



ALAN WILSON  
ATTORNEY GENERAL

October 24, 2017

Sheriff S. Duane Lewis  
Berkeley County  
223 N. Live Oak Drive  
Moncks Corner, SC 29461

Dear Sheriff Lewis:

We received your request seeking an opinion on the following questions:

1. What should this office do with cash money which was intended by a criminal defendant to be the consideration for illegal services, e.g. prostitution, and which was seized by the arresting officer at the time of the arrest?
2. What should this office do with properties of a criminal defendant which were seized in connection with a narcotics arrest, but regarding which no civil forfeiture case was initiated within the applicable statute of limitations?
3. What should this office do with cash money believed by the business operator at the time of collection to be counterfeit, but which later turned out to be legal tender?

For the purposes of this opinion, we presume that the property at issue has no evidentiary value and is not subject to an order of restitution, fee repayment, a consent order of forfeiture, or some other similar order. We understand the question is focused squarely on who has the right to the property.

#### **Law/Analysis:**

We encourage you to coordinate with your circuit solicitor or other appropriate prosecuting authority<sup>1</sup> to resolve these fact-specific questions on an ongoing, case-by-case basis. Our Office's longstanding policy is to defer to magistrates in their determinations of probable cause, and to local law enforcement officers and solicitors in deciding what charges to bring and which cases to prosecute. *See, e.g., Op. S.C. Att'y Gen.*, 2016 WL 3946153 (July 5, 2016). As you also know, law enforcement officers and solicitors have discretion in how they allocate the

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<sup>1</sup> This opinion makes several references to the circuit solicitor as one prosecutorial authority among several which has the power to bring civil forfeiture actions. This should not be read so as to diminish the power of other appropriate authorities to bring such actions. *Cf. Op. S.C. Att'y Gen.*, 1998 WL 745998 (June 23, 1998) (advising that law enforcement consult with their local attorney on a forfeiture question).

limited resources that the taxpayers provide to them. *Id.* Our opinion setting out the law here is intended to aid you in those discussions.

**1. Cash intended by a criminal defendant as consideration for illegal services, such as prostitution, seized at the time of arrest.**

South Carolina law provides various statutory procedures to confirm the forfeiture of cash intended for use in particular crimes. *See, e.g.*, S.C. Code Ann. § 44-53-530 (2015). As noted above, we encourage you to thoroughly discuss the applicability and practicality of such forfeiture actions with your circuit solicitor or other appropriate prosecuting authority on a case-by-case basis. *Cf. Op. S.C. Att'y Gen.*, 1998 WL 745998 (June 23, 1998) (advising consultation with the circuit solicitor regarding practical considerations in forfeiture actions). In order to be as responsive as possible to your question, we discuss some applicable law in this opinion to aid your office in those discussions.

As a preliminary matter, a state or a political subdivision which seeks to seize money or other property must do so only in a way that comports with constitutional mandates. *See, e.g., Medlock v. 1985 FORD F-150 PICK UP VIN 1FTDF15YGFNA22049*, 308 S.C. 68, 471 S.E.2d 85 (1992) (holding, on state constitutional grounds, that the owners of property subject to South Carolina's drug-related forfeiture statute are entitled to a jury trial where the property "normally is used for lawful purposes"). As you no doubt are aware, the Fourth Amendment of the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Additionally, the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." US Const. amend. V. The Fourteenth Amendment similarly provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Fourteenth Amendment also incorporated certain federal constitutional protections and made them binding upon the states. *See, e.g., Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (Fourth Amendment incorporation); *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897) (partial Fifth Amendment incorporation). Similarly, the South Carolina Constitution mandates that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated." S.C. Const. art. I § 10. Additionally, the South Carolina Constitution forbids that "any person be deprived of life, liberty, or property without due process of law." S.C. Const. art. I § 3.

