Seizure Report. In addition to the report submitted to the prosecuting agency, the seizing agency shall prepare a report for dissemination to the public that contains the following information: 1) description of the quantity and nature of the property and money seized; 2) seizing agency; 3) make, model & year of a vehicle; and 4) current custodian of the seized property. This report only needs to be disseminated upon request.

S.C. Code Ann. § 16-8-260 – Gang Activity

Law enforcement agencies may seize certain property where there is **reasonable belief** that the property is being used or has been used in a pattern of criminal gang activity **or** in the commission of a criminal act for the purpose of benefiting, promoting, or furthering the interests of a criminal gang.

Property that may be seized pursuant to this statute includes: 1) firearms; 2) ammunition; 3) dangerous weapons; 4) written or electronic communications; 5) records; 6) money; 7) negotiable instruments; 8) valuables; 9) assets owned or titled in the name of the gang or an individual gang member; and 10) real or personal property that is subject to the control of a criminal gang member and which is traceable to criminal gang activity.

Timeline. The solicitor must initiate a civil forfeiture action regarding any property seized pursuant to this statute within **90 days** of the seizure. The court may stay civil forfeiture proceedings during the criminal trial for a related criminal indictment.

S.C. Code Ann. § 16-13-175 – Vehicles Used in Larcenies

A vehicle that is used in a larceny is subject to confiscation and forfeiture if the offender is the registered owner of the vehicle. Conviction of the underlying larceny is a prerequisite to forfeiture of the vehicle, but not the initial confiscation of the vehicle.

A vehicle subject to confiscation and forfeiture under this section may be confiscated pursuant to a warrant or upon probable cause to believe that the motor vehicle was used in a larceny.

The seizing agency may initiate the forfeiture action for the vehicle. The solicitor's office is not a required party for this type of forfeiture action. Sections (C) and (D) of the statute describe the forfeiture procedure.

S.C. Code Ann. § 16-15-445 – Obscenity Materials

"All equipment used directly in violating the laws against disseminating obscene materials¹, including software, may be seized and ordered forfeited" after the defendant is convicted of the underlying offense. 12 S.C. Jur. Obscene & Sex Oriented Matters § 25 (May 2019).

A criminal conviction is required to forfeit property pursuant to this section. A separate civil forfeiture action is not required for this type of forfeiture because § 16-15-445(A) allows "the court in which the conviction was obtained" to order the property forfeited.

¹ Seizure and forfeiture of equipment is permissible where there is a conviction of one of the following offenses: § [16-15-305](#). Disseminating, procuring or promoting obscenity unlawful; § [16-15-342](#). Criminal solicitation of a minor; § [16-15-395](#), [405](#), and [410](#). First, second and third degree sexual exploitation of a minor.

Since the Court of General Sessions is the appropriate venue for this type of action, this forfeiture needs to be initiated by the Solicitor's Office.

S.C. Code Ann. § 16-19-80 – Wagers

"All and every sum or sums of money staked, betted or pending on the event of any such game or games aforesaid are hereby declared to be forfeited."

In State v. Petty, 270 S.C. 206, 241 S.E.2d 561 (1978), the South Carolina Supreme Court adopted the standard "that the object seized must be 'an integral part of' or 'fruit of' a gambling operation." 2009 WL 276741, at *1 (S.C.A.G. Jan. 2, 2009).

The South Carolina Attorney General has also opined advised that forfeiture proceedings under S.C. Code Section 16-19-80 should be conducted pursuant to S.C. Code Section 44-53-530." 2009 WL 276741, at *2 (S.C.A.G. Jan. 2, 2009).

S.C. Code Ann. § 16-23-50 – Handgun (16-23-20)

Upon conviction of 16-23-20 (unlawful carrying of handgun; exceptions) or 16-23-30 (sale or delivery of handgun to and possession by certain persons unlawful; stolen handguns), "the handgun involved in the violation of [the crime] must be confiscated" and delivered to the jurisdiction where the crime occurred. S.C. Code Ann. § 16-23-50.

For purposes of this statute, handgun means "any firearm designed to expel a projectile and designed to be fired from the hand." S.C. Code Ann. § 16-23-10(1). Firearms that are generally recognized as antiques, curiosities, or collectors' items, or that do not fire fixed cartridges are not eligible for seizure and forfeiture under this statute.

This statute does not require a separate forfeiture action or hearing. The forfeiture of the handgun is an additional penalty for committing the crime and the ownership of the handgun is transferred to the arresting agency upon the entering of the conviction.

S.C. Code Ann. § 16-23-405 – Weapon used in or in furtherance of a crime

"A person convicted of a crime, in addition to a penalty, shall have a weapon used in the commission or in furtherance of the crime confiscated." S.C. Code Ann. § 16-23-405(B)

Weapon "means firearm (rifle, shotgun, pistol, or similar device that propels a projectile through the energy of an explosive), a blackjack, a metal pipe or pole, or any other type of device, or object which may be used to inflict bodily injury or death." S.C. Code Ann. § 16-23-405(A)

This statute does not require a separate forfeiture action or hearing. The forfeiture of the weapon is an additional penalty for committing the crime and the ownership of the weapon is transferred to the arresting agency upon the entering of the conviction.

S.C. Code Ann. § 16-23-460 – Carrying concealed weapons

A defendant that is convicted of carrying a concealed weapon must forfeit the weapon to the arresting agency.

For purposes of this statute, “deadly weapon” refers to a handgun, regardless of whether the handgun is used to commit a crime. “Deadly weapon” only refers to rifles, shotguns, dirks, slingshots, metal knuckles, knives, or razors if “they are used with the intent to commit a crime or in furtherance of a crime.”² S.C. Code Ann. § 16-23-460(C).

This statute does not require a separate forfeiture action or hearing. The forfeiture of the weapon is an additional penalty for committing the crime and the ownership of the weapon is transferred to the arresting agency upon the entering of the conviction.

S.C. Code Ann. § 16-23-430 – Weapon on school property

Any weapon used in violation of the statute prohibiting carrying weapons on school property may be confiscated by the arresting agency. § 16-23-430(C). For purposes of this statute, weapon refers to “a knife, with a blade over two inches long, a blackjack, a metal pipe or pole, firearms, or any other... object which may be used to inflict bodily injury or death.” S.C. Code Ann. § 16-23-430(A).

The S.C. Court of Appeals held that, “it is a *per se* violation to bring a firearm onto school grounds, regardless of whether it may be used to inflict bodily injury or death.” *In re Thomas Edward D.*, 344 S.C. 329 (Ct. App. 2001).

S.C. Code Ann. § 16-23-500 – Unlawful possession of a firearm by a person convicted of violent offense

It is a crime for a person who has been convicted of a violent felony, as defined by § 16-1-60, to possess a firearm or ammunition. A defendant convicted of unlawful possession of a firearm must forfeit the firearm to the arresting agency.

This statute does not require a separate forfeiture action or hearing. The forfeiture of the weapon is an additional penalty for committing the crime and the ownership of the weapon is transferred to the arresting agency upon the entering of the conviction.

