

STATE OF INDIANA)
)SS:
DELAWARE COUNTY)

In the Delaware Circuit Court No. 2
2008 Term

**FINDINGS AND REPORT ON CIVIL DRUG FORFEITURES
IN DIVISION 2, INCLUDING A LIMITED NUMBER OF CASES
IN THE OTHER FOUR DIVISIONS OF THE DELAWARE CIRCUIT COURT**

The Court, having reviewed the agreed judgments, default judgments, and other entries and files of this and other divisions of this Circuit Court, together with evidence obtained by court order and evidence submitted at review hearings herein, being advised, now makes the following findings:

1. From the start of these hearings on June 13, 2008, this court's purposes in these hearings into civil drug forfeitures were to determine:
(a) whether civil drug forfeitures were being handled correctly; (b) in the event civil drug forfeitures were not being handled correctly, whether such handling amounted to fraud on the court; (c) in the event drug forfeiture cases were not being handled in a lawful manner, the court would seek to establish procedures that would ensure such cases being properly handled in the future.

2. I.C. 34-24-1-4 sets forth the statutory requirements whereby property subject to seizure for drug-related activities may be forfeited and distributed. The legitimacy of the forfeiture must be established by a preponderance of the evidence at court hearings. As part of any judgment in favor of the state, city, or county, the court **shall** determine the amount of law enforcement costs, which shall include the costs of the police agencies as well as the costs of prosecuting the civil and related criminal actions. See I.C. 34-6-2-73. Use and sale of non-cash assets is governed by I.C. 34-24-1-4(c). Ultimate distribution of cash and non-cash assets which have been converted to cash is directed by I.C. 34-24-1-4(d), with the proceeds being deposited in the general funds of the state, city, or county that employed the law enforcement officers; however, any excess over the law enforcement costs is directed to the state treasurer for deposit in the common school fund. For the purpose of distribution of forfeiture assets, the General Assembly defines units of government as city, county, and township. I.C. 36-1-2-23. Departments are not units of government. See *Long v. Barrett*, ___ F.Supp.2d ___, 2002 U.S. Dist. LEXIS 7144 (S.D.Ind.2002), where it was determined that sheriffs' departments could not be sued because under I.C. 36-1-4-3, only a unit of government could be sued, and under I.C. 36-1-2-23, a unit of government was county, municipality, or township.

The purpose of the Indiana General Assembly is clear. The forfeited asset is to go to the general fund of the unit of government that employed the law enforcement officers so that the fiscal body that appropriated the general fund tax revenue to pay for the police officers and/or

criminal and civil prosecutions would be reimbursed, that any use of such money would be determined by the duly elected local government fiscal body, herein the Muncie Common Council or the Delaware County Council. If there were any monies left after these costs were reimbursed, the monies were to go to the state common school fund.

3. One of the subjects of this court investigation has been an agency known variously as the Muncie Drug Interdiction Unit, the Muncie Police Department, the Muncie-Delaware County Drug Task Force, or simply the Drug Task Force; hereinafter, this agency shall be referred to as the DTF.

4. There are four (4) written employment contracts governing prosecution of civil drug forfeitures in Delaware County pertinent to this investigation. One addresses Mark R. McKinney alone, with Richard W. Reed as prosecutor, the second addresses McKinney and Eric M. Hoffman, with Reed as prosecutor, the third addresses Hoffman, with McKinney as prosecutor, and the fourth addresses Louis Denney, with Reed as prosecutor; they were submitted to the court Wednesday, August 6, 2008.

Prior to this, the court was unaware of the existence of such contracts. These contracts uniformly call for compensation "by Prosecutor in an amount equal to twenty-five percent (25%) of any judgment entered in . . . [civil drug forfeiture cases] . . . **or the attorney fee allowed by the court in such actions, whichever is less** [court's emphasis], with the further agreement that Attorney will be paid no less than Fifteen Thousand Dollars (\$15,000.00) per year . . . and that such compensation will be in addition to his current salary." The court also notes that each contract contains a reference to the pertinent Indiana Code statutory citation for civil drug forfeitures, i.e. prior to July 1, 1998, I.C. 34-4-30.1 *et seq.*, and after July 1, 1998, I.C. 34-24-1-1 *et seq.*

Both McKinney and Hoffman, each of whom was a full-time deputy prosecutor at all times pertinent herein, were clearly advised as to the statute they were to utilize. McKinney and Hoffman both had the resources of the Prosecutor's Office at their disposal. As private, contingent fee counsel in civil drug forfeiture actions, McKinney's and Hoffman's office address for such forfeitures was listed as the same address as the public office of the Delaware County Prosecutor in the Delaware County Building, the same office where they were working as a full-time deputy prosecutors.

If there were a failure by these full-time deputy prosecutors-turned-private-contingent fee-lawyers to act in accord with the statute, it was at their peril. As legal experts, they were expected to follow the statutory commands. This they did not do. McKinney testified he was unaware that city accounts 23120439071 and 22700367011 were not general fund accounts and advised that former Muncie City Controller Chauvin had represented such accounts as general fund accounts.