Within this constitutional framework, the state or a political subdivision has the power to seize certain property which is believed to be involved in certain crimes and thereby forfeited to the state, and to confirm the forfeiture in subsequent proceedings. *See, e.g., State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). Forfeiture proceedings are civil, in rem cases which target such property, and may be brought independently of criminal prosecutions. *See id; see also Farmer v. Florence Cnty Sheriff's Office*, 401 S.C. 606, 738 S.E.2d 473 (2013). "[F]orfeiture serves a deterrent purpose both by preventing the further illicit use of the property and by imposing an economic penalty, thereby rendering the illegal behavior unprofitable." *Mims Amusement Co. v. SLED*, 366 S.C. 141, 147, 621 S.E.2d 344, 347 (2005) (internal citations omitted); *see also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686, 94 S.Ct. 2080, 2093, 40 L.Ed. 452, 470 (1974) (opining that certain forfeiture statutes "further the punitive and deterrent purposes that have been found sufficient to uphold, against constitutional challenge, the application of other forfeiture statutes."). In *Myers v. Real Property at 1518 Holmes Street*, the South Carolina Supreme Court held that seizure and forfeiture of contraband is within the legitimate police power of the state, and is not a "taking" for constitutional purposes. *Myers v. Real Property at 1518 Holmes Street*, 306 S.C. 232, 411 S.E.2d 206 (1991). The Court in *Myers* also relied on U.S. Supreme Court precedent to hold that due process permitted a post-seizure hearing to confirm forfeiture and did not require notice in advance of a seizure in light of the extraordinary nature of the forfeiture situations. *Id.* at 236, 411 S.E.2d at 212 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. at 680, 94 S.Ct. at 2090, 40 L.Ed. at 466 (1974)). Our state Supreme Court reiterate this due process holding in *State v. 192 Coin-Operated Video Game Machines*, opining that "[t]he most due process requires is a post-seizure opportunity for an innocent owner 'to come forward and show, if he can, why the res should not be forfeited and disposed of as provided for by law.'" *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 197, 525 S.E.2d 872, 883 (2000) (quoting *Moore v. Timmerman*, 276 S.C. 104, 109, 276 S.E.2d 290, 293 (1981)).

Our state's highest Court also has held that the requirements of due process differ according to the nature of the property seized. *See Mims Amusement Co. v. SLED*, 366 S.C. 141, 621 S.E.2d 344 (2005). In the way of background, we note that our state's Supreme Court has distinguished between "derivative contraband," meaning property which normally has a lawful use and is seized as a result of an unlawful use; and "contraband *per se*," meaning property that normally has no lawful use. *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 189, 525 S.E.2d 872, 879 (2000). The Court expounded on this distinction in *Mims Amusement Co. v. SLED*:

Courts have recognized two classes of contraband subject to forfeiture by statute. The first class is contraband *per se*, which are things that may be forfeited

because they are illegal to possess and not susceptible of ownership. This class includes illegal gambling devices such as roulette wheels or craps tables, "moonshine" liquor, [or] illegal narcotic drugs . . . . The second class is derivative contraband, which are things that may be forfeited because they are instrumentalities of a crime, but which ordinarily are not illegal to possess. This class includes items such as currency, vehicles, or real property used in the commission of a crime or traceable to the proceeds of criminal activity.

*Mims Amusement Co.*, 366 S.C. at 149-50, 621 S.E.2d at 348 (2005) (internal citations omitted).

This distinction between types of contraband controls in part what due process requires in the exercise of the police power in pursuit of forfeiture. *See Mims Amusement Co v. SLED*, 366 S.C. 141, 147, 621 S.E.2d 344, 347 (2005). As our Supreme Court has opined, the general rule is that "[a] property interest in derivative contraband is not extinguished automatically if the property is used unlawfully; therefore, forfeiture of such property is permitted only as authorized by statute and in compliance with the safeguards of due process." *Id.*, but see, e.g., S.C. Code Ann. § 44-53-520 (Supp. 2016) (declaring certain property forfeited at the time of their illegal use). As a result, our state's highest Court has reversed forfeiture confirmations where the procedures used did not adequately safeguard the constitutional rights of the owner of the property. See, e.g., *Moore v. Timmerman*, 276 S.C. 104, 276 S.E.2d 290 (1984). For example, in *Moore v. Timmerman*, our Supreme Court affirmed the decision of the trial court to set aside the public sale of a shotgun which had been seized from persons engaged in illegal night hunting for deer but which belonged to an innocent third party who was not involved in the crime. *Id.* The Court in *Timmerman* held that even though "the property was forfeited and sold in conformity with the [applicable] statutory provisions" which only required a criminal conviction, due process required the opportunity for an innocent owner who was not subject to criminal prosecution "to come forward and show, if he can, why the res should not be forfeited and disposed of as provided for by law." *Id.* Similarly, in *Medlock v. 1985 Ford F-150 Pick Up*, the Supreme Court considered a challenge to the forfeiture of a personal vehicle where the forfeiture was confirmed in a bench trial held pursuant to the then-current versions of S.C. Code Ann. §§ 44-53-530 and -530 (Supp. 1991). *Medlock v. 1985 Ford F-150 Pick Up VIN 1FTDF15YGFNA22049*, 308 S.C. 68, 70, 471 S.E.2d 85, 86 (1992). The Court reversed the confirmation, and held that because the vehicle normally had a lawful purpose, the South Carolina Constitution entitled the owner to a jury trial in the forfeiture hearing. *Id.* at 70-72, 471 S.E.2d at 86-87.

