

STATE BOARD OF ACCOUNTS
302 West Washington Street
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INDIANAPOLIS, INDIANA 46204-2769

AUDIT REPORT
OF
COUNTY PROSECUTING ATTORNEY
PUTNAM COUNTY, INDIANA
January 1, 2007 to December 31, 2007



FILED

11/05/2008

TABLE OF CONTENTS

<u>Description</u>	<u>Page</u>
County Officials	2
Transmittal Letter	3
Audit Result and Comment: Asset Forfeiture Fund	4
Exit Conference.....	5
Official Response	6-10

COUNTY OFFICIALS

<u>Office</u>	<u>Official</u>	<u>Term</u>
Prosecuting Attorney	Timothy Bookwalter	01-01-07 to 12-31-10
President of the County Council	Mitchell Proctor	01-01-07 to 12-31-08
President of the Board of County Commissioners	Kristina Warren Gene Beck	01-01-07 to 12-31-07 01-01-08 to 12-31-08



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TO: THE OFFICIALS OF PUTNAM COUNTY

We have audited the records of the County Prosecuting Attorney for the period from January 1, 2007 to December 31, 2007, and certify that the records and accountability for cash and other assets are satisfactory to the best of our knowledge and belief, except as stated in the Audit Result and Comment. The financial transactions of this office are reflected in the Annual Report of Putnam County for the year 2007.

STATE BOARD OF ACCOUNTS

August 20, 2008

COUNTY PROSECUTING ATTORNEY
PUTNAM COUNTY
AUDIT RESULT AND COMMENT

ASSET FORFEITURE FUND

County Ordinance 2005-3-7 established the Putnam County Prosecutor's Asset Forfeiture Fund. The fund receives deposits in the form of proceeds recovered in forfeiture actions. The ordinance specifies the fund be appropriated for funding law enforcement activities. Purchases included three police vehicles, vehicle repairs, vehicle equipment, rifles, radios, vests, training, canine program expenses, Indiana State Police overtime and training, registration fee for Fire Investigator I class, insurance, a computer, a digital camera and two kayaks. Payroll disbursements were also made to County Sheriff Deputies for hours worked on drug interdiction.

The Putnam County Prosecuting Attorney has a contract for legal services with Attorney Christopher B. Gambill to represent him in all forfeiture proceedings instituted pursuant to Indiana Code 34-24-1 and 34-24-2 and as an agent and representative in all matters concerning D.A.G. referrals to the United States Attorney's Office or any other Federal Forfeiture proceeding. The contract for legal services specifies the attorney shall receive 33% of whatever may be recovered either by settlement or trial for a claim pursuant to Indiana Code 34-2-1 and 34-24-2. The Attorney utilizes Assignment of Property Agreements and Settlement Agreements to seize drug suspects' property or money in a civil action, without court orders, to disburse hundreds of thousands of dollars in cash and property for receipt to the Asset Forfeiture Fund.

Property confiscated pursuant to Indiana Code 34-24-1, regarding controlled substances, may be disposed of as ordered by a court. Property as used in this chapter includes cash and other assets. Indiana Code 34-24-1-4 and 34-24-1-6 require proceeds from the sale of property seized under this chapter and cash to be distributed in the following order:

- (1) To the sheriff to cover expenses of the sale.
- (2) To persons with a valid interest determined by the Court.
- (3) To the affected general fund for reimbursement of law enforcement costs.

Law enforcement costs determined by the Court must be deposited in the General Fund of the unit employing the law enforcement agency making the seizure. Any excess over the law enforcement costs must be transferred to the State Treasurer for deposit in the Common School Fund.

Indiana Code 34-24-1-4(d) states in part: "If the court enters judgment in favor of the state, or the state and a unit (if appropriate), the court shall, subject to section 5 of this chapter (1) determine the amount of law enforcement costs; and (2) order that: (A) the property, if not money or real property, be sold under section 6 of this chapter, by the sheriff of the county in which the property was seized and if the property is a vehicle, this sale shall occur after any period of use specified in subsection (c); (B) the property, if it is real property, be sold in the same manner as real property is sold on execution under IC 34-55-6 (C) the proceeds of the sale or the money be (i) deposited in the general fund of the state or the unit that employed the law enforcement office that seized the property; . . . (D) any excess in value of the proceeds or the money over the law enforcement costs be forfeited and transferred to the treasurer of the state for deposit in the common school fund."