In McKinney's defense, he called Joseph Richard Winkle, who served as Muncie Police Chief from January 1996 to February 2008. Former Chief Winkle testified he was advised by the State Board of Accounts Field Examiner in 1997 at the audit for 1996 that an authorized general fund account for forfeitures did not exist and that the existing city accounts into which forfeiture money was going - accounts 23120439071 and 22700367011 - were not general fund accounts. Former Chief Winkle asserted he contacted then-Prosecutor Richard W. Reed about the problem, and Prosecutor Reed asserted the State Board of Accounts had no authority in the matter. Former

Chief Winkle further stated he also contacted a city attorney who verbally approved the DTF accounts. Former Chief Winkle was uncertain as to the identity of the city attorney. Former Chief Winkle also testified that the State Board of Accounts raised at each annual audit thereafter throughout his term of office the same objection as to the lack of a general fund account for receipt of civil drug forfeitures and the impropriety of city accounts 23120439071 and 22700367011 for receipt of forfeitures.

This testimony is consistent with the testimony of Stephanie Heath, Field Examiner for the State Board of Accounts: that for the last ten (10) years, at the end of each audit, the City of Muncie's Mayor, Controller, and police department officials were advised as to the lack of a general fund account for the receipt of civil forfeiture funds and that the DTF accounts 23120439071 and 22700367011 were not general fund accounts, and, therefore, inappropriate for receipt of general fund money.

There is no merit in the argument that persons employed to prosecute civil forfeitures under a statute would not familiarize themselves with the procedures set forth in the statute and make a concerted and reasonable effort to see that the monies due the fiscal bodies of local units of government went to their general funds. There is no legitimate excuse. They cannot rely on the opinion of a city controller or on the Nuremberg defense of past practice or everyone else was doing it that way. McKinney and Hoffman's knowledge is inferred from the circumstances. They should have known that the forfeited assets were not going to general fund accounts. The Indiana General Assembly made the State of Indiana and the fiscal bodies of the City of Muncie and Delaware County their clients, and their duty was clear: perform asset forfeitures in accord with the law and distribute the monies from the asset forfeitures into the appropriate general funds. If needed, guides were available from other prosecutors. See a revised summary of the civil forfeiture statute by the Allen County Prosecuting Attorney dated March 14, 1997, which is attached as court's exhibit 1.

Asset forfeitures occurred, and these did not appear to be seriously contested. Most cases were resolved by default or agreed judgment, or by secret agreement. A contested matter was practically non-existent. These cases most probably could have been conducted in a streamlined manner; unfortunately, the results never met the statutory requirements. In most cases, whether there were an agreed or default judgment or secret agreement, the cash usually went to City of Muncie General Fund, Seizures and Forfeitures Account 23120439071. Some cash did go to City of Muncie General Fund Account 22700367011; however, neither of these accounts were true general fund accounts accessible to the City Common Council; they were false designations whose effect was to deceive the court. The accounts were accessible to the DTF. On a few occasions, forfeited cash went directly to the DTF.

The Indiana General Assembly's intent in I.C. 34-24-1-4 is clear and unambiguous: oversight of forfeited assets was to be by the duly elected fiscal bodies of the units of government which had spent public revenues to employ the police and prosecutors used in law enforcement, to reimburse these fiscal bodies, and, if there were any overage, to provide a revenue source for the state common school fund. The end result of diverting forfeited assets to DTF control was to: (1) deny the Muncie Common Council and the Delaware County Council large sums of money, and (2) substitute the DTF officers' judgment for that of the duly elected and authorized councils in spending this money. Where and how the money was spent is now public record. The court does not comment on the expenditures of this money other than to note that the DTF was not lawfully entitled to spend it.

The court could find no instance of any money directed to the Delaware County General Fund for appropriation by the County Council. Law enforcement costs were never detailed, monies never apportioned in accord with the law, and attorney fees, while asserted to be contingent, were withheld from the court, obtained without court overview. As early as April 19, 1999, members of the Indiana Commission on Judicial Qualifications, in a letter to this judge, pointed out that the forfeiture statute "calls for the proceeds to be deposited in a state or local general fund or into the common school fund, but more critically . . . question[ed] the propriety of a practice whereby the deputy prosecutors receive[d] a percentage of the fruits of forfeiture actions, which practice appears to give them a personal stake in the proceedings. A copy of the letter was sent to the Indiana Disciplinary Commission which was at that time reviewing the conduct of Louis Denney and Mark R. McKinney in asset forfeitures.

The court notes that McKinney withheld his compensation from judicial supervision. Attorney fees are not mentioned in the agreed or default judgments submitted to the court. The court was never advised of an alternative provision that allowed less than 25%. Further, by crafting court orders on agreed judgments or default judgments that he submitted as to omit any reference to attorney fees, McKinney avoided the court making fee determinations using the factors established in Rule 1.5(a) of the Rules of Professional Conduct. McKinney submitted his claims on DTF accounts, with one exception: on March 26, 2007, a separate check labeled "auction proceeds" was issued directly to him by DTF auctioneer Noah Mason for \$8,413.92 in addition to the \$5,965.06 for that year paid out of the DTF city accounts. To date, the total sums paid him under the 25% contingent fee since 2000 amount to \$106,070.27.