S.C. Code Ann. § 16-27-55 – Animal fighting or baiting

A person who violates animal fighting statutes found in Title 16, Chapter 27 is subject to forfeiture of real and personal property, which is knowingly used to engage in a violation of or to further a violation of those statutes and monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by a person to engage in or further a violation of those statutes. S.C. Code Ann. § 16-27-55.

² See [State v. Knight](#), 2006 WL 7285728 (S.C. Ct. of Appeals, 2006) for discussion of definition of “deadly weapon.”

Property subject to forfeiture under this statute may be seized pursuant to a warrant describing the property sought. Additionally, a warrantless seizure is permissible where investigating agency has probable cause to believe that the property was used or is intended to be used in violation of animal fighting laws. S.C. Code § 16-27-55.

Monies seized must be deposited in an interest bearing account pending final disposition by the court unless the seizing agency determines the monies to be of an evidential nature and provides for appropriate security in another manner.

Forfeiture proceedings initiated under this statute are subject to the procedures and requirements for drug forfeitures found in S.C. Code § 44-53-530.

S.C. Code Ann. § 23-31-1040 – Unlawful for a person adjudicated as a mental defective or committed to a mental institution to ship, transport, possess, or receive a firearm or ammunition

It is illegal for a person involuntarily committed to a mental institution or adjudicated as mental defective to possess a firearm. Upon conviction of this offense, ownership of the firearm used in the crime is to be transferred to the arresting agency.

This statute does not require a separate forfeiture action or hearing. The forfeiture of the weapon is an additional penalty for committing the crime and the ownership of the weapon is transferred to the arresting agency upon the entering of the conviction.

S.C. Code Ann. § 44-53-520 Narcotics & Controlled Substances Seizures

The following property is subject to seizure and forfeiture pursuant to S.C. Code Ann. § 44-53-520:

1. all **controlled substances** and their **containers**, which have been manufactured, distributed, dispensed, or acquired in violation of Article 3, Chapter 53, Title 44;
2. all **raw materials, products, and equipment**, and their **containers**, which are used, or positioned for use, in manufacturing, producing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of Article 3, Chapter 53, Title 44;
3. all **real and personal property** which is **knowingly used** to facilitate production, manufacturing, distribution, sale, importation, exportation, or trafficking in controlled substances;
4. all **books, records, and research products** which are used, or positioned for use, in violation of Article 3, Chapter 53, Title 44;

5. all **conveyances**³ (i.e., trailers, aircraft, motor vehicles, motor homes and boats) which are used or intended to be used to conceal, contain or transport controlled substances, and the controlled substance at issue is one of the following:

- a) 1 lb or more of marijuana or hashish;
- b) more than 4 grains of opium;
- c) more than 2 grains of heroin;
- d) more than 4 grains of morphine;
- e) more than 10 grains of cocaine;
- f) more than 50 micrograms of LSD or its compounds;
- g) more than 10 grains of crack;
- h) more than 1 gram of ice or crank; or
- i) 15 tablets, or the equivalent, of MDMA.

6. all **property**, including cash, negotiable instruments, or other things of value furnished or intended to be **furnished in exchange** for a controlled substance;

7. all **proceeds**, including cash, real and personal property traceable⁴ to any exchange for controlled substances; and

8. all **cash seized in close proximity**⁵ to forfeitable controlled substances, drug paraphernalia, and forfeitable drug records.⁶

The property described in items 1-8 may be seized pursuant to a warrant or if the law enforcement agency “has **probable cause** to believe that the property was used or is intended to be used in violation of [Article 3, Chapter 53, Title 44].” S.C. Code Ann. § 44-53-520(b)(4). According to the S.C. Supreme Court, “The initial burden lies with the state to show it had probable cause for believing a substantial connection exists between the property to be forfeited and the criminal activity. Once probable cause is shown, the burden shifts to the property owner to show by a preponderance of the evidence that the property was innocently owned.” *Gowdy v. Gibson*, 391, S.C. 374, 379 (2011).

³ The discovery of a controlled substance of the particular weight listed below is a prerequisite to the seizure and forfeiture of a conveyance. According to the S.C. Court of Appeals, the fact that the legislature specifically addresses conveyances in § [44-53-520\(a\)\(6\)](#), “appear[s] to reflect the intent that all conveyances be forfeited pursuant to that subsection only.” *Hembree v. One Thouse Eight Hundred Fort-Seven Dollars*, 404, S.C. 241, 248 (Ct. App. 2013).

⁴ The S.C. Supreme Court found that cash was traceable to narcotics activity where, “a large sum of cash was found hidden in a convicted drug dealer’s bedroom, under his sole control, bundled in a way that is typical for drug transactions, and in close proximity to drug paraphernalia.” *Gowdy v. Gibson*, 391, S.C. 374, 383 (2011).

⁵ According to the S.C. Supreme Court, “close proximity... should be decided on a case by case basis.” *Gowdy v. Gibson*, 391, S.C. 381 (2011). A finding of “close proximity” is a question of fact and courts have found that drugs and money were in close proximity where they were housed on the same property, approximately 140 feet apart, and the property was under control of the defendant. *Id.*

⁶ If the person from whom the cash was seized can establish to the satisfaction of a court of competent jurisdiction that he seized funds were not the product of illegal conduct, the money must be returned pursuant to a court order. S.C. Code Ann. § [44-53-520\(a\)\(8\)](#).

In the event that property is seized pursuant to S.C. Code Ann. § 44-53-520(b), “proceedings under Section 44-53-530 regarding forfeiture and disposition must be instituted within a reasonable time.” S.C. Code Ann. § 44-53-520(c). The Attorney General or the Circuit Solicitor is responsible for filing the forfeiture action.

For purposes of S.C. Code Ann. § 44-53-520, “whenever the seizure of any property... is accomplished as a result of a joint effort by more than one law enforcement agency, the law enforcement agency initiating the investigation is considered to be the agency making the seizure.” S.C. Code Ann. § 44-53-520(h).

Storage of Seized Property. Law enforcement agencies must take reasonable steps to maintain seized property. Money that is seized must be deposited in an interest bearing account, unless the bills have evidentiary value themselves.

Seizure Report. Within 10 days of the seizure, or a reasonable period of time after the seizure, the seizing agency shall submit a report to the solicitor’s office that contains the following information: 1) description of seized property – including make, model & year, if a vehicle; 2) circumstances of seizure; 3) present location of seized property; 4) owner’s name; 5) lienholder(s); 6) seizing agency.

Public Seizure Report. In addition to the report submitted to the prosecuting agency, the seizing agency shall prepare a report for dissemination to the public that contains the following information: 1) description of the quantity and nature of the property and money seized; 2) seizing agency; 3) make, model & year of a vehicle; and 4) current custodian of the seized property. This report only needs to be disseminated upon request.