Indiana Code 34-24-1-6 Sec.6(b) states in part: "When property is sold at a public sale under this chapter, the proceeds shall be distributed in the following order: (1) First, to the sheriff of the county for all expenditures made or incurred in connection with the sale, including storage, transportation, and necessary repair. (2) Second, to any person: (A) holding a valid lien, mortgage, land contract, or interest under a conditional sales contract or the holder of other such interest; or (B) who is a co-owner and has an ownership interest; up to the amount of that person's interest as determined by the court. (3) The remainder, if any, shall be transferred by the sheriff to the appropriate fund as ordered by the court in section 4(d) of this chapter."

COUNTY PROSECUTING ATTORNEY
PUTNAM COUNTY
EXIT CONFERENCE

The contents of this report were discussed on August 26, 2008, with Timothy Bookwalter, Prosecuting Attorney. The official response has been made a part of this report and may be found on pages 6 through 10.



LAW OFFICES

LARRY J. WAGNER
CHRISTOPHER B. GAMBILL
K. ROBERT SCHALBURG

JAMES L. CRAWFORD
1944-2003

August 27, 2008

State Board of Accounts
302 West Washington Street
Room E 418
Indianapolis, IN 46204-2765

Re: County Prosecutor Putnam County Audit Results and Comments

OFFICIAL RESPONSE

The undersigned serves as the forfeiture attorney for the Putnam County Prosecutor. This correspondence is prepared as an "Official Response" to the Audit Results and Comments prepared by the State Board of Accounts in review of the Asset Forfeiture Fund of Putnam County.

OVERVIEW

Though not stated explicitly, there is an underlying current in the Audit Results and Comments that the forfeiture procedures followed in Putnam County are suspect. The undersigned would welcome an audit of his activities in every county in which he provides services as a Forfeiture Attorney. All property which is seized is subject to the appropriate chain of possession requirements applicable to all criminal evidence.

Secondly, when assets are delivered to the Forfeiture Attorney there is a sign-in procedure with signatures required of the person signing in the money and the person receiving money. Typically, the law enforcement agency delivering the asset has their own sign-in procedure as well. A complete accounting of each forfeiture is made to the Prosecutor's office with a copy provided to the law enforcement agency who made the original seizure.

Finally, every seized asset fund in each county requires an appropriation process for the expenditure of any funds pursuant to each applicable county ordinance.

The Audit Results and Comments make no reference to any wrongfully seized assets, mishandled funds, or misappropriations. I assume there was no evidence of such misdeeds. Below you will find a response to each paragraph of the Audit Results and Comments.

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PARAGRAPH 1

Paragraph 1 of the Audit Results and Comments accurately describes the Putnam County Ordinance 2005-3-7 which was used to establish the Putnam County Prosecutor's Asset Forfeiture Fund. Indiana Code 5-11-1-3 specifically permits municipalities to set up separate accounts for funds. Furthermore, Indiana Code 36-1-3 et seq authorizes home rule powers to municipalities. Therefore, it is entirely appropriate for Putnam County to set up a separate account or as a specified delineation of funds within the County General Fund for assets procured through Indiana Code 34-2-1 et seq or Indiana Code 34-24-2 et seq.

PARAGRAPH 2

The second paragraph acknowledges that the Putnam County Prosecutor has employed an Asset Forfeiture Attorney pursuant to Indiana Code 34-24-1-8. This Code Section permits a prosecuting attorney to retain an attorney to bring actions under the Indiana Forfeiture Act. Indiana Code 34-24-2 et seq has a similar provision. It should be noted that contingent fee agreements have been upheld by Indiana Courts as an appropriate basis for receiving an attorney fee. Furthermore, the 33% Attorney Fee Provision is well within the range of contingent fees approved by the Courts.

Paragraph 2 inaccurately provides the following:

“The attorney utilizes Assignment of Property Agreements and Settlement Agreements to seize drug suspects' property or money in a civil action, without court orders, to disperse hundreds of thousands of dollars in cash and property for receipt to the Asset Forfeiture Fund.”

There are several mistakes within this statement. First, property can only be “seized” pursuant to Indiana Code 34-24-1-2. There are three appropriate seizure options. They are as follows:

1. The seizure is incident to a lawful
 - a. arrest
 - b. search
 - c. administrative inspection
2. The property has been the subject of a prior Judgment in favor of the State
3. The Court has made an ex parte determination that the property is subject to seizure.

The reference to Assignments and Settlement Agreements serving as the basis for a

seizure is simply incorrect. However, the Audit Results and Comments is accurate in noting that Assignment of Property Agreements and Settlement Agreements are used to resolve these civil disputes without court orders.