5. The court has examined more than 450 civil forfeiture cases in this division of the Delaware Circuit Court, going back to July 12, 1988, including 54 Trial Rule 41(E) cases, plus one case in division 1, three (3) cases in division 3, and three (3) in division 4. Documents reviewed by the court, in addition to case files, include city and county police reports of the DTF, Muncie Police Department property room records including property abandonment affidavits, State Board of Accounts summaries, including the 2006 State Board of Accounts audit report regarding the Muncie-Delaware County Drug Task Force which includes objections raised in prior Reports B14766, B16971, B19302, B21583, B23897, B25557, and B27632, and bank statements for the DTF checking account # 212-6753 at First Merchants Bank, N.A., Muncie, IN, first opened in 2000-2001 and first discovered by State Board of Accounts field examiners in the August, 2006, audit of 2005, when two separate \$10,000.00 checks drawn on the account were uncovered as contract payments for two (2) new high-end SUVs - a Tahoe and an Expedition - presumably for use by DTF supervisors, the money coming from DTF property room abandoned cash; at that time, the State Board of Accounts objected to the account, and it was closed in November, 2007, shortly after the city election.

Secret agreements came to the court's attention in various ways: a chance comment by a DTF supervisor that they existed but that a court order would be needed before the judge would be permitted to view them - the court followed up and 38 secret agreements were obtained, an order to McKinney did not produce anything new, an order to Hoffman secured several, plus information as to the existence of a secret agreement concerning Christopher Bryant, one was brought to court, and another was discovered in an order for bank documents, and others were located among the abandoned property affidavits from the Muncie Police Department property room.

From 1999 to 2008, 140 abandoned property affidavits were executed by the officer in charge of the Muncie Police Department property room and various members of the DTF. The court also found instances where property was declared abandoned while forfeiture cases were pending and the owners of the property and their counsel were obviously present and actively engaged in the litigation. These instances include transfers of \$4,542.00 from Erwin C. Nuckols, cause 18C02-0008-MI-59, \$168.00 from Nicholas Huggins, cause 18C02-0106-MI-52, and \$2,676.00 from Jeff Petro, cause 18C02-0103-MI-12. These affidavits routinely cited I.C. 35-33-5-5 as authority for transfer of cash from the property room to DTF controlled account 22700367011; however, had the statute been followed, the cash would have gone to the Delaware County General Fund instead. As a result, \$68,621.84 that should have gone to the Delaware County General Fund was diverted to the control of the DTF. Mark R. McKinney denies that he had any knowledge of the affidavits or the transfers, and no testimony ties him to this unlawful transfer of funds. Rule 6 of the proposed local court rule governing storage, processing, and disposition of drug forfeitures and all other property held as evidence addresses this failure to follow legislative requirements by providing court supervision at all crucial stages: (1) confirming reasonable efforts have been taken to ascertain ownership or the rightful owner has been duly notified to take possession and has not done so; (2) determining that the statutory ninety (90) day period has passed; (3) authorizing the Sheriff to conduct the public sale; (4) ordering the Sheriff to report the proceeds of sale; (5) directing the deposit of the money or proceeds be deposited into the Clerk's Trust Account, with the Clerk paying the proceeds over to the county general fund and filing the quietus with the court. A copy of the proposed local rules, which are to be considered at the Delaware Circuit Court Board of Judges meeting on August 20, 2008, is attached as court's exhibit 2.

6. The court uncovered forty-five secret agreements, titled "Confidential Settlement Agreements." Six (6) of these agreements were turned over to the divisions of this Court having civil causes concerning the subject property: one was submitted to division 1, one to division 3, and four to division 4. In his report to the court, Eric M. Hoffman noted that he was aware of an additional settlement agreement concerning a Christopher Bryant, but presently unable to locate it. By checking Hoffman's claim and the city fee payment records, the court ascertained that the agreement was entered into on or about March 12, 2007, that cash in the sum of \$12,858.00 and various personalty were received as a result of the agreement. Cash and personalty were likely directed into DTF account 23120439071 because that is the account from which Hoffman's attorney fees were paid. The court notes no additional information other than Hoffman seeks an additional 25% of auction proceeds.

The discovery of these secret agreements, together with McKinney's demand for their immediate return, raised red flags with the court. McKinney contended that they were protected by attorney-client privilege. There being no objection to the court's obtaining the documents by either Delaware County or the City of Muncie, the court determined McKinney lacked standing to raise that objection and denied it. McKinney also raised the objection that the documents identified the participants as cooperating witnesses, but the court's review showed nothing other than the persons were surrendering cash and property, and, other than cooperating by surrendering their property, there was nothing identifying persons as potential informants for the State. The court pointed out that these people were giving up cash and things of value and not being paid for testimony; McKinney later dropped his objection, and it was deemed withdrawn.

Finally, McKinney asserted the documents were his work product, and the court is willing to accept that they are indeed his craftsmanship; however, considering the public authority he has been given to prosecute civil drug forfeitures and the public nature of the property as subject to forfeiture, the work product doctrine did not preclude the court's seizure in advancing the investigation herein.