S.C. Code Ann. § 56-5-6240 – Habitual DUS/DUI Offenses

A vehicle that is used in the commission of a 4th or subsequent DUS in the last 5 years or a 3rd or subsequent DUI in the last 10 years “must be confiscated by the arresting officer... at the time of the arrest.” S.C. Code Ann. § 56-5-6240(A). It is mandatory that the officer confiscate the vehicle used in one of the crimes.

“Fourth or subsequent DUS” and “third or subsequent DUI” refer to the number of convictions and not the individual charges for purposes of forfeiture pursuant to § 56-5-6240. According to the S.C. Attorney General, “...in circumstances where a defendant originally charged with a fourth offense DUS and pleads to a third offense, the vehicle driving at the time of arrest may still remain subject to forfeiture if in fact that offense was the fourth or subsequent DUS violation for that driver within the last ten years.” Op. S.C. Att’y Gen., 1991 WL 474770 (June 25, 1991). This interpretation was adopted by the S.C. Supreme Court, which held that “The statute refers to the number of offenses that have occurred during the relevant time period, not to a conviction for ‘DUI, fourth offense.’” *City of Sumter Policy Dept. v. One (1) Blue Mazda Truck VIN...*, 330 S.C. 371 (1998).

Additionally, convictions for DUS or DUI from other jurisdictions will also count as prior convictions pursuant to this statute for purposes of forfeiture. In an opinion from 2015, the

S.C. Attorney General opined that "...Section 56-5-6240's DUS and DUI language is intended to serve as a mere factual description of the offenses and convictions triggering forfeiture of a vehicle pursuant to the terms of Section 56-5-6240, and is not intended to exclusively reference South Carolina's DUS or DUI statutes." Op. S.C. Atty Gen., 2015 WL 9243425 (Dec. 1, 2015).

The arresting agency must deliver the seized vehicle to the chief law enforcement officer of the jurisdiction where the arrest was made. The agency holding the vehicle must notify the registered owner of the confiscation within 72 hours.

Registered owner has 10 days to request a hearing regarding confiscation of the vehicle.

The purpose of the hearing is to determine if there is a preponderance of the evidence that (1) the use of the vehicle on the occasion of the arrest was not expressly or impliedly authorized, or (2) the registered owner did not know that the driver did not possess a valid license.

The confiscated vehicle may be returned to the registered owner upon petition to the court by the confiscating agency if the criminal charge has not been disposed of within 12 months of the date of confiscation.

If the individual is convicted of the DUI or DUS that gave rise to the confiscation of the vehicle, the vehicle is subject to forfeiture if the defendant is the registered owner OR a resident of the household of the registered owner. S.C. Code Ann. § 56-5-6240(A). The agency holding the vehicle must initiate an action in circuit court in order to accomplish forfeiture of the vehicle. If the court orders the vehicle forfeited to the agency holding the vehicle, it may be disposed of pursuant to § 56-5-5640 for abandoned vehicles OR if the fair market value is less than \$500, the vehicle may be sold for scrap to the highest bidder after first receiving at least two bids.

S.C. Code Ann. § 56-29-40 – Chop Shops

Any tool, implement, or instrumentality, including any motor vehicle, which is used or possessed in connection with any violation of § 56-29-30⁷ is subject to seizure by the arresting agency. S.C. Code Ann. § 56-29-40(A).

The circuit solicitor is responsible for filing a forfeiture proceeding for any property that is seized pursuant to § 56-29-40. S.C. Code Ann. § 56-29-50(E). As § 56-29-50(E)(4) reminds us, forfeiture is accomplished by showing by a preponderance of the evidence, "that the property was used in the commission of a violation of Section 56-29-30, or was used or possessed to facilitate the violation."

⁷ S.C. Code Ann. § [56-29-30](#) criminalizes chop shop operations, as well as altering vehicle identification numbers.

The statutes for chop shop seizures and forfeitures are unique in that there are record retention requirements. Pursuant to S.C. Code § 56-29-50(L), “When a seized vehicle is forfeited, restored to its owner, or disposed of as unidentifiable, the seizing agency shall retain a report of the transaction for a period of at least **seven years** from the date of the transaction.”

Chapter 3:

Consent Orders

In This Chapter:

- ✓ What Kind of Property Can Be Seized Under State Drug Laws?
- ✓ When and How Can Property or Cash Be Seized Under South Carolina Drug Laws?
- ✓ How is the Forfeiture Confirmed?
- ✓ What Is a Consent Order?
- ✓ Who Needs to Approve, Sign, Consent on a Consent Order?
- ✓ What Must Be Included or Recited in a Consent Order?
- ✓ Summary and Questions for Consideration

What Kind of Property Can Be Seized Under State Drug Laws?

S.C. Code Ann. § 44-53-520(a) provides that certain property is “*subject to forfeiture*” (*i.e.*, not automatic; there is a process that must be followed). Those items include the following:

- Unlawful controlled substances
- Raw materials & equipment used for manufacturing, processing, delivering, etc. such substances
- Containers for above substances, raw materials, etc.
- All property used to facilitate manufacturing, production, distribution, etc. of such substances
- Books, records, research materials, etc. used or positioned for use in violation of article
- Conveyances used to transport, conceal, contain, etc. illegal controlled substances (but be mindful of weight thresholds for seizing motor vehicles)
- Monies, negotiable instruments, securities, or other things of ***value furnished or intended to be furnished by any person in exchange for a controlled substance***, and ***all proceeds*** including, but not limited to, monies, and real and personal property ***traceable to any exchange***
- Monies seized ***in close proximity*** to forfeitable controlled substances, drug manufacturing, or distributing paraphernalia, or in close proximity to forfeitable records of the importation, manufacturing, or distribution of controlled substances and ***all monies seized at the time of arrest or search***

involving violation of this article (owner has opportunity to establish to court's satisfaction that the monies seized are not products of illegal acts)

When and How Can Property or Cash Be Seized Under South Carolina Drug Laws?

S.C. Code Ann. § 44-53-520(b) allows for **seizure** of property subject to forfeiture either

- Upon issuance of a (seizure) warrant or
- Without process under certain conditions, such as:
 - Search incident to arrest (caution: remember you can't search a car "incident to arrest," only on probable cause or inventory in accordance with established agency procedures. *St. v. Brown*, 401 S.C. 82, 736 S.E.2d 263 (2013), *Arizona v. Gant*, 556 U.S. 332 (2009), [United States v. Brown](#), [787 F.2d 929](#), 931-32 (4th Cir. 1986)
 - Execution of search warrant (but remember automobile exception allows for search of car without warrant upon showing of probable cause)
 - Property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding based upon this article
 - Probable cause to believe that the property is directly or indirectly dangerous to health or safety
 - Probable cause to believe that the property was used or is intended to be used in violation of this article

How is the Forfeiture Confirmed?

There are only **TWO WAYS** to have property deemed **FORFEITED**:

- 1) Petition
- 2) Consent Order

(Please Note: BOTH Methods REQUIRE the INVOLVEMENT AND CONSENT of the SOLICITOR (or his/her designee), i.e., no forfeiture can be accomplished under Title 44 without the Solicitor.)