Conversely, our Supreme Court also has held that there is no right to a jury trial in a forfeiture proceeding against contraband *per se*, such as illegal gaming devices, because the very possession of such items is illegal. *Mims Amusement Co. v. SLED*, 366 S.C. 141, 154, 621

S.E.2d 344, 351 (2005) (citing, *inter alia*, *People ex rel. O'Malley v. 6323 North LaCrosse Ave.*, 158 Ill.2d 453, 199 Ill.Dec. 690, 634 N.E.2d 743, 746 (1994) ("There is a vast difference between the forfeiture of contraband *per se* and the forfeiture, by an innocent third party, of legal property . . . .")). Although the owner of the property is entitled to a post-seizure hearing to determine whether the seized items are in fact contraband *per se*, the Court held in *Mims Amusement Co. v. SLED* that due process is satisfied where that hearing is a bench trial before a single magistrate. *Id.*; see also *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 196, 525 S.E.2d 872, 883 (2000) (construing S.C. Code Ann. § 12-21-2712 (Supp. 1998) to require "an opportunity for the owner of [property alleged to be contraband *per se*] to be heard concerning their legality").

In light of these constitutional requirements, the South Carolina General Assembly has enacted several statutes which set out the substantive conditions under which funds connected with various crimes may be seized, along with the procedural processes to confirm those seizures. See, e.g., S.C. Code Ann. § 44-53-520 & -530 (Supp. 2016). While we cannot undertake to describe all these statutes in a single opinion, we discuss two such statutes here as examples: S.C. Code Ann. § 44-53-520 *et. seq.* (Supp. 2016), which relates to drug transactions and is discussed later in this opinion; and S.C. Code Ann. § 16-3-2090 (2015), which relates to human trafficking. This latter statute appears to be most relevant to your reference to prostitution in your question. See § 16-3-2090.

Article 19 of Title 16 deals with human trafficking generally, and Section 16-3-2090 provides for seizure of assets connected with human trafficking specifically. See S.C. Code Ann. § 16-3-2010 *et. seq.* (2015). While Section 16-3-2090 is too lengthy to set out fully in this opinion, it does provide in relevant part that:

(A)(1) The following are subject to forfeiture:

(a) all monies used, or intended for use, in violation of Section 16-3-2020 [Trafficking in persons];

...

(d) all property used or intended for use, in any manner or part, to commit or facilitate the commission of a violation for pecuniary gain of Section 16-3-2020;

...

(g) all property including, but not limited to, monies, negotiable instruments, securities, or other things of value furnished or intended to be

furnished by any person in exchange for any kind of services under Section 16-3-2020, and all proceeds including, but not limited to, monies, and real and personal property traceable to any exchange under Section 16-3-2020;

...

(4) Any property taken or detained under this section is not subject to replevin but is considered to be in the custody of the investigating agency making the seizure subject only to the orders of the court having jurisdiction over the forfeiture proceedings. Property is forfeited and transferred to the government at the moment of illegal use. Seizure and forfeiture proceedings confirm the transfer.

...

(7) When property and monies of any value as defined in this article or anything else of any value is seized, the law enforcement agency making the seizure, within ten days or a reasonable period of time after the seizure, shall submit a report to the appropriate prosecution agency.

S.C. Code Ann. § 16-3-2090(A) (Supp. 2014).

We encourage you to discuss with your solicitor or other appropriate prosecuting authority whether this statute applies to cases in your office, such as your hypothetical funds which were intended to pay for prostitution. Please note that the application of asset forfeiture statutes is fact-specific inquiry, and this Office cannot opine as to all possible results of litigation in this area. We can say with confidence, however, that the legislative intent behind Section 16-3-2090 should control the interpretation and application of that section. *Ducworth v. Neely*, 319 S.C. 158, 459 S.E.2d 896 (Ct. App. 1995). As succinctly set out by the South Carolina Court of Appeals,

The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Id.* In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459. Further, "the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given

effect." *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). Accordingly, we "read the statute as a whole" and "should not concentrate on isolated phrases within the statute." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). "In that vein, we must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law." *Id.* (alterations, citation, and internal quotation marks omitted).