At the court's most recent hearing on August 11, 2008, McKinney asserted: "We always complied with whatever the court asked. . . . All you had to do was ask." The court is not in a position to "ask" if the subject matter is withheld from the court. The use of secret agreements effectively circumvented judicial scrutiny the Indiana General Assembly mandated in I.C. 34-24-1-4. Forfeitures are to be via court adjudication, and it is important to note that the secret agreements preclude court adjudication in forfeitures. In some instances, cases have been pending for years, but the court is never advised of the action taken, nor is its approval sought with regard to disposition of property, civil or criminal attorney fees, or other law enforcement costs. In every case the statutory requirement is avoided. Paraphrasing Stephanie Heath, field examiner for the State Board of Accounts: for the last ten years, not a penny of civil drug forfeitures in Delaware County has gone to the general fund of Delaware County, the general fund of the City of Muncie, or the common school fund of the state of Indiana. Instead, the money has gone almost exclusively to the DTF, and the fiscal bodies of the local units of government - the Common Council of the City of Muncie and the Delaware County Council - who were to be reimbursed the law enforcement costs according to the legislative plan, were totally ignored.

The court does note it found one exception to the exclusive transfer of funds to DTF accounts in a secret agreement between the Muncie-Delaware County Drug Task Force and A.L. McCowan signed by McCowan's counsel Jill Gonzales and Mark R. McKinney as deputy prosecutor on September 24, 2001, \$1,740.00 was forfeited by McCowan to the Indiana State Police Forfeiture Fund "in satisfaction of costs of law enforcement associated with and the related civil and/or criminal actions herein, less \$435.00 in attorney fees payable to Mark R. McKinney and the Delaware County Prosecutor's Office." \$1,740.00 was to be returned to McCowan through Jill Gonzales. As part of the agreement, the State of Indiana agreed "to forego filing any further civil forfeiture action based on the charges in 18C05-0102-DF-52." The companion criminal case 18C05-0102-DF-52 was dismissed on motion of the State on July 22, 2004. No civil action was filed. As of July 2, 2008, the Indiana State Police had not received any payment after almost seven (7) years.

Invariably, these secret agreements contained a provision to dismiss a pending civil forfeiture or forbear from filing such a case. These agreements were not a solitary happenstance. To the extent they were found, they display a consistent course of conduct from 2000 through 2007. Courts trust attorneys to tell them all they need to know. Such candor is alarmingly absent in these secret agreements. They constitute a carefully crafted assault on the judicial system and court adjudication in civil forfeitures. In using them, McKinney and Hoffman may have jeopardized our community's grant-in-aid through the Indiana Criminal Justice Institute. Grant program income under Federal guidelines is considered earned when the property has been **adjudicated** to the benefit of the law enforcement entity. Under Chapter 4: Program Income of U.S. Department of Justice Office of Justice Programs, "States or local units of government MAY USE PROGRAM INCOME FROM SEIZED AND FORFEITURE ASSETS AS MATCH **when assets are adjudicated by a State Court, in accordance with the State law** [court's

emphasis].”

McKinney contends he, while having a contingent interest in the outcome of negotiations for what is to become public property, has the right to enter into such negotiations without being subject to judicial scrutiny; that his secret agreements which dispose of public property or public claims to property are tantamount to a court adjudication as to satisfy both state and federal guidelines. There is a total failure to advise the court of the terms of the secret agreements and to seek court approval. The inference the court draws from this conduct is that McKinney and Hoffman, the counsel representing the state and local units of government, intended to divide public property in a manner resulting in their personal benefit and to hide their conduct from court supervision.

As a result of forty (40) of these secret agreements, \$146,075.89 went to DTF account 23120439071, \$5,325.28 went to DTF account 22700367011, and \$63,946.57 was returned to the defendants. See court’s exhibit 3. Since the employment contracts that McKinney and Hoffman called for contingent fees “equal to twenty-five percent (25%) of any judgment entered”, and none of these secret agreements resulted in court adjudication, neither McKinney nor Hoffman would appear to be entitled to attorney fees. If so, this would result in a return of \$37,850.29 to be divided among the City and County General Funds.

The contracts entered into by full-time, deputy prosecutors Mark R. McKinney and Eric M. Hoffman with Prosecuting Attorney Richard W. Reed and by full-time, deputy prosecutor Eric M. Hoffman with Prosecutor Mark R. McKinney provided for compensation “in an amount equal to twenty-five (25%) of any judgment entered in such actions . . . or the attorney fee allowed by the court in such actions, whichever is less.” The court was not provided with copies of such contracts until Wednesday, August 6, 2008. The court cannot emphasize strongly enough that the contracts herein involved the disposition of public property by a public officer, and this makes the issue of contingent fee crucial because the contingent fee arrangement made McKinney and Hoffman financially interested in the contracts comprising the secret agreements. The court cites In the Matter of State Board of Accounts, etc. et al. v. Halovachka etc., 236 Ind. 565, 142 N.E.2d 593, 1957 Ind. LEXIS 208. Here, Indiana Supreme Court Chief Justice Achor, noting the inherent problem of having a public officer engaged in contracts in which he had a personal interest, quoted Cheney v. Unroe (1906), 166 Ind. 550, 77 N.E. 1041:

“ . . . ‘It is a well-established and salutary doctrine,’ . . . ‘that he who is entrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself. This rule does not depend on reasoning technical in its character, and is not local in its application. It is based on principles of reason, or morality, and of public policy. It has its foundations in the very constitution of our nature, for it has authoritatively been declared that a man cannot serve two masters, and is recognized and enforced wherever a well-regulated system of jurisprudence prevails.’ 1 Dillon, Mun. Corp. (4th ed), section 444. . . .”