Petitions

In accordance with S.C. Code Ann. § 44-53-530(a), "Forfeiture of property defined in Section 44-53-520 **must be accomplished by petition of the Attorney General or his designee or the circuit solicitor or his designee to the court of common pleas** for the jurisdiction where the items were seized." Section 44-53-530(a) goes on to state:

Notice of hearing or rule to show cause must be directed to all persons with interests in the property listed in the petition, including law enforcement agencies which have notified the petitioner of their involvement in effecting the seizure. Owners of record and lienholders of record may be **served** by certified mail, to the last known address as appears in the records of the governmental agency which records the title or lien.

Therefore, petitions:

- Require **a formal legal action** in the Court of Common Pleas
- Require **notice**
- Require opportunity to be heard
- Require **service**

This is true in all cases, **UNLESS** a consent order is approved by the court.

Consent Orders

In accordance with S.C. Code Ann. § 44-53-530(d):

Any forfeiture may be effected by consent order approved by the court without filing or serving pleadings or notices provided that all owners and other persons with interests in the property, including participating law enforcement agencies, entitled to notice under this section, except lienholders and agencies, consent to the forfeiture. Disposition of the property may be accomplished by consent of the petitioner and those agencies involved (note: disposition is usually set forth in the same consent order as the forfeiture, but does not have to be). Persons entitled to notice under this section may consent to some issues and have the judge determine the remaining issues (note: this would then require filing the §44-53-530(a) civil forfeiture petition as to all property not forfeited by consent order). (Editors notes not included in the statute.)

Section 44-53-530(d) goes on to require, “*All proceeds of property and cash forfeited by consent order must be disposed of as provided in subsection (e) of this section.*” Section 44-53-530(e) reads as follows:

(e) All real or personal property, conveyances, and equipment of any value defined in Section 44-53-520, when reduced to proceeds, any cash more than one thousand dollars, any negotiable instruments, and any securities which are seized and forfeited must be disposed of as follows:

- (1) seventy-five percent to the law enforcement agency or agencies;*
- (2) twenty percent to the prosecuting agency; and*
- (3) five percent must be remitted to the State Treasurer and deposited to the credit of the general fund of the State.*

What Is a Consent Order?

Generally, under *common dictionary meaning*, the word “*order*”, when used in this context, means, “a specific rule, regulation, or authoritative direction : [command](#).” [2019 Merriam-Webster, Inc.](#)

- Sheriffs give orders
- Army Generals give orders
- Drill sergeants give orders
- School principals give orders

In other words, an order is a direction or command *given by someone with the authority* to give the command. Whether or not someone has the authority depends on the facts/circumstances.

In *legal terminology*, an order is defined as “*Direction of a court or judge normally made or entered in writing....*” [West's Encyclopedia of American Law, edition 2. Copyright 2008 The Gale Group, Inc.](#)

With some specific exceptions (*e.g.*, writ of execution on a judgment must be attested to by the Clerk of Court under S.C. Code Ann. § 15-39-80, but does not require additional approval by the court/judge; subpoenas may sometimes be signed by attorneys instead of a clerk or judge), a **court order must be signed by a judge**.

S.C. Code Ann. § 44-53-530(d) specifically requires **approval by the court**.

Question: What is approval by the court, i.e., who has the authority to issue an order?

Answer: The presiding Judge (or chief administrative judge).

Court orders are often issued by the judge ruling in favor of or against a particular party. Consent orders, however, are more in the nature of voluntary agreements where all the parties agree to the terms before the order is presented to the judge for his/her signature. Basically, the parties all consent and jointly request that the judge issue an order containing the particular terms worked out among the parties. Consent orders are usually drafted by the joint efforts and/or review of all parties' counsel, then presented in final form with all required signatures to the judge for his/her consideration and signature.

Who Needs to Approve, Sign, Consent on a Consent Order?

To put it simply, **ALL AFFECTED PARTIES** need to approve, sign, or consent on a Consent Order. S.C. Code Ann. § 44-53-530(d) states:

"Any forfeiture may be effected by consent order approved by the court without filing or serving pleadings or notices provided that all owners and other persons with interests in the property, including participating law enforcement agencies, entitled to notice under this section, except lienholders and agencies, consent to the forfeiture. Disposition of the property may be accomplished by consent of the petitioner and those agencies involved. Persons entitled to notice under this section may consent to some issues and have the judge determine the remaining issues."

The next logical question is, who is "entitled to notice?" To answer that question, we must turn to S.C. Code Ann. § 44-53-530(a), which says:

The petition shall describe the property and include the names of all owners of record and lienholders of record.

The petition shall identify any other persons known to the petitioner to have interests in the property. Petitions for the forfeiture of conveyances shall also include: the make, model, and year of the conveyance, the person in whose name the conveyance is registered, and the person who holds the title to the conveyance.

*Notice of hearing or rule to show cause must be directed to all persons with interests in the property listed in the petition, including **law enforcement agencies which have notified the petitioner of their involvement in effecting the seizure.***

Even though the requirements for filing and serving pleadings and notices are not necessary, everyone who would be entitled to such notice still must consent to the forfeiture.

The court may require documentation to prove consent from all affected parties. So, how do you show everyone's consent on the consent order?

- Recite it in the body of the order AND
- Have all interested parties sign the proposed consent order before sending it to the judge for his/her approval/signature.

In summary, the following individuals must agree to a consent order:

SIGNATORIES:

- 1) Solicitor (or the attorney bringing the action on his/her behalf, *i.e.*, solicitor's designee in accordance with §44-53-530(a)).
- 2) All involved law enforcement agencies (make sure it is signed by someone who has been authorized by Sheriff to sign – could be attorney, could be Sheriff, could be Chief Deputy)
- 3) Owner of property (sometimes owner's attorney will sign for owner, but often the attorney will actually want his/her client to sign for himself/herself)
- 4) If owner is represented by counsel, owner's attorney (even if owner himself/herself also signs)
- 5) Any other interested party (except lienholders) as set forth in §44-53-530(a) (and/or their counsel if they are represented)
- 6) All lawyers representing anyone involved in the civil forfeiture

CAUTION: While a defendant in a forfeiture action may represent himself/herself and therefore the consent order might not contain signature of a lawyer acting on defendant's behalf, there must always be a lawyer's signature for the plaintiff/petitioner (AG and solicitors are themselves lawyers; their "designee" would also have to be a lawyer in order to bring a civil action on behalf of the AG or solicitor). A law enforcement officer, on his/her

own, drafting and/or signing and/or presenting a proposed consent to the court would probably be engaging in the unauthorized practice of law.