*Hembree v. One Thousand Eight Hundred Forty-Seven Dollars (1,847.00), U.S. Currency*, 404 S.C. 241, 743 S.E.2d 864 (2013). Our Court of Appeals also has opined that

[a] civil in rem forfeiture proceeding is also in the nature of a penal action and accordingly must also be strictly construed. Moreover, in rem forfeiture statutes must be interpreted in light of the evil sought to be remedied and in a manner that is consistent with the statute's purpose.

*Ducworth v. Neely*, 319 S.C. 158, 162-63, 459 S.E.2d 896, 899 (Ct. App. 1995) (citing *S. C. State Law Enforcement Div. v. Crook*, 273 S.C. 285, 255 S.E.2d 846 (1979)).

Applying these rules to Section 16-3-2090, the plain language of Section 16-3-2090(A)(1)(d) establishes that "all property . . . intended for use [to] facilitate the commission of a violation for pecuniary gain of Section 16-3-2020" are subject to seizure. § 16-3-2090(A)(1)(d) (emphasis added). Additionally, all money "intended to be furnished by any person in exchange for any kind of services under Section 16-3-2020" is similarly subject to seizure. § 16-3-2090(A)(1)(g) (emphasis added). The plain language found in each of these subsections describes, among other property, funds paid or intended to be paid from third parties to human traffickers who offer their victims for a profit. *See id.* For this reason, we believe that the General Assembly intended that Section 16-3-2090 provide a legal process to confirm the forfeiture of funds which a person attempts to use to engage a prostitute who is a victim of human trafficking, even if the would-be customer himself is not guilty of the felony of human trafficking. *See id.* While we are not aware of any reported cases addressing this question, and the result of any litigation necessarily depends on the facts of a particular case, we believe that this interpretation is most consistent with the language and purpose of the General Assembly in Section 16-3-2090. *See id.*

Finally, while we have discussed one specific civil forfeiture statute as an example in response to your specific hypothetical, we reiterate our advice to discuss the facts of specific cases with your solicitor to determine what causes of action might apply on an ongoing basis. South Carolina's forfeiture statutes are varied, and they operate distinctly from each other. For

example, Section 16-8-260 provides for the seizure of firearms or money which law enforcement "reasonably believes . . . has been used in a pattern of criminal gang activity." S.C. Code Ann § 16-8-260(A)(1)&(2) (2015). Section 16-13-175 permits the confiscation of a "motor vehicle used in the commission of [a] larceny" under certain conditions. S.C. Code Ann. § 16-13-175(A) (2015). And Section 39-15-1195 subjects a variety of types of property to forfeiture "upon violation of Section 39-15-1190," which prohibits the sale of counterfeit goods. S.C. Code Ann. §§ 39-15-1190 & -1195 (Supp. 2016). Because these and other forfeiture statutes empower law enforcement agents to seize property only under certain circumstances, and because they also empower the circuit solicitor to bring civil actions to confirm the forfeiture in their prosecutorial discretion, we strongly encourage you to work with your solicitor to discuss the applicability and practicality of such actions on a case-by-case basis. *See, e.g.*, S.C. Code Ann. §§ 44-53-520 & -530 (Supp. 2016) (discussing the power of law enforcement officers to seize certain property and the power of the solicitor to bring actions confirming the forfeitures).

We also note for your reference that our Office has opined on other, more specific questions regarding civil forfeiture before on many occasions. For example, a 2008 opinion of this Office answered several questions from then-Solicitor Trey Gowdy regarding forfeitures by consent order in the context of plea agreements. *Op. S.C. Att'y Gen.*, 2008 WL 4489045 (September 19, 2008). A prior 2001 opinion discussed the operation of Sections 44-53-520 and -530 following a directed verdict of "not guilty" in a criminal case. *Op. S.C. Att'y Gen.*, 2001 WL 1736768 (November 7, 2001). And a 1997 opinion discussed the application of our state's gambling seizure statute to cockfighting. *Op. S.C. Att'y Gen.*, 1997 WL 665441 (September 22, 1997). You may find these and numerous other prior opinions of this Office useful in your discussions with the solicitor as specific questions arise.

## **2. Property of a criminal defendant seized in connection with a narcotics arrest, where no civil forfeiture case was initiated within the applicable statute of limitations.**

In response to this question, we reiterate our advice to coordinate with the local solicitor's office or other appropriate prosecuting authority to resolve all questions related to the disposition of seized assets on a case-by-case basis. To aid you in that discussion, we opine here that a court most likely would hold that an action to confirm forfeiture pursuant to Section 44-53-530 must simply be brought "within a reasonable time period following the seizure," and that language precludes the mechanical application of a particular statute of limitations. *See* S.C. Code Ann. § 44-53-530(a) (Supp. 2016).