7. The court now presents a few cases to illustrate adverse effects on our local judicial system in the way civil drug forfeitures have been handled:

In State of Indiana, City of Muncie & Delaware County v. Emery Brown and \$858.00 in

U.S. currency and various personalty, 18C02-0108-MI-70, on March 11, 2005, when Emery Brown, who was incarcerated at Pendleton Correctional Facility, did not appear, Judge Pro Tem Ronald L. Henderson proceeded to hear evidence and grant forfeiture judgment to Mark McKinney as private counsel. McKinney submitted a judgment, which was signed by Henderson on March 30, 2005. This judgment is troubling for two reasons: (1) the appearance of impropriety by Judge Pro Tem Henderson in presiding over a bench trial and granting judgment to McKinney, and (2) the abandonment in the decree by McKinney of the statutory requirement that the forfeiture proceeds would go to a general fund. First, Henderson, who is presently chief administrative deputy under now-Prosecutor McKinney, was a fellow deputy prosecutor with McKinney from November 10, 1997 to January 1, 2003, assisted in prosecuting civil forfeitures close in time to the underlying seizure in December 6, 2000, and received payments from DTF accounts as late as December 8, 2000, from DTF accounts 23120439071 and 22700367011. Second, the judgment does not make any mention of placing currency and personalty into any county or city general fund account; the assets are ordered directly to the DTF.

In State of Indiana and City of Muncie v. Deborah Wells and \$190.00 in U.S. currency, 18C02-0008-MI-45, a default judgment directing delivery of the money to the City of Muncie General Fund Account # 22700367011 "in satisfaction of costs of law enforcement" was submitted to the court on November 20, 2000. The judgment was never signed, and no order was ever entered in the Court Clerk's order book; nevertheless, a CCS entry of judgment was made and sent to the DTF, and the money was transferred to the separate fund account #22700367011 of the DTF. No companion criminal cause was ever opened.

State of Indiana, City of Muncie, & Delaware County v. Jack O. Simmons and \$6,518.50 in U.S. currency and various personal property, 18C02-0008-MI-65, was filed in this division on August 14, 2000. Mr. Simmons was also charged with four (4) Class B felony counts involving controlled substances, each bearing a standard sentence of ten years, in criminal cause 18C01-0007-CF-48. The criminal cause was ultimately resolved by amending count 1 to a Class C felony, carrying a standard sentence of 4 years. Mr. Simmons pled guilty to that offense on February 1, 2001, and sentencing was scheduled for April 2, 2001. Mr. Simmons died prior to sentencing. This civil forfeiture remains pending although a secret agreement was entered into between Mark McKinney as counsel for plaintiffs, Greg Ellison as supervisor for the DTF, the personal representative of the Estate of Jackie Simmons, and counsel for the Estate. The secret agreement and its approval by the probate court in Madison County is attached as court's exhibit 4. Pursuant to the agreement, \$6,518.50 is transferred to the City of Muncie General Fund Seizure and Forfeiture Account # 23120439071, which in truth and fact was a separate DTF account and not a General Fund Account. A 1986 Mercedes Benz 420 SEL was to be used by the DTF, then sold by the Sheriff. Ultimately, the proceeds of the sale of the Mercedes were to be directed to the same DTF account, again improperly described as a General Fund Account. While the contract was submitted, approved on February 26, 2002, and signed by the probate judge, the Honorable Frederick R. Spencer, it was never submitted to this court before which the forfeiture action was pending and is still pending. This court had absolutely no knowledge of what had taken place until it obtained a copy of the secret agreement pursuant to a *sua sponte* order in cause 18D02-9902-MI-62, an action Mark McKinney strongly objected to, filing a request for a protective order to return the secret agreements and any copies that may have been made by the court and furnished to counsel for the City of Muncie and Delaware County. "All you had to do was ask" said McKinney. If the matter is withheld from the court's knowledge,

how can the judge ask?