Remember it is the Attorney General or his designee, or the circuit solicitor or his designee, that must bring the forfeiture action, so the caption on the consent order should also reflect Solicitor as Plaintiff/Petitioner, even though the statute allows for the approval of a consent order without the filing and serving of pleadings. Whether you will actually be able to file the consent order without paying the civil action filing fee is probably up to your county's Clerk of Court. In some counties, consent orders can be filed using the same case number as the general sessions criminal case. Sometimes, however, there may not be a criminal case, or the only criminal charge might be in magistrate's court. Even so, the consent order still must be **approved** by a *circuit court judge*, but there does not seem to be a statutory requirement that the consent order be **filed**. If you can get the order filed, better practice is to go ahead and file it.

What Must Be Included or Recited in a Consent Order?

Even though the law clearly requires certain notices and approvals on consent orders, there really is no definitive rule or available form order that exists in our State today. Therefore, you may be wondering, what *must* the consent order look like? Here are a few tips that, if properly applied, will lead to more successful consent orders:

- As one circuit court judge stated years ago, "I want to make sure someone reading this order years after you and I have retired, can determine what led to the government's seizure of this property and why I approved its forfeiture."
- Order should recite both **factual** and **legal** basis
- Consider not only reciting a summary of the facts in the body of the order, but also attaching the incident report and the drug analysis if available
- If arrest was made, cite warrant or indictment number and charge(s)
- If conviction, refer to it in order
- If no conviction or no arrest, consider reciting reason(s) why not (*e.g.*, criminal charges dismissed at solicitor's discretion in exchange for cooperation by defendant; or defendant was cited, but not arrested, for small amount of marijuana, but during course of investigation L/E agency learned of recent similar patterns of seizures on a repeated basis in three other states regarding this same defendant, who is a known drug dealer currently under federal indictment, and based on all facts and circumstances L/E believes the funds are used in or are the proceeds of illegal drug manufacturing and distribution....)

- Include language that shows that all parties (particularly defendant/owner) are knowingly and voluntarily consenting
- Consider including language separating the consensual civil settlement from any pending criminal charges
- Consider including language that shows defendant is aware of his right to due process*
- Include language as to how funds will be distributed (this can be done in a separate consent between/among petitioner and involved law enforcement agencies, but is usually done as all part of the same order).

*REMEMBER: Defendant/Claimant/Interested Owner(s)' due process rights are both statutory (§44-53-530) and constitutional (14th amendment, cannot deprive one of life, liberty **or property** without due process). Rights can, of course, be waived, but what will the test be? Was the waiver KNOWING, VOLUNTARY, INTELLIGENT?

Summary and Questions for Consideration

There are ONLY TWO WAYS to have money/property FORFEITED under §44-53-530:

- 1) BY PETITION TO THE COURT OF COMMON PLEAS**
- 2) BY CONSENT ORDER APPROVED BY THE COURT**

FORFEITURES CANNOT OCCUR BY AGREEMENT, WAIVER, CONTRACT, ETC. WITHOUT FIRST FILING THE ACTION IN COMMON PLEAS.

Many types of civil disputes can be settled by various contractual means without filing legal action:

- Insurance company waivers and releases when upon payment of damages.
- Landlord/tenant agreements and/or post-tenancy settlements.
- Settlement of various kinds of debt (*e.g.*, promissory notes, credit card balances, IRS taxes).
- Contract disputes resulting in settlements and/or agreements not to sue.

Often lawsuits are filed, then later withdrawn/voluntarily dismissed after settlement agreements (note: sometimes such settlements may require court approval, *e.g.*, for minors).

A forfeiture action might be settled by agreement *after* bringing the action in Common Pleas (pleadings, service, notice, opportunity to be heard – in short, allowing for due

process); may or may not require court approval. Also, consent orders are often used to settle civil actions that are already pending; this could also happen after the filing of a forfeiture action.

BUT Consent Orders entered into under §44-53-530(d) – *i.e.*, without filing the action in Common Pleas ***always must have the Court's (Judge's) approval.***

SEE ATTACHED SAMPLE CONSENT ORDERS – CAUTION: THESE ARE LEGAL DOCUMENTS, WHICH SHOULD ONLY BE USED WITH DIRECT SUPERVISION AND APPROVAL OF A LICENSED ATTORNEY. DRAFTING, SIGNING, AND/OR FILING THESE DOCUMENTS BY NON-LAWYERS COULD BE DEEMED THE UNAUTHORIZED PRACTICE OF LAW, THEREBY SUBJECTING SUCH PERSONS TO CRIMINAL PROSECUTION.

QUESTIONS FOR CONSIDERATION

- 1) You draft a “one size fits all” consent order with blanks to fill in for names, dates and amounts. You staple an incident report to the form order. All parties, including defendant/owner, sign order acknowledging their consent. Will a circuit court judge in your county, who knows nothing about the case, sign the consent order?
- 2) You draft a well-written, detailed consent order. Everybody signs it except the defendant/owner. BUT, your detailed consent order also recites that the defendant/owner has indicated his consent to forfeiting the property by signing a “waiver of rights” form, indicating he voluntarily surrenders the money to the Sheriff’s Office and will make no further claim for the property. The signed and witnessed “waiver of rights” form is attached to the consent order. The reason you do this is because often defendants/owners are from out of state and leave town as soon as they bond out of jail the next morning, so you will not have time to type up a detailed consent order to present to them. Consequently, your deputies sometimes get these waivers signed either at the roadside or in the jail booking area. Will the judge sign the consent order? Has the defendant/owner knowingly and voluntarily waived his rights?
- 3) Same scenario as #2 above, but the judge decides to sign the consent order, and funds are then distributed to the agencies and spent. The following year, you are served with a federal court summons and complaint, alleging that you violated the defendant’s 4th and 14th amendment rights by illegally seizing his money and then “coercing” him into signing a waiver at the roadside. Are you comfortable with the “waiver of rights” form that the defendant signed?
- 4) Your attorney and/or the solicitor drafted a detailed consent order. Your attorney sent the proposed consent order to the defendant’s attorney. Defendant’s attorney

talks to his client and then calls your attorney back with a couple of proposed revisions, to which your attorney agrees. Defendant's attorney takes the revised consent order to his client, his client signs it, his attorney signs it, all other affected parties sign it, and then the judge signs it. Clocked-in copies are distributed to everyone, including defendant and his attorney. The following year, you are served with a federal court summons and complaint, alleging that you violated the defendant's 4th and 14th amendment rights by illegally seizing his money and then "coercing" him into agreeing to give most of it to the Sheriff's Office. How nervous are you about this lawsuit? Do you feel any differently if defendant was ultimately indicted and tried on the drug charges, but after two hung juries, solicitor eventually nolle prossed the charges?

- 5) You make a traffic stop for speeding. Driver and sole occupant is extremely nervous when you approach the car. Within a few seconds and without any questioning by you, driver blurts out "Look man, I've got a little weed for my personal use; that's all I've got. I was gonna use the \$50,000 in the back seat to pick up some heroin for my brother, but I haven't done it yet. Take the money, man, and please just give me a break on this little bit of weed so I won't lose my real job." You seize the little bit of marijuana and the \$50K and write driver a ticket for simple possession. Driver hangs around town a couple of days, voluntarily meeting with you and telling you about his brother's drug operation in another state; you pass that info along to that state's authorities and they're not surprised since brother is a big-time drug dealer there. Driver also signs your detailed consent order giving up the \$50K; judge signs the consent order; funds are distributed and spent. Eight months later, driver's brother sues to get his money back. Should you plan to hand it over? How might you establish that you are entitled to at least some portion of it?