South Carolina, like most states, has established a civil forfeiture statute targeting property associated with illegal drug transactions. S.C. Code Ann. § 44-53-520 *et. seq.* (Supp. 2016). Our state's drug-related forfeiture statute is set out at Section 44-53-520 *et. seq.*, and it



includes an enumerated list of property subject to forfeiture and seizure. *Id.* We decline to set out the entire list here, but it includes, in relevant part:

(6) all conveyances including, but not limited to, trailers, aircraft, motor vehicles, and watergoing vessels [provided that certain statutory conditions are met];

(7) all property including, but not limited to, 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;

(8) all 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. If the person from whom the monies were taken can establish to the satisfaction of a court of competent jurisdiction that the monies seized are not products of illegal acts, the monies must be returned pursuant to court order.

§ 44-53-520(a)(6)-(8). The numerous references to "this article" in the subsection quoted above refer to Article 3, Title 44, which deals with illegal drug transactions. *See* S.C. Code Ann. § 44-53-110 *et. seq.* (Supp. 2016). Furthermore, Subsection (d) states:

Any property taken or detained under this section is not subject to replevin but is considered to be in the custody of the department making the seizure subject only to the orders of the court having jurisdiction over the forfeiture proceedings. Property described in Section 44-53-520(a) is forfeited and transferred to the government at the moment of illegal use. Seizure and forfeiture proceedings confirm the transfer.

S.C. Code Ann. § 44-53-520(d) (Supp. 2016) (emphasis added).

Section 44-53-530 sets out the judicial process for seizure and forfeiture proceedings, and reads in relevant part:

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. The petition must be submitted to the court within a reasonable time period following seizure and shall set forth the facts upon which the seizure was made.

SC. Code Ann. § 44-53-530(a) (Supp. 2016). This "reasonable time" requirement stands in contrast to the generally-applicable statute of limitations found in Section 15-3-550(2), which imposes a two-year limitation upon "an action upon a statute for a forfeiture or penalty to the State<sup>2</sup>." S.C. Code Ann. § 15-3-550(2) (Supp. 2016).

We are not aware of any South Carolina precedent which squarely addresses a challenge to an action to confirm forfeiture under Section 44-53-530 on the basis that it was not brought within the two-year time period set out in Section 15-3-550(2).<sup>3</sup> In the absence of controlling precedent, a court faced with such a challenge would be called upon to construe these two sections in order to effect the legislative intent of the General Assembly. *See Hembree v. One Thousand Eight Hundred Forty-Seven Dollars (1,847.00), U.S. Currency*, 404 S.C. 241, 743 S.E.2d 864 (2013); *see also discussion re: construction of forfeiture statutes, supra*.

We believe a court faced with this question would conclude that the better reading of the two statutes is that the General Assembly intended that the specific "reasonable time" requirement in Section 44-53-530 supplant the general two-year limitation found in Section 15-3-550(2) for the purposes of actions to confirm forfeiture brought under the authority of that section due to the extraordinary nature of the underlying action. *See Ducworth v. Neely*, 319 S.C. 158, 459 S.E.2d 896 (Ct. App. 1995). As stated by the Court of Appeals in *Ducworth*, "in rem forfeiture statutes must be interpreted in light of the evil sought to be remedied and in a manner that is consistent with the statute's purpose." *Id.* at 162, 459 S.E.2d at 899. Sections 44-53-520 and -530 seek to remedy the evil of drug trafficking in part by providing for the seizure and forfeiture the assets and profits associated with a profit-driven crime, and those sections must be interpreted in light of their purpose: to empower law enforcement officers and prosecutors with another tool to

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<sup>2</sup> Additionally, Section 15-3-620 states that "[t]he limitations prescribed by this article [which includes Section 15-3-550] shall apply to actions brought in the name of the State or for its benefit in the same manner as to actions by private parties . . ." S.C. Code Ann. § 15-3-620 (Supp. 2016).

