

## Civil Asset Forfeitures

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## The Role of the Judiciary

“...it is indispensable, that there should be a judicial department, to ascertain, and decide, rights, to punish crimes, to administer justice, and to protect the innocent from injury and usurpation.”

– Joseph Story, “A Familiar Exposition of the Constitution of the United States” (1840)

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## The Role of the Judiciary – according to the Federalist Papers

- “But it is not with a view to infractions of the Constitution only [but also] to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws.” – Alexander Hamilton, Federalist 78
- “Government is instituted no less for protection of the property than of the persons of individuals. The one as well as the other, therefore, may be considered as represented by those who are charged with the government.” – James Madison, Federalist 54

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The Role of the Judiciary – according to the Tennessee Constitution

- “That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land.” – Art. I, § 8, Tenn. Const.

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The Role of the Judiciary – according to the Forfeiture Statute

- “The judge shall issue the forfeiture warrant if the judge finds that the offered proof establishes probable cause to believe that:
  - A. The property is subject to forfeiture; and
  - B. If the property is owned by one whose interest is described in public records of titles, registrations or other recorded documents, that the owner’s interest is subject to forfeiture under the applicable provision of law.” – Tenn. Code Ann. § 40-33-203(c)(1)(A)&(B)
- However, we just saw that part of our job is to act as a check upon the power of the state against the citizenry by ensuring that the government does not improperly trespass upon the property rights of citizens.

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So, the question today is, how do we satisfy our judiciary role when tasked with issuing a warrant to seize and potentially forfeit the property of a private citizen?

- Who is presumed to be innocent
- Who often has not yet had a day in criminal court
- Who often does not have counsel
- Who may not be allowed to participate in the proceeding
- Whose counsel is not allowed to participate in the proceeding
- Whose property may be held by a low standard of proof
- Who may be acquitted or have their charges dismissed
- With no monetary limits

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Bottom line, we gotta get this right

We really do.

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The best starting place for getting it right is making sure we understand:

- The Scope and Purpose of the Forfeiture Warrant Hearing
  - Summary of Asset Forfeiture Process
  - The Forfeiture Warrant Hearing Generally
- The Judge's Duties in a Forfeiture Warrant Hearing
  - Hearing Requirements in Practice
  - Special Ownership Interests
- What Happens After the Forfeiture Warrant Hearing
  - Appeals from Judicial Commissioners or Magistrates
  - After the Forfeiture Warrant is Final

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Summary of Civil Asset Forfeiture

Purpose  
Types of cases  
Timeline

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Summary of Civil Asset Forfeiture:  
Purpose of Civil Asset Forfeiture

- Remedial in Nature
- Encourages property owners to make sure property is not used for illegal purposes
- May abate a nuisance
- Ensures persons do not profit from their illegal acts
- Deterrent effect

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Summary of Civil Asset Forfeiture:  
Common Types of *Civil* Forfeiture Cases

- Three Common Types of Cases for TDOS Forfeitures
- Narcotics (§ 53-11-451)
  - Note: Includes Simple Possession, Unlawful Drug Paraphernalia
- DOR – Driving on Revoked license due to DUI (§ 55-50-504)
- DUI – Conviction of 2<sup>nd</sup> or Subsequent in last 5 years (§ 55-10-414)

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Summary of Civil Asset Forfeiture:  
Timeline of Forfeiture Cases

- Initial Seizure
- Additional Investigation Period
- Forfeiture Warrant Hearing ← you are here
- TDOS Review, Approval, and (if approved) Notice
- Petition or Administrative Forfeiture\*
- TDOS Proceeding before Administrative Court
  - includes appeals from administrative forfeitures
- Appellate Review
  - Chancery/Circuit → Tenn. Ct. App. → Tenn. Sup. Ct. → SCOTUS

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THE FORFEITURE WARRANT HEARING

What it Does  
 What it Doesn't  
 Why It's So Darn Complicated

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The Forfeiture Warrant Hearing: What is it?

- Probable Cause Determination
  - Looking for PC to believe "the property is subject to forfeiture" – § 40-33-204(c)(1)
  - General Sessions, Circuit, Criminal Court, Popularly Elected City Judge (if licensed attorney) or Magistrate/Judicial Commissioner (if licensed attorney)
- **DOES** Transfer Jurisdiction to Department of Safety/APD
  - "Once personal property is seized pursuant to an applicable provision of law, no forfeiture action shall proceed unless a forfeiture warrant is issued... The forfeiture warrant shall authorize the institution of a forfeiture proceeding..." – § 40-33-204(a)
- **DOESN'T** Forfeit the Seized Property
  - Hold on the property pending the forfeiture proceeding
  - Bonding procedure available to owners for property return prior to disposition of forfeiture proceeding

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The Forfeiture Warrant Hearing: Why Does it Give Us a Hard Time?