Chapter 4:

Financial Accounts

In This Chapter:

- ✓ Types of Financial Accounts
- ✓ Confidential Funds / Cash Management System Essentials
- ✓ Custodian of Accounts

Types of Financial Accounts

To fully understand the necessity for various types of financial accounts, it is imperative to recognize the difference between seized funds and forfeited funds. To be overly simplistic, law enforcement officers *seize* property while the courts *forfeit* property. In other words, law enforcement officers have been granted the statutory authority to seize or take certain items, but those items must be properly stored and maintained while the defendant is afforded due process before the courts. Law enforcement agencies are essentially safekeepers of this seized property during this time. If the court agrees with a petition made by the Attorney General, Solicitor, or his designee or approves a consent order, then the court can issue an order permanently transferring ownership of the property to the law enforcement entity. This is known as forfeiture.

Clearly, there is quite the legal distinction between seizures and forfeitures. Since law enforcement agencies merely serve as safekeepers for seized property and have no lawful right to use the property without a court order, law enforcement agencies must differentiate between seized accounts (sometimes referred to as uncleared accounts) and forfeited accounts (sometimes referred to as cleared accounts). S.C. Code Ann. § §44-53-520(i) actually requires, "Any monies seized must be deposited in an interest bearing account pending final disposition by the court unless the seizing agency determines the monies to be of an evidential nature and provides for security in another manner." Clearly, seized and forfeited funds **must be housed in separate accounts**.

To that end, agencies commonly maintain at least three separate accounts:

Seized Accounts:

An Interest Bearing Account for All Seized Monies (This account should clearly document the amount of the original seizure.)

Forfeited Accounts:

- An Account for Forfeited Funds Stemming from the First \$1,000 of Any Cash Seizure
- An Account for All Forfeited Monies and Proceeds from the Sale of Forfeited Property

To be clear, the accounts referenced in this Chapter only refer to seizure or forfeiture accounts that have been established pursuant to South Carolina law. Federal asset forfeiture or “equitable sharing” accounts will be discussed in a separate Chapter of this Guidebook.

S.C. Code Ann. § 44-53-530(f) reads, “The first one thousand dollars of any cash seized and forfeited pursuant to this article *remains with and is the property of the law enforcement agency which effected the seizure* unless otherwise agreed to by the law enforcement agency and prosecuting agency.” As we will cover later in this Chapter, the fact that the General Assembly intended for the first one thousand dollars of any cash seized and forfeited to “remain with and is the property of the law enforcement agency which effected the seizure” is very unique. In fact, it is the only forfeiture account under South Carolina law that gives custody of the account directly to the law enforcement entity rather than a governing body. Additionally, the law goes on to distinguish the permissible expenditure of the first one thousand dollars of any cash forfeiture from the remaining total of other forfeited monies. Therefore, if a law enforcement entity wishes to spend the first one thousand dollars for, “any public purpose of law enforcement”⁸, then the law enforcement entity will need to track those forfeited funds separately from the remaining funds. Please note that the authority to spend the first one thousand dollars on, “any public purpose of law enforcement”, is derived primarily from a South Carolina Attorney General’s Opinion (cited in the footnote below) rather than the Code of Laws.

Confidential Funds / Cash Management System Essentials

Section 44-53-530(j) reads as follows:

A law enforcement agency may draw from the account an amount necessary to maintain a confidential financial account to be used in the purchase of information or evidence relating to an investigation, to purchase services, or to provide compensation in matters which are confidential and in support of law enforcement activity. The disbursement of funds from the confidential financial account must be made in accordance with procedures approved by the South Carolina Law Enforcement Division (division). All records of disbursement must be maintained and made available for audit purposes as provided in this section.

⁸ See [Op. Atty. Gen., June 28, 2011](#).

The statutes clearly allow forfeited funds to be used to establish and maintain a confidential financial account, but those funds can only be used, “in the purchase of information or evidence relating to an investigation, to purchase services, or to provide compensation in matters which are confidential and in support of law enforcement activity.”

Obviously, in order to maintain the “confidential” nature of these expenses, it may be necessary to issue cash payments. While cash payments are certainly permissible under the statute, it is critically important to strictly maintain and enforce a comprehensive cash management system for these confidential accounts. The last sentence of Section 44-56-530(j) requires, “All expenditures from these (confidential) accounts must be fully documented and audited annually with the general fund of the appropriate jurisdiction.” Therefore, it is imperative to stay apprised of the activities in these accounts.

Therefore, the following suggestions are strongly encouraged:

Audit Your Records Regularly and Keep an Accounting of the Beginning Balance

Sheriffs have long been encouraged to request audits when assuming or departing Office. Little can be done to validate the accuracy of the previous administration’s record keeping but securing an accurate beginning balance and abiding by the remaining suggestions in this section will provide all the documentation needed to prove your administration enforced and followed the law. Again, an audit is statutorily required at least annually, but periodic internal audits (monthly and/or quarterly) are also recommended.

Develop and Implement Strictly Enforced Cash Management System

Each agency should have and disseminate a written directive that clearly outlines who (person/position) may accept or disburse cash (that directive should be updated as necessary to apply to current staff). The directive should also address the need for account ledgers to track balances, receipts, and disbursements.

To guard against abuse, the written directive should require the separation of functions and provide sufficient internal and external controls. In other words, agencies are encouraged to divide duties for different phases of any significant transaction.

Written Documentation of All Expenditures

Document. Document. Document. The need for documentation of all expenditures of public funds, especially forfeited funds, cannot be stressed enough. In fact, each individual disbursement should have accompanying

documentation to justify the handling/use/expenditure. Additionally, details such as who, when, why, what, how much spent, and how much returned to the fund should all be documented and stored as well.

While the details surrounding certain expenditures, such as payments to confidential informants, must remain anonymous, law enforcement agencies should always err on the side of public disclosure when it comes to the expenditure of forfeited funds. If an expense of forfeited funds can be documented in a manner in which it will not compromise the integrity of a law enforcement investigation or action, it should be documented and made available pursuant to South Carolina's *Freedom of Information Act*.

