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February 15, 2022

Hon. Fred Patton, Chairman
House Judiciary Committee

Re: Written-only testimony in support of HB 2648; civil asset forfeiture reform

Chairman Patton and Members of the House Judiciary Committee:

I write in support of HB 2648 in my capacity as Jefferson County Attorney. I had the pleasure of serving on the Kansas Judicial Council's Civil Asset Forfeiture Advisory Committee in the fall of 2017. That committee was commissioned by then House Judiciary Chairman Blaine Finch and then Senate Judiciary Committee Chairman Rick Wilborn to "study the topic of civil asset forfeiture, which had been the subject of a Legislative Post Audit report in July 2016, as well as five House bills and three Senate bills introduced in 2017." *Report of the Judicial Council Civil Asset Forfeiture Advisory Committee (December 21, 2017)*. The committee's work ultimately assisted the Kansas Legislature's consideration and ultimate passage of HB 2459 (2018) during the 2018 legislative session.

During our deliberations as a committee in the fall of 2017, I consistently stated my personal support for the two core policy provisions in HB 2648, the current bill being considered by this committee. Those two policy provisions include: 1) requiring a criminal conviction prior to the forfeiture of civil assets under the Kansas standard asset seizure and forfeiture act ("the Act"); and 2) remittance of all forfeited proceeds under the Act to the state general fund. During our deliberations, and for reasons stated below, I stated my belief that the Act should not create "profit motive" potential in matters of official discretion in the executive branch, whether in a prosecutor's office, a law enforcement agency, or any other agency possessing statutory authority to deprive individuals of their liberty or property, subject to the rule of law.

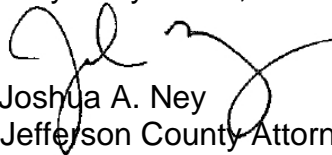
Under current law, a portion of the proceeds of civil asset forfeiture are distributed to the county or district attorney's office that initiated the civil forfeiture action. Distributed funds may "be used for such additional law enforcement and prosecutorial purposes as the county or district attorney or other governmental agency's attorney deems appropriate, including educational purposes," subject to county commissioner authorization. In addition, because civil asset forfeiture does not currently require a criminal conviction, there is a much lower standard of proof required to deprive accused individuals of their property under the Act.

The "profit motive" potential this creates is akin to an elected prosecutor's diversion program wherein a county or district attorney maintains discretion on how to spend diversion funds. In such a scenario, a prosecutor would have a unilateral power to charge, divert, collect, and spend moneys collected in lieu of additional criminal proceedings. This "profit motive" potential would be inappropriate in a diversion context, and I have consistently believed that it is inappropriate within the civil asset forfeiture context as well.

HB 2648 does much to curtail this current "profit motive" potential in current law. The bill would require the criminal conduct "nexus" in civil asset forfeiture to be held to the criminal burden of proof required for a conviction, established either at trial beyond a reasonable doubt or through a plea. More importantly, the bill would mandate that all proceeds be remitted to the state general fund, thus removing the "contingency fee" type arrangement that exists for law enforcement agencies seeking asset forfeiture under current law.

The well-known quote from Federalist 51 states: "If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." There are many honorable men and women who serve in law enforcement or prosecutor offices across our state, but theirs is an immense and frightening power: power to deprive individuals of their freedom or property, subject to the rule of law. The rule of law must constrain prosecutorial and investigative discretion solely to the interests of justice and admit no possibility for consideration of pecuniary interests of an agency's budget. HB 2648 advances this constraint on the discretion of the executive branch while maintaining proper procedures for deterring criminal conduct in our state.

Very Truly Yours,

A handwritten signature in black ink, appearing to read 'Joshua A. Ney', written over the typed name and title.

Joshua A. Ney
Jefferson County Attorney