<sup>3</sup> One unpublished opinion of the South Carolina Court of Appeals, *Maples v. Myers*, deals with this question tangentially. *Maples v. Myers*, 2004-UP-364, 2004 WL 6331521 (Ct. App. 2004) (unpublished). In *Maples*, law enforcement agents seized the plaintiff's personal vehicle and other property pursuant to Section 44-53-520, and made a timely report to the solicitor's office as required by the statute. *Id.* at 1. "The solicitor's office, however, did not file a final forfeiture complaint against any of this property until . . . almost five years after the property's seizure." *Id.* After pleading guilty to several criminal charges, the defendant sued the solicitor and his assistant personally for conspiracy and conversion based on their "[failure] to comply with the forfeiture statute in a timely manner." *Id.* at 2. The Court of Appeals in *Maples* cited and quoted the "reasonable time" requirement in Section 44-53-520 in a footnote, together with a "see also" citation of Section 15-3-550. *Id.* at 1 n.3. The opinion also stated that the court "[did] not in any way condone the solicitor's office undue delay." *Id.* at 3. However, the Court of Appeals held that the defendants were entitled to absolute prosecutorial immunity, and denied relief on that basis without discussing the interaction between the "reasonable time" requirement and the statute of limitations, or explaining at what point the delay became "undue." *Id.* Therefore, even if this opinion had been published, we do not believe it would be dispositive of the question here. *See id.*

reduce drug trafficking. *See Op. S.C. Att'y Gen.*, 2017 WL 2399760 (May 17, 2017). As a recent opinion of this Office stated:

One legislative intent which is apparent on the face of Section 44-53-530(g) is that the funds seized in drug operations be repurposed to fund more drug law enforcement . . . [Sections 44-53-520 *et. seq.*] reflects an effort to empower law enforcement agencies to repurpose drug money to fight drug crime.

*Id.* More generally, the South Carolina Supreme Court has opined that "forfeiture serves a deterrent purpose both by preventing the further illicit use of the property and by imposing an economic penalty, thereby rendering the illegal behavior unprofitable." *Mims Amusement Co. v. SLED*, 366 S.C. 141, 147, 621 S.E.2d 344, 347 (2005) (internal citations omitted) (discussing forfeiture of illegal gaming devices). Therefore, any construction of Section 44-53-530 must account for the nature of investigations and enforcement of drug laws in light of the purpose of forfeiture statutes generally. *See Ducworth*, 319 S.C. at 162, 459 S.E.2d at 899.

As you no doubt are aware, investigations of drug trafficking present unique challenges to law enforcement officers and prosecutors. It is common knowledge that trafficking sometimes involves complex distribution networks which cross state lines or national borders. Moreover, once the presence of trafficking is discovered, investigators sometimes prefer to continue the investigation before making public arrests or seizures in order to determine the extent of the distribution network and identify additional suspects who might be made defendants. All this is complicated by the fact that illegal narcotics transactions usually happen by agreement between two persons with a vested interest in evading discovery. The net result is that narcotics investigations range in length and complexity from one-off street interactions to complex, multi-year investigations involving coalitions of state and federal agencies – such as Operation Jackpot, which started in Hilton Head, South Carolina and ultimately dismantled an international drug trafficking ring.

Given the exceptional nature of drug trafficking investigations, we must construe Section 44-53-530 as a tool that may follow a multi-year investigation of the evil it seeks to remedy. *See Ducworth v. Neely*, 319 S.C. 158, 459 S.E.2d 896 (Ct. App. 1995). Section 44-53-520(d) provides that "[p]roperty described in Section 44-53-520(a) is forfeited and transferred to the government at the moment of illegal use. Seizure and forfeiture proceedings confirm the transfer." Generally speaking, a statute of limitations begins to run against a potential litigant at the moment that they knew or should have known that they had a cause of action. *See, e.g., Johnston v. Bowen*, 313 S.C. 61, 437 S.E.2d 45 (2009); *see also* S.C. Code Ann. § 15-3-620 ("The limitations prescribed by this article shall apply to actions brought in the name of the State or for its benefit in the same manner as to actions by private parties . . ."). In the context of an

ongoing narcotics trafficking investigation, investigators could discover that property is subject to forfeiture early on, but might prefer not to seize it immediately to avoid compromising the ongoing investigation. If, however, a generally-applicable statute of limitations were mechanically applied in that context, these investigators would be forced to choose between either initiating a seizure and taking the risk that high-level traffickers remain undiscovered; or continuing the covert investigation and taking the risk that assets which rightfully should be forfeited are not seized. *Cf. Op. S.C. Att'y Gen.*, 2017 WL 2399760 (May 17, 2017) (discussing the legislative intent in Section 44-53-530 to avoid the appearance of "undue pressure and perverse incentives," and to "preserve public trust in the integrity of the hard-working men and women who serve and protect our state every day"). We do not believe that the General Assembly intended to place narcotics investigators into this absurd double bind. *See Ducworth v. Neely*, 319 S.C. 158, 459 S.E.2d 896 (Ct. App. 1995) (Section 44-53-520 "must be interpreted in light of the evil sought to be remedied."); *see also Op. S.C. Att'y Gen.*, 2006 WL 1877123 (June 5, 2006) (noting that a construction of a statute which leads to a plainly absurd and unintended result should be rejected). For this reason, the better reading of Section 44-53-530(a) is that the General Assembly contemplated that in some instances, a seizure would follow a lengthy investigation, and intended that the "reasonable time" requirement supplant the generally-applicable statute of limitations for that reason.<sup>4</sup> *See id.*