Furthermore, it should be explicitly understood that all forfeited funds, even the first \$1,000 of forfeited funds, are public trust funds. Therefore, despite the fact that there is no specific, statutory requirement to audit each of these funds, audits are still required. As an October 3, 2005 South Carolina Attorney General Opinion⁹ states:

As set forth, there is a distinction between the first one thousand dollars of any cash seized and forfeited (subsection f) and any remaining funds. This first one thousand dollars " ... remains with and is the property of the law enforcement agency which effected the seizure unless otherwise agreed to by the law enforcement agency and prosecuting agency." There is no specific reference to an audit of these funds. However, pursuant to subsection (g), "[a]ll forfeited monies and proceeds from the sale of forfeited property as defined in Section 44-53-520 must be retained by the governing body of the local law enforcement agency or prosecution agency and deposited in a separate, special account in the name of each appropriate agency." As further provided by subsection (g), "[a]ll expenditures from these accounts must be documented, and the documentation made available for audit purposes." Therefore, there is the specific statutory requirement of an audit of these other funds.

Custodian of Accounts

S.C. Code Ann. § 44-53-530(g) reads as follows:

(g) All forfeited monies and proceeds from the sale of forfeited property as defined in Section 44-53-520 must be retained by the governing body of the local law enforcement agency or prosecution agency and deposited in a separate, special account in the name of each appropriate agency. These accounts may be drawn on and used only by the law enforcement agency or prosecution agency for which the account was established. For law enforcement agencies, the

⁹ See [Op. Atty. Gen., October 3, 2005](#).

accounts must be used for drug enforcement activities, or for drug or other law enforcement training or education. For prosecution agencies, the accounts must be used in matters relating to the prosecution of drug offenses and litigation of drug-related matters.

These accounts must not be used to supplant operating funds in the current or future budgets. Expenditures from these accounts for an item that would be a recurring expense must be approved by the governing body before purchase or, in the case of a state law enforcement agency or prosecution agency, approved as provided by law.

In the case of a state law enforcement agency or state prosecution agency, monies and proceeds must be remitted to the State Treasurer who shall establish separate, special accounts as provided in this section for local agencies.

All expenditures from these accounts must be documented, and the documentation made available for audit purposes and upon request by a person under the provisions of Chapter 4, Title 30, the Freedom of Information Act.

Several concepts are explained in this subsection, but we will focus on two.

First, all forfeiture accounts ***must be retained by the local governing body***. "All forfeited monies and proceeds from the sale of forfeited property as defined in Section 44-53-520 must be retained by the governing body of the local law enforcement agency or prosecution agency and deposited in a separate, special account in the name of each appropriate agency."

Interestingly, S.C. Code Ann. § 44-53-530(f) reads, "The first one thousand dollars of any cash seized and forfeited pursuant to this article remains with and is the property of the law enforcement agency which effected the seizure unless otherwise agreed to by the law enforcement agency and prosecuting agency." As referenced earlier, this section of law is very unique in the fact that it specifically intends for the first one thousand dollars of any cash seized and forfeited to "remain with and is the property of the law enforcement agency which effected the seizure".

So, what is the right answer? Who should be in possession of forfeiture accounts? The law enforcement agency or the governing body? One could certainly make a solid legal argument that portions of the forfeiture accounts can and should remain in the possession of the Sheriff. **We recommend, however, that Sheriffs comply with the spirit of S.C. Code Ann. § 44-53-530 and allow the county's governing body to be in possession of all forfeiture accounts.** While this may seem counterintuitive to law enforcement agency heads, the law clearly requires the governing body to retain the funds yet stops short of granting the governing body the authority to expend such funds.

Which leads to the second point in this subsection; “These accounts may be drawn on and used only by the law enforcement agency or prosecution agency for which the account was established.” While this bifurcated process may seem a bit odd, it is actually in accordance with the functions of county government as outlined in Chapter 9, Title 4. Additionally, requiring the governing body to retain the funds achieves two key purposes; it should trigger an annual audit since the governing body’s general fund is required to be audited and it underscores the notion that forfeited funds and forfeited property are public dollars and generally must be spent in the same manner as other public funds.

Additionally, the statute specifically prohibits forfeiture funds from being used to supplant operating funds in current or future budgets. The second paragraph of Section 44-53-530(g) states, “These accounts must not be used to supplant operating funds in the current or future budgets.” Therefore, it should be clearly understood that while forfeiture funds may be housed in accounts possessed by the governing body, the authority to spend those funds rests solely with law enforcement and prosecution agencies. This authority is not absolute, however, as Section 44-53-530(g) goes on to state, “Expenditures from these accounts for an item that would be a recurring expense must be approved by the governing body before purchase or, in the case of a state law enforcement agency or prosecution agency, approved as provided by law.”

Chapter 5:

Expenditure of Forfeited Funds

In This Chapter:

- ✓ Expenditure of Forfeited Funds
- ✓ Use of Forfeited Assets Under South Carolina Law
- ✓ Asset Forfeiture and Equitable Sharing Under Federal Law

Expenditure of Forfeited Funds

The purpose of civil asset forfeiture is to “remove the tools of crime from criminal organizations, deprive wrongdoers of the proceeds of their crimes, recover property that may be used to compensate victims, and deter crime.” **Civil asset forfeiture should never be the focus of law enforcement activities, but rather the byproduct.** Once approved, law enforcement agencies must abide by the legislative and administrative directives for the proper use and expenditure of the forfeited funds. The State of South Carolina and the United States Justice Department have their own specific guidelines for the use of forfeited assets which differ in some material ways. Therefore, we will discuss each separately.

Use of Forfeited Assets Under South Carolina Law

S.C. Code Ann. § 44-53-520 establishes the things which are subject to forfeiture. According to this code section, the described property “is forfeited and transferred to the government at the moment of illegal use. Seizure and forfeiture confirms the transfer.”¹⁰ All proceeds of property and cash forfeited by consent order must be disposed of as provided in *S.C. Code Ann. Section 44-53-530(e)*.

All real or personal property, conveyances, and equipment of any value defined in Section 44-53-520, when reduced to proceeds, any cash more than one thousand dollars, any negotiable instruments, and any securities which are seized and forfeited must be disposed of as follows:

¹⁰ S.C. Code Ann. Section [44-53-520\(d\)](#).

- 1. seventy-five percent to the law enforcement agency or agencies;**
- 2. twenty percent to the prosecuting agency; and**
- 3. five percent must be remitted to the State Treasurer and deposited to the credit of the general fund of the State.**

Pursuant to *S.C. Code Ann. Section 44-53-530(f)* the first \$1000 of any cash seized and forfeited remains with and is the property of the law enforcement agency which effected the seizure unless otherwise agreed to by the law enforcement agency and the prosecuting agency. There is a distinction between the first one thousand dollars of any cash seized and forfeited (subsection f) and any remaining or excess funds. The legislature did not intend to limit the use of the first one thousand dollars to drug enforcement activities, or for drug or other law enforcement training or education.¹¹ This first one thousand dollars can be used for any public purpose of law enforcement.