In **State of Indiana, City of Muncie, & Delaware County v. Tommy Christie, \$49,518.00 in U.S. currency and various personal property**, 18 D02-9907-MI-48, an agreed judgment was filed on September 1, 2000, and not signed until September 28, 2000. Mark McKinney, as attorney for Plaintiffs, defendant Tommy Christie, and his attorney Michael Alexander signed the agreed entry. The agreed judgment calls for the immediate forfeiture of \$29,518.00 in U.S. currency to be delivered "to the City of Muncie General Fund Seizure and Forfeiture Account #23120439071 in satisfaction of costs of law enforcement." As in all other cases, the costs are not established or apportioned between units of government, and the account is a separate DTF controlled account, not a general fund account of the City of Muncie, and certainly not a general fund account of Delaware County, which would, at the least had the criminal and civil prosecution costs to be considered in the apportionment of funds. A copy of the agreed judgment is included as court's exhibit 5. The court notes that "various personal property items" were surrendered for use by the DTF prior to sale by the Sheriff, with proceeds of sale going into the same separate DTF account. The list of items "for use" is quite extensive, including 3 handguns, 1 rifle, 1 shotgun, 1 sentry safe, 3 Fender amplifiers, 8 guitars, 1 air compressor, 2 mountain bikes, Harley Davidson collectibles, Nascar collectibles, and a 1977 Chevrolet Corvette. The agreed judgment calls for dismissal of the cause, which is improper, preventing the court from supervising the ultimate sale and transfer of proceeds into general fund accounts.

Please note that this civil forfeiture was filed by Mark R McKinney as private counsel on July 19, 1999, and that he was attorney for Plaintiffs throughout. The companion criminal cause was also filed by Mark McKinney as deputy prosecutor on July 17, 1999, and he remained on that case throughout, including disposition. In **State of Indiana v. Tommy W. Christie**, 18D01-9907-CF-57, Mr. Christie was initially charged with one count of dealing in cocaine as a Class A felony (standard sentence 30 years) and five drug related offenses as Class D felony (standard sentence 1 and ½ years). The probable cause affidavit recited that in execution of a search warrant at Christie's residence, Christie, a convicted felon, was found armed with a .45 caliber handgun; police also located more than ten ounces of powder and crack cocaine, an amount of marijuana which was 25 grams short of one pound, as well as both schedule II and IV substances. In excess of \$49,000.00 was located in Christie's bedroom. The affidavit further alleges: "[a]fter being mirandized Mr. Christie admitted the gun and drugs belonged to him." The probable cause affidavit is attached as court's exhibit 6. On December 27, 1999, McKinney, as deputy prosecutor, amends the Class A felony count to a Class B felony (standard sentence 10 years), and Christie pleads guilty to the lesser charge. On February 7, 2000, Christie, having a prior felony conviction, receives a sentence of ten years. On February 29, 2000, McKinney moved to dismiss the remaining five Class D felony counts; this motion was granted by Judge Barnet on March 1, 2000.

In **State of Indiana v. James E. Morris**, 18 C02-0102-CF-07, on February 7, 2001, the defendant was charged with count 1 dealing in a schedule II controlled substance, a Class B felony (standard sentence 10 years) and count 2 maintaining a common nuisance, a Class D felony (standard sentence 1 and ½ years). A February 6, 2001, arrest report related that Morris sold ten (10) Oxycotin 40 mg. pills for \$200.00 to an undercover police officer while stating "he had around 100 pills and to come back anytime." On March 6, 2001, according to his attorney's testimony, Morris entered into a secret agreement with Greg Ellison, Muncie-Delaware County Drug Task Force supervisor, whereby Morris surrendered \$4,340.00 "to the City of Muncie

General Fund Seizure and Forfeiture Account # 23120439071. The remaining \$4,340.00 and a Dodge Diplomat were returned to Morris via his attorney. In accord with the agreement "to forego any civil forfeiture action", no civil action was ever filed. The criminal action was resolved June 4, 2001, when Morris pled guilty to count 1 dealing in a schedule II controlled substance, a Class B felony. On August 30, 2001, Morris was sentenced to six (6) years imprisonment, which was the minimum mandatory sentence, this being his third felony conviction. On October 22, 2001, count 2 was dismissed on the State's motion.

State of Indiana, City of Muncie, and Delaware County v. Robert Skeen, Trista Skeen, \$5,650.00 in U.S. currency and various personal property, 18D02-9909-MI-62, was filed by Mark R. McKinney as private counsel on September 16, 1999. On October 2, 2000, an agreed entry and order on disbursement of funds and stipulation of dismissal was shown on the CCS. Subsequently, that entry was noted as erroneous and stricken. The cause remains pending. The court, learning from Officer Greg Ellison, a DTF supervisor, that "confidential settlement agreements" relating to the disposition of the subject property in the Skeen case and other cases, ordered the production of such agreements. The secret agreement in the Skeen case, dated October 30, 2000, and attached as court exhibit 7, called for the surrender of one-half of the seized currency - \$2,825.00, 9 two-dollar bills, 1 handgun, 1 rifle, miscellaneous television and sound equipment, and a 1977 Chevrolet Corvette. The \$2,825.00 is to be delivered to the falsely identified City of Muncie General Fund Seizure and Forfeiture Account #23120439071 to satisfy law enforcement costs. The remaining property is to be used by the DTF, then auctioned by the Sheriff, with proceeds of sale going to same separate DTF account. The agreement further recites: "The parties hereby agree that the pending civil forfeiture action shall be dismissed, with prejudice, costs paid."