In the absence of a bright-line statute of limitations, a court weighing a forfeiture action under Section 44-53-530 would still be called upon to determine whether the action was initiated within a "reasonable time." S.C. Code Ann. § 44-53-530(a) (Supp. 2016). While determining what constitutes a "reasonable time" following a seizure for the purposes of Section 44-530-530(a) requires a fact-specific analysis, South Carolina law at least suggests that this amount of time extends to the limits of constitutional protections of the right to a speedy trial. *See Farmer v. Florence Cnty Sheriff's Office*, 401 S.C. 606, 738 S.E.2d 473, (2013). In *Farmer v. Florence County Sheriff's Office*, the South Carolina Supreme Court considered an action for the return of allegedly counterfeit goods where the charges for distribution of counterfeit goods had been dropped, but the goods had not been returned nine months after the seizure and apparently no action under Section 44-53-530 had been initiated.<sup>5</sup> *Id.* at 609, 738 S.E.2d at 475. Both the trial court and the South Carolina Court of Appeals in *Farmer* concluded that the plaintiff was entitled to the return of the goods. *Id.* at 610, 738 S.E.2d at 475. The Supreme Court in *Farmer*

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<sup>4</sup> This result also is consistent with "[t]he general rule of statutory construction . . . that a specific statute prevails over a more general one." *Atlas Food Systems and Services, Inc. v. Crane Nat. Vendors*, 319 S.C. 556, 462 S.E.2d 858 (1995) (internal citations omitted).

<sup>5</sup> Section 39-15-1195 is a forfeiture statute which is modeled upon Section 44-53-520 and describes property subject to forfeiture "upon violation of Section 39-15-1190," which prohibits the sale of counterfeit goods. S.C. Code Ann. §§ 39-15-1190 & -1195 (Supp. 2016). Section 39-15-1195 also provides that seizure of property pursuant to that section is confirmed by forfeiture proceedings pursuant to Section 44-53-530. § 39-15-1195(C) & (H)(1).

ultimately reversed the decisions of the lower courts on procedural grounds, but nevertheless undertook to discuss constitutional questions related to Section 44-53-530 in a footnote to "dispel any uncertainty" that might have arisen:

While not properly before the Court, [were] § 39-15-1195 and § 44-53-530 actually subjected to a due process challenge, it appears that both would survive such a challenge by the owner of the seized property. This Court has held 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 should not be forfeited . . . ." *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000) (internal citation omitted). Further, whether a prosecutorial delay in instituting forfeiture proceedings violates the owner's due process right is a fact-intensive inquiry subject to the same considerations applicable to a constitutional speedy trial claim. *United States v. \$8,850*, 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983) (length of delay, reason for delay, owner's assertion of right, and prejudice). Obviously no due process claim was made here. Moreover, the Court of Appeals erred in relying on two federal cases involving a statute that provided no owner-initiated option, and further misread *Moore v. Timmerman*, 276 S.C. 104, 276 S.E.2d 290 (1984), which merely reiterates that an owner of seized property must have an opportunity to be heard.

*Id.* at 614 n. 3, 738 S.E.2d at 478 n.3 (emphasis added). For the purposes of this opinion, we highlight two points here: first, the Supreme Court explicitly stated that the constitutional test to assess a speedy trial claim applied to "prosecutorial delay in instituting forfeiture proceedings," which suggests that the outer limits of the reasonable time to bring a forfeiture action are coextensive with the outer limits of the time limitation imposed by the right to a speedy trial. *See id.* (citing *United States v. \$8,850*, 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983)). Second, the Court emphasized that the owner of the seized property had the statutory right to initiate proceedings to recover it. *Id.* Indeed, Section 39-15-1195(H)(1) provides that "[a]n owner may apply to the court of common pleas for the return of an item seized pursuant to the provisions of this chapter." S.C. Code Ann. § 39-15-1195(H)(1) (Supp. 2016). Section 44-53-586 provides a similar right to owners of property seized pursuant to Section 44-53-520 in narcotics cases. S.C. Code Ann. § 44-53-586 (2015). Therefore, the owner of seized property which the state alleges is subject to forfeiture under Section 44-53-520 has the statutory power to protect his own property rights by initiating judicial review of the seizure. *Id.*; *but see Nelson v. Colorado*, 137 S.Ct. 1249, 197 L.Ed.2d 611 (2017) (holding, on federal due process grounds, that Colorado's statutory process for a person to recoup fines and restitution after a conviction was overturned presented an unconstitutionally high barrier). While this language in the *Farmer*