It is essential to recognize that the Indiana Forfeiture Act authorizes a legal action which is civil in nature to advance non-punitive remedial legislative goals. See Katner v. State 655 N.E.2d 345 (1995). Therefore, any evaluation of the actions of a forfeiture attorney, the settlements reached, or the utilization of monies obtained must be done within the context of lawful civil remedies and governed by the Indiana Rules of Civil Procedure. The Assignment of Property Form utilized by the undersigned, and provided without objection to the preparer of this report, specifically explains to the signor the legal process of forfeitures. Furthermore, it outlines with specificity the rights of the signor and the Burden of Proof of the prosecutor. Also, a copy of the Indiana Forfeiture Statute is provided to every person who is presented an Assignment of Property Form.

The Settlement Agreement Form is an agreement which typically provides that some of the assets are given to the Seized Asset Fund and some portion of the assets seized returned to the defendant. Usually the defendant is represented by legal counsel. Typically there is a negotiation process similar to any civil action involving disputes of tort or contract.

In Indiana, most civil disputes are resolved by a Settlement Agreement. Persons familiar with such settlement agreements would note that the settlement agreement used by the undersigned contains much of the same language used in settlement agreements which resolve tort or contract actions.

There is an inference within the second paragraph that obtaining assets pursuant to a settlement agreement is improper. Such an inference is simply false. In fact, Indiana Code 36-1-4-5 specifically provides the power to municipalities to acquire, hold and convey interests in real and personal property. Furthermore, Indiana Code 36-1-4-10 provides property may be acquired by gift. Therefore, there is no question that under Indiana Law the prosecutor's office, through its forfeiture attorney, may receive or acquire assets pursuant to Assignments or Settlement Agreements.

PARAGRAPH 3

The Audit Results and Comments state that money may be "confiscated pursuant to Indiana Code 34-24-1 regarding controlled substances...." This statement is misleading. First, property must be seized pursuant to one of the three lawful means for seizure (see response to paragraph 2 above). Second, Indiana Code 34-24-1 et seq does not limit the seizure of property to offenses of controlled substances. In fact, Indiana Code 34-24-1-1 (a) (3) provides that "any portion of real or personal property purchased with money that is traceable as a proceed of a

violation of a criminal statute" are subject to seizure. Other portions of this Statute explain that the violation of other criminal statutes permits the seizure of assets.

PARAGRAPHS 4 & 5

The last portion of the Audit Results and Comments addresses the disposition of property when a Judgment has been entered by the Court. Many times a Judgment is entered as a result of a Forfeiture Complaint. If a Judgment is entered, counsel determines from the prosecutor's office what costs were associated with prosecuting the underlying criminal case. Secondly, there is a determination of law enforcement costs of the investigation. The attorney then prepares an Affidavit informing the Court of the attorney fee, the law enforcement costs and the prosecuting costs. Such a procedure is strictly followed in Putnam County and in the other six (6) Counties that the undersigned provides such service.

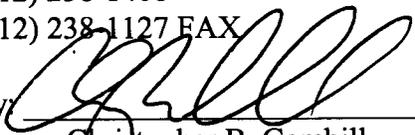
When the money or value of the property forfeited exceeds the above described costs, the balance is deposited in the State Common School Fund. In fact, when the undersigned first began working as a forfeiture attorney over 8 years ago, it took a great deal of effort for people at both the County and State level to recognize that the monies that were to be deposited in the Common School Fund were done so in compliance with the Act. In fact, the undersigned was informed by an employee of the State that "no one has ever done this before". The undersigned cannot attest to the accuracy of this employee's statement, but that was the response. The reason that money must be placed in the Common School Fund is due to an arcane constitutional provision within the Indiana Constitution. The legislature in creating the Forfeiture Act, designed it to maximize the amount of money which could be used for law enforcement. Obviously, if the legislature had believed that forfeited money should not be used for law enforcement all proceeds could have been legislatively placed in the Common School Fund. This was not the plan or design of the Indiana Forfeiture Act. In fact, as the Supreme Court said in Katner this act advances the legislative intent of permitting law enforcement agencies to defer some of their expenses incurred in the battle against drug dealing.

Putnam County agrees with the legislation that criminal profits should be seized whenever legally possible and used to help pay for additional law enforcement efforts. This statute was never intended to be a funding mechanism for the State Common School Fund. Any effort by the State Board of Accounts to make it such a funding mechanism will certainly cause an end to law enforcement efforts to seize criminal profits if those profits are deferred from use by law enforcement agencies.

State Board of Accounts
August 27, 2008
Page Five

Respectfully Submitted,

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By: 

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cc: Tim Bookwalter