The statute further requires that all forfeited monies and proceeds from the sale of forfeited property in excess of the first one thousand dollars must be retained by the governing body of the local law enforcement agency or prosecution agency and deposited in a separate, special account in the name of each agency.¹² Law enforcement agencies must only use the monies from these accounts for “drug enforcement activities, or for drug or other law enforcement training or education.”¹³ Monies in these accounts must **not** be used to supplant operating funds in the current or future budgets of the agencies. All expenditures from these accounts must be documented, and audited annually with the general fund of the appropriate jurisdiction.¹⁴ The documentation is also to be available upon request from a person under to the South Carolina *Freedom of Information Act*.¹⁵

Pursuant to *S.C. Code Ann. Section 44-53-530(i)* expenditures from the accounts must be made in accordance with established procurement procedures of the jurisdiction where the account is established. In addition, under *S.C. Code Ann. Section 44-53-530(h)* the use of forfeited property retained by the law enforcement agency must also be documented and available upon request pursuant to the *Freedom of Information Act*.

The definition of “drug enforcement activities” for which the forfeited funds can be used has been subject to much discussion. There is little statutory guidance and no reported court cases known at this time. In response to requests for guidance the S.C. Attorney General has issued numerous opinions on the expenditure of the funds which admittedly are made on a case by case basis. For instance, the purchase of handguns for deputies from drug forfeiture funds has been found appropriate because every law enforcement officer in the agency was, at one time or another involved in drug arrests.¹⁶ In addition, it was not unreasonable for

¹¹ See [Op. Atty. Gen., June 28, 2011](#).

¹² See S.C. Code Ann. Section [44-53-530\(g\)](#).

¹³ Id. at [44-53-530\(g\)](#).

¹⁴ There is a specific statutory requirement of an audit of these other funds. [Op. Atty. Gen., October 3, 2005](#). See S.C. Code Ann. Section [44-53-530\(j\)](#).

¹⁵ See S.C. Code Ann. Section [30-4-10](#), et. seq.

¹⁶ See [Op. Atty. Gen., December 3, 1992](#).

SLED to use state forfeited funds to support the Implied Consent Program.¹⁷ The purchase of automobiles to be used primarily for traffic safety was not an appropriate use of forfeited funds as they would be utilized for purposes other than drug enforcement.¹⁸ However, the use of forfeited funds to purchase radar units because of the “strong connection between the use of radar and the interception of drugs being transported on the highway” was appropriate as a recognized tool in narcotics interdiction.¹⁹

The Attorney General has also opined that it was not unreasonable to purchase video imaging equipment used to produce photo lineups for identification purposes because drug dealers typically use street names and an accessible imaging system to create lineups in a more expedient manner would constitute drug related activity within the limitation of the statute.²⁰

In summary, under the South Carolina law, the proper expenditure of forfeited assets are as follows;

- First \$1000 in cash forfeiture is for the exclusive use of the seizing law enforcement agency and can be used for **“any public purpose for law enforcement.”**
- Of any remaining amount after the first \$1000, 75% goes to the seizing law enforcement agency, 20% goes to the prosecuting agency and 5% goes to the State Treasurer.
- All proceeds of forfeitures in excess of the first \$1000 must be used exclusively for **drug enforcement activities or for drug or other law enforcement training or education.**
- Proceeds must be deposited into a special account with the agencies’ governing body.
- The monies cannot be used to supplant operating funds within current or future budgets.
- All forfeited property or equipment not reduced to proceeds can be used by the agency or transferred to another appropriate agency, but must not be used to supplant operating funds within current or future budgets.
- The use of property retained by the law enforcement agency must be documented and made available for FOIA requests.
- All accounts must be audited annually and expenditures must be documented and made available for FOIA requests.

¹⁷ See [Op. Atty. Gen., August 1, 2011](#).

¹⁸ See [Op. Atty. Gen., December 3, 1992](#).

¹⁹ See [Op. Atty. Gen., December 9, 1996](#).

²⁰ See [Op. Atty. Gen., July 10, 1997](#).

- All expenditures must be made in accordance with procurement requirements of the jurisdiction.

Chapter 6:

Federal Equitable Sharing

Program

In This Chapter:

- ✓ What is Equitable Sharing?

What is Equitable Sharing?

The Department of Justice Asset Forfeiture Program is a nationwide law enforcement initiative that removes the tools of crime from criminal organizations, deters crime and deprives wrongdoers of their criminal proceeds, and recovers property that may be used to compensate victims. Equitable sharing further enhances the law enforcement mission by fostering cooperation among federal, state, and local law enforcement agencies. Federal law authorizes the Attorney General to share federally forfeited property with participating state and local law enforcement agencies. The exercise of this authority is discretionary and limited by statute. The Attorney General is not required to share property in any case.

There are two Federal Asset Forfeiture programs that local law enforcement may participate in: Justice and Treasury. Each Department oversees its own respective Equitable Sharing Programs.

The Department of Justice Equitable Sharing Program is administered by the Asset Forfeiture and Money Laundering Section (AFMLS) for Justice seizing agencies – DEA, FBI, ATF, Department of Agriculture, US Postal Inspection Service, Food and Drug Administration, Defense Criminal Investigative Service, and Department of State.

The Treasury Equitable Sharing Program is administered by the Treasury Executive Office for Asset Forfeiture (TEOAF) for Treasury and Department of Homeland Security seizing agencies – ICE, IRS, US Secret Service, US Coast Guard, Customs and Boarder Protection, Tax and Trade Bureau.

State and local law enforcement agencies may receive equitable sharing funds by participating directly with federal agencies on investigations that lead to the seizure and forfeiture of property, or by seizing property and requesting a federal agency to adopt the seizure and proceed with federal forfeiture. Once an investigation is completed and the seized assets are forfeited, the assisting state and local law enforcement agencies can request

a share of the forfeited assets or a percentage of the proceeds derived from the sale of forfeited assets. Generally, the degree of a state or local agency's direct participation in an investigation determines the equitable share allocated to that agency.

To request a share of seized assets, a state or local law enforcement agency must first become a member of the Equitable Sharing Program. Agencies become members of the program by signing and submitting an annual Equitable Sharing Agreement and Certification (ESAC) report to MLARS. As part of each annual agreement, officials of participating agencies certify that they will use equitable sharing funds for allowable law enforcement purposes.

This document outlines categories of allowable and unallowable uses for equitable sharing funds and property.

Rather than providing additional instruction or commentary, representatives from the Money Laundering Asset Recovery Section (MLARS) of the US Department of Justice have asked that we simply refer to the latest guidance offered directly from them. [The Guide to Equitable Sharing for State and Local Law Enforcement Agencies \(Equitable Sharing Guide\), issued by MLARS in July 2018](#), can be found my clicking the embedded hyperlink.

If an agency is unsure whether a proposed expenditure is permissible, it should email mlars.ESPProgram@usdoj.gov for Department of Justice fund expenditures or treas.aca@treasury.gov for Department of the Treasury fund for guidance regarding the appropriateness of the proposed expenditure.

Asset Forfeiture Guidebook

Appendix

[Sample Consent Order – Pro Se Defendant](#)

[Sample Consent Order – Represented Defendant](#)

Asset Forfeiture Guidebook

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The contents contained herein have been reviewed by the South Carolina Sheriffs' Association Board of Directors at a meeting held on the date shown on the cover of this guidebook