Initial charges were filed in the companion criminal action, **State of Indiana v. Robert Michael Skeens**, 18C01-9909-CF-71, on September 9, 1999. Count 1 charged dealing in cocaine, a Class A felony (standard sentence 30 years); count 2 charged possession of marijuana, a Class D felony (standard sentence 1 ½ years). The DTF seizure form for Robert and Trista Skeen for September 7, 1999, shows 66.5 grams of cocaine and 304.5 grams of marijuana taken by police. On April 26, 2001, Robert Skeen pleads guilty to count 1 amended to allege dealing in cocaine, Class B felony (standard sentence 10 years), as a lesser included offense. Count 2 is dismissed on the State's motion. On August 30, 2001, Robert Skeen receives a ten (10) years sentence, with six (6) years executed and four (4) years suspended.

The court notes Mark R. McKinney was elected Delaware County Prosecuting Attorney in November 2006, that he took office on January 1, 2007, opting to serve as full-time prosecutor. Statute precludes the private practice of law by full-time prosecutors. There are, however, at least three (3) instances where McKinney handled civil drug forfeitures as private counsel during his first year in office:

(1) **Adrian Kirtz**. McKinney acknowledges he entered into a secret agreement with Kirtz in the first quarter of 2007. Adrian Kirtz and his lawyer Jake Dunnuck place the signing of the agreement in mid-February 2007. Pursuant to the secret agreement which purports to be between "the Muncie-Delaware County Drug Task Force, Adrian Kirtz, and Lacie Williams, in person and by counsel," and signed by Mark R. McKinney as Counsel For Plaintiffs, Adrian Kirtz, Lacie Williams, and Jake Dunnuck as Counsel For Defendants. Pursuant to the agreement \$35,774.24 in U.S. currency is forfeited to be delivered "to the City of Muncie General Fund Seizure and Forfeiture Account #23120439071 in satisfaction of costs of law enforcement associated with

this and the related civil and criminal actions herein . . .” In paragraph 8 of the second page, the parties “agree to the dismissal and/or waiver of the pending or potential forfeiture action, with prejudice, costs paid.” The court notes that no civil forfeiture action was filed until this court *sua sponte* opened an MI file on July 9, 2008. The only other relevant civil action was 18C04-0612-MI-93, where an order seizing Adrian Kirtz’ and Lacie Williams’ bank accounts was sought and obtained by McKinney as DTF private counsel on December 21, 2006. No further action was taken in that cause until July 11, 2008, when this court notified the Honorable John Feick, judge of division 4, that on March 8, 2007, there had been a distribution of funds from the accounts he had ordered frozen: a check to Jake Dunnuck Attorney for \$26,838.79, which appears to match the amount recited at paragraph 4 on the second page of the secret agreement, and a check to Muncie Drug Task Force in the sum of \$25,212.89, which is less than the \$35,774.24 recited in paragraph one of the secret agreement; however, it was enough to exhaust Williams’ account. Also, an additional \$18,023.00 was seized in the December 20, 2006, police raids. The agreement also provided for the return of a 1977 Chevrolet van, a 1995 GMC van, other personalty, and acknowledged that \$5,000.00 in U.S. currency had already been returned to Kirtz and Williams. Kirtz and Williams also agreed to forfeit a 2003 GMC Denali (a vehicle which Officer Ellison testified had extensive, high-cost customizations), a 1993 Kawasaki motorcycle, and various other personalty. The GMC Denali, the 1993 Kawasaki motorcycle, and the personalty are to be used by the DTF for up to three (3) years, then sold at auction by the Sheriff, with proceeds again going to the previously cited DTF account. Officer Greg Ellison, a DTF supervisor, testified he later learned that a \$17,000 lien existed against the GMC Denali, a very high-end, luxury vehicle, that he used DTF funds, which the court has determined from Muncie City records actually amounted to \$17,873.32, to pay off the Communitywide Federal Credit Union on March 30, 2007, from DTF account 23120439071. This luxury vehicle, which would be readily noted and avoided by the local drug community, simply sits in storage. The court notes neither this division nor division 4 was notified about the secret agreement; it was discovered as the result of an order for bank documents. On April 15, McKinney filed a private attorney claim seeking \$4,864.31, plus 25% of auction proceeds for his attorney services; the \$4,864.31 was paid out of the DTF account 23120439071. The secret agreement, invoice and purchase order are attached as court’s exhibit 8.

The companion criminal actions **State of Indiana v. Lacie Williams**, 18C03-0701-FA-01, and **State of Indiana v. Adrian Kirtz**, 18C05-0701-FA-01, were predated by a number of search warrants issued by Judge Robert L. Barnet, judge of division 3, which were served on December 20, 2006. On December 21, 2006, Mark R. McKinney appears as private counsel for the DTF before Judge Feick of division 4 and files a probable cause affidavit seeking the seizure of certain bank accounts of Lacie Williams and Adrian Kirtz. The probable cause affidavit, affirmed by Jess E. Neal, a then-supervisor of the DTF, alleged: (1) the search warrants issued by Judge Barnet had been served; (2) the DTF had recovered nine (9) ounces of cocaine which Kirtz admitted “belonged to him”; (3) that Kirtz “advised that his girlfriend Lacie Williams was holding 8-9 ounces of powder cocaine for him”; (4) that “Lacie Williams was arrested and also gave a statement to police admitting that she was Kirtz’ girlfriend, that there was cocaine in her bedroom that she was ‘holding’ for Kirtz, but that it was his cocaine”; (5) that during a search of Lacie Williams’ residence, officers recovered approximately 9 ounces of powder cocaine.” On January 3, 2007, three (3) criminal counts were filed against Kirtz in division 5: counts 1 and 2 were each for dealing in cocaine as a Class A felony (standard sentence 30 years), and count 3