- Because the Statute Stinks
- Controlled by Tenn. Code Ann. § 40-33-204
- Has to be one of the most unnecessarily complicated statutes ever...
  - Really.
- It is drafted in a manner that seems like an attempt to divide up requirements by fact pattern; but it doesn't always stick to that division and continually refers back to itself which makes reading it absolutely tiresome.

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Hearing Requirements in Practice

Overview  
 Requirement Categories  
 Unchanging Requirements  
 Requirements by Scenario

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Hearing Requirements in Practice: Overview

- In Theory, the Forfeiture Warrant Hearing is Three Simple Steps:
  - Officer presents paperwork, Judge takes testimony on probable cause, Judge issues an order
- In Practice, the Statute Assigns More Duties to Judges:
  - Knowing when *ex parte* hearing is *required*, knowing what parties are allowed to testify (if not *ex parte*), determining which deadlines apply, ensuring the required records are maintained, ensuring forms are completed properly, ensuring required questions are asked, etc.
- Breaking down the statute's requirements by factual scenarios can help you slog through its complex language.
  - and we made you a cheat sheet just case it doesn't.

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Hearing Requirements in Practice:  
Requirement Categories

- DEADLINES and extensions or continuances
- DOCUMENTS and which are required when
- TESTIMONY and parties who are permitted to give it and/or be present
- CHECKBOXES and statutory questions
- RECORDING and the duty to maintain
- RULING and permissible dispositions

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### Hearing Requirements in Practice: The Unchanging Requirements

- In EVERY Forfeiture Warrant Hearing, the Judge will make a probable cause determination and the proof will include:
  - The Notice of Seizure (Document)
  - The Forfeiture Warrant (Document)
  - Affidavit in Support of Forfeiture Warrant (Document)
  - The Supporting Narrative (Document), and
  - Testimony of Law Enforcement Officer (Testimony)

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### Hearing Requirements in Practice: The Unchanging Requirements

- The Court is ALWAYS required to record the hearing and to maintain both the recording and copies of submitted documents.
  - Absolute statutory requirement. WILL destroy case if you do not satisfy this obligation.
  - Must be audio recording, not a "recording" like one would make when recording a deed. See § 40-33-204(i).
- The Court will ALWAYS issue the forfeiture warrant, deny the forfeiture warrant, or sign the 10 day extension under § 204(c)(2). The statute does not contemplate continuances.

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### Hearing Requirements in Practice: Requirements by Scenario (i.e. the Cheat Sheet Scenarios)

- DEADLINES and extensions or continuances
- DOCUMENTS and which are required when
- TESTIMONY and parties who are permitted to give it and/or be present
- CHECKBOXES and statutory questions
- RECORDING and the duty to maintain
- RULING and permissible dispositions

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Recurring Circumstances Regarding  
Special Ownership Interests

Currency  
Bank Accounts  
Lienholders  
Vehicle Ownership

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Recurring Circumstances Regarding Special  
Property Interests: Currency

- Rebuttable presumption that currency is not subject to forfeiture "absent evidence to the contrary"
  - i.e. must show PC of nexus between currency and criminal activity
- Most Judges have interpreted this to mean the presence of small amounts of a controlled substance near seized currency is not enough, *on its own*, for seizure.
  - However, case law states that a large volume of a controlled substance and its proximity to currency is "strongly probative" evidence.
    - e.g. \$10k next to 3 marijuana cigarettes vs. \$10k next to 3 pounds of marijuana.
- Bottom Line: Just ask the officer what ties the currency to drug trade.

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Recurring Circumstances Regarding Special  
Property Interests: Bank Accounts & Lienholders

- Bank Accounts:
  - Bank accounts will never fall under cheat sheet scenario one because the person in possession is always the Bank.
  - This means the bank account will also have a separate Notice of Seizure from any other seized property (and may be submitted in a separate Forfeiture Warrant Hearing).
- Lienholders:
  - Their interests are almost never attempted to be seized.
  - Lienholders should (almost always) be listed separately from the PIP and owners on the Affidavit in Support of Forfeiture Warrant because their interest is not sought by the seizing agency.
    - You may occasionally see potential owners listed here as well. If so, best practice is to clarify with the testifying officer whether they're seeking that owner's interest or not.

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**Forfeiture Warrant**

Any other question deemed necessary to determine the legal and factual basis for forfeiture of such owner, co-owner or secured party's interest.

There is further probable cause to believe that Jane Doe and Potential Owner has an ownership, co-ownership, (Owners/Co-owners/Lienholders) or security interest in said property and that such interest is subject to forfeiture in that said individual had knowledge of, or participated in, the use of the above-described property in violation of the above indicated statute.