footnote was not essential to the South Carolina Supreme Court's holding, we give great weight to the decision of the Court to go out of its way to declare these constitutional conclusions so unequivocally and to cite supporting authority for them.

We would be remiss not to note that a court also could interpret the "reasonable time" requirement in Section 44-53-530 as a purely pro-defendant protection that has no bearing on the statute of limitations. But we believe that the better reading of the statute is that the General Assembly intended to give prosecuting authorities the latitude to initiate actions to confirm forfeiture within constitutional parameters, not to require them to mechanically resort to a two-year limitation that is not suited for the unique nature and purpose of forfeiture actions. *See Ducworth v. Neely*, 319 S.C. 158, 459 S.E.2d 896 (Ct. App. 1995). In other words, we believe that the General Assembly intended to set out an exceptional timing rule in Section 44-53-530(a) in light of the exceptional nature of the underlying action. *See discussion, supra*.


**3. Cash believed to be counterfeit at the time of collection, but later determined to be legal tender.**

We reiterate our advice to coordinate with the local solicitor's office or other appropriate prosecuting authority to resolve this question on a case-by-case basis. Generally speaking, cash which is initially believed to be, but is later determined not to be, counterfeit or other contraband ultimately should be returned the person having the property rights to that cash, in the absence of some other legal basis for retaining it. *See discussion re: constitutional protections of property, supra*. However, such other legal bases might include a variety of complex legal issues, ranging from evidentiary concerns to anticipated forfeiture actions. *See, e.g., Farmer v. Florence Cnty Sheriff's Office*, 401 S.C. 606, 738 S.E.2d 473, (2013). In *Farmer v. Florence County Sheriff's Office* (discussed above), the South Carolina Supreme Court opined that "[s]eized property can be held for other than criminal prosecution purposes, as civil forfeiture is available even where no criminal proceeding is contemplated." 401 S.C. at 614, 738 S.E.2d at 478 (dismissing case on procedural grounds). Of course, this power must be understood in the context of other applicable law, including constitutional limitations. *Cf., e.g., Nelson v. Colorado*, 137 S.Ct. 1249, 197 L.Ed.2d 611 (2017) (holding, on federal due process grounds, that Colorado's statutory process for a person to recoup fines and restitution after a conviction was overturned presented an unconstitutionally high barrier). And in some cases, your office might face additional complexities, such as your duties under our state's Post-Conviction DNA Testing Act. *See S.C. Code Ann. § 17-28-10 et. seq.* (2014). For this reason, any counsel we might give in the absence of a specific factual scenario could only be speculative, and we reiterate our advice that your office coordinate with the local solicitor's office to resolve this question on a case-by-case basis.

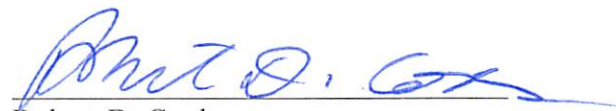
**Conclusion:**

For the reasons set out above, we encourage you to coordinate with your circuit solicitor or other appropriate prosecuting authority to resolve these fact-specific questions on an ongoing, case-by-case basis. Our Office's longstanding policy is to defer to magistrates in their determinations of probable cause, and to local law enforcement officers and solicitors in deciding what charges to bring and which cases to prosecute. *See, e.g., Op. S.C Att'y Gen.*, 2016 WL 3946153 (July 5, 2016). As you know, law enforcement officers and solicitors have discretion in how they allocate the limited resources that the taxpayers provide to them. *Id.* This opinion is not an attempt to comment on any pending litigation or criminal proceeding. Our discussion of the law here is simply intended to aid you in your discussions with your circuit solicitor.

Sincerely,

  
\_\_\_\_\_  
David S. Jones  
Assistant Attorney General

REVIEWED AND APPROVED BY:

  
\_\_\_\_\_  
Robert D. Cook  
Solicitor General