You are **THEREFORE COMMANDED** to seize and/or hold said property until such time as the Commissioner of the Tennessee Department of Safety and Homeland Security shall legally dispose of said property pursuant to Title 40, Chapter 33, Part 2 of the Tennessee Code Annotated.

**Names in first blank should always match. These are the parties subject to forfeiture.**

**Affidavit in Support of FW**

Affiant further avers that Jane Doe and Potential Owner (Owners/Co-owners/Lienholders) has an ownership, co-ownership, or security interest in the above described property and that said interest is subject to forfeiture pursuant to the statute noted above.

There is further probable cause to believe that the above-described property and the interest of the aforementioned party(s) are subject to forfeiture based on the following facts:

**SEE ATTACHED NARRATIVE AND ACCOMPANYING DOCUMENTS.**  
(All Narrative and Accompanying Documents Shall be Deemed to be a Part of the Existing Warrant.)

A search of the title history and testimony from witnesses has established that Lienholder (Other parties with an interest) has an ownership, co-ownership, or secured interest in the seized property which is not subject to forfeiture.

Wherefore Affiant prays that the court issue a Forfeiture Warrant authorizing the sustenance of a forfeiture proceeding for the above-described property and interest.

**Lienholders or owners listed in this second spot are not subject to forfeiture proceedings.**

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Recurring Circumstances Regarding Special Property Interests: Ownership, Knowledge, & Indicia of Ownership

- For most judges, ownership of seized property is likely the most challenging aspect of Forfeiture Warrant Hearings.
- The following slides will attempt to outline the approach many judges presiding over a high volume of Forfeiture Warrant Hearings have adopted based on their best interpretation of the relevant statutes.

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Ownership, Knowledge, & Indicia of Ownership: Step One

- If multiple potential owners, try to determine the true/actual owner using indicia of ownership found in § 40-33-204(d) & other evidence.
  - Basic reasoning is that because ownership is fluid "[t]he intention of the Parties and not the certificate of title determines ownership."
  - Factors in §204(d) are not exhaustive.
  - Classic example is a parent who purchases a vehicle for a child but remains the registered owner for insurance purposes or other reasons.
- NOTE: The determinations in both steps are VERY fact specific.

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### Ownership, Knowledge, & Indicia of Ownership: Step Two

- Next, if applicable, determine whether PC exists that the true/actual owner had knowledge of the wrongdoing giving rise to seizure, therefore satisfying § 40-33-204(c)(1).
- Pay attention to § 53-11-451, § 55-50-504(g), & § 55-10-414.
  - Only Drug seizures under § 53-11-451 have the knowledge requirement (framed like an affirmative defense in the statute).
  - Remember that these statutes are standards for actual forfeiture after opportunity for due process; issuance of FW based on PC does not forfeit property.
  - Division of ownership interests is not as clear cut as we would like, and determining the ownership interests (i.e. defining by percentage) between potential owners may be inappropriate in FWH.

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### Ownership, Knowledge, & Indicia of Ownership: Examples

- Fact patterns in handout.
  - Pattern 1
  - Pattern 2
  - Pattern 3
  - Pattern 4
- NOTE: We don't get to decide to whom the vehicle is returned. § 40-33-204(h) requires return to registered owner or PIP.

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### Appeals from Judicial Commissioner or Magistrate

- Deadline
- Applicability
- Standard of Review
- Form of Review

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### Appeals from Judicial Commissioner or Magistrate

- 10-Day Deadline after initial Forfeiture Warrant Hearing
  - § 40-33-204(j)(1)
- These only apply to those counties in which Judicial Commissioners and Magistrates are licensed attorneys because you must have a license to practice law to preside over a forfeiture warrant hearing.
- "On appeal, the general sessions court shall conduct a hearing and review the issuance of the forfeiture warrant..."
  - I take this to mean the appeal to general sessions will be *de novo*—an entirely new hearing that is not based solely on the record of the prior hearing.

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### What Comes After the Forfeiture Warrant is Final

- When Denied
- When Granted
- Outline of TDOS Proceedings
- Appellate Hierarchy

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### What Comes After the Forfeiture Warrant is Final

- If Denied:
  - Currently nothing. No appeal, no review, nothing... except maybe angry phone calls from law enforcement.
- If Granted/Issued:
  - Jurisdiction shifts to the Department of Safety/Administrative Procedures Division upon your signature or expiration of appeal from JC/Magistrate deadline

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What Comes After the Forfeiture Warrant is Final: TDOS Proceedings

- Attorney Review of Forfeiture Warrant and Seizure Packet
  - Dismissed or Approved based on more than mere probable cause
  - Better law enforcement training means fewer dismissals at this stage
- Notice Sent to Interested Parties
  - Can include parties unknown at time of FWH
- Settlement, Trial, or Forfeiture
- Appellate Review
  - Administrative → Chancery/Circuit → Court of Appeals → TN Supreme Court → SCOTUS

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