was for possession of cocaine as a Class C felony (standard sentence 4 years). Also on January 3, 2007, one criminal count was filed against Williams in division 3: dealing in cocaine as a Class A felony (standard sentence 30 years). All criminal informations were prepared by McKinney as deputy prosecutor. On February 26, 2007, Jake Dunnuck entered his appearance for Williams. Pursuant to a plea agreement filed on November 26, 2007, Williams pled guilty to a second count alleging maintaining a common nuisance, a Class D felony (standard sentence 1 and ½ years). On January 10, 2008, the plea agreement and plea were accepted. Williams was fined \$1.00 and sentenced to the Delaware County Jail for one (1) year, suspended. After the one (1) year probation, Williams may petition the court to have the conviction amended to show a Class A misdemeanor instead of a Class D felony. On January 22, 2008, the State moved to dismiss count 1. The motion was granted the same day.

Kirtz' court proceedings appear to be more convoluted; however, he has avoided imposition of penalties in three (3) courts. Kirtz was on probation in division 2 for possession of cocaine as a Class C felony when he was charged in division 5 on January 3, 2007. There have been multiple continuances by defendant's counsel in division 5 since his initial hearing there on January 22, 2007. There have been multiple continuances by the State in the revocation proceedings against Kirtz commenced in this court on January 26, 2007. On June 9, 2008, a warrant was issued for Kirtz' failure to appear by this judge in division 2. On June 24, 2008, a warrant was ordered issued for Kirtz' failure to appear by division 5 Judge Chris Teagle. Kirtz, located in Youngstown, Ohio, initially resisted extradition; however, he recently surrendered to the Sheriff of Grant County, Indiana, and is presently in custody, and scheduled for fact-finding hearing in division 2 on October 9, 2008, and jury trial in division 5 on November 18, 2008. Kirtz is presently scheduled on September 11, 2008, in United States District Court for the Southern District of Indiana, Indianapolis Division, for plea and sentence in cause #1:07-cr-00154-SEB-KPF-1, where he has pled guilty to two (2) indictment charges of conspiracy to use fire to commit mail fraud in August and December, 2005.

(2) **Kelvin Lampkins.** On August 25, 2006, Mark R. McKinney, as a private attorney, filed a complaint captioned **State of Indiana and the Muncie-Delaware County Drug Task Force vs. Kelvin Lampkins and \$2,898.00**, 18C04-0608-MI-77. An alias summons was filed by McKinney, again as private counsel on February 15, 2007. On April 19, 2007, McKinney, again as private attorney, filed a verified motion for default judgment, together with a non-military affidavit and affidavit of counsel. An affidavit of law enforcement was also filed at that time. On April 19, 2007, Judge John Feick signed the default judgment McKinney had submitted, which called for "deposit of the currency [\$2,898.00] in the City of Muncie General Fund, Account # 23120439071. On April 24, 2007, McKinney submitted his private attorney's fee claim for the judgment to the DTF and was paid \$724.50 from the 23120439071 account on May 2, 2007. The court papers, including CCS, invoice, and purchase order are attached as court's exhibit 9.

(3) **Brad Chappell.** On June 19, 2007, Mark R. McKinney appeared as private counsel and filed a complaint captioned **State of Indiana and the Muncie-Delaware County Drug Task Force vs. Brad Chappell and \$4,000.00 in U.S. Currency**, 18C04-0706-MI-49. On November 7, 2007, McKinney as private Attorney for Plaintiffs, submitted an "Agreed Entry, Order on Disbursement of Funds and Stipulation of Dismissal" to Judge Feick. The document, dated October 22, 2007, bore the signatures of McKinney, the defendant Brad Chappell, and Jake Dunnuck as Attorney for Defendant. The entry, which was signed by Judge Feick on November 7, 2007, simply calls for forfeiture of \$2,000.00 "to the City of Muncie General Fund Seizure and

Forfeiture Account # 23120439071, return of the remaining \$2,000.00 to Brad Chappell through Jake Dunnuck, and "dismissal of the above-entitled cause of action, with prejudice, costs paid." Court papers, including CCS, are attached as court's exhibit 10.

The court now enters its conclusions:

(a) Civil drug forfeitures were not handled correctly.

In one secret agreement dated September 24, 2001, forfeited assets were directed to the Indiana State Police Forfeiture Fund, less 25% to Mark R. McKinney **as deputy prosecutor** [court's emphasis]. As provided in the agreement, no civil action was filed; consequently, there was no court oversight.

In all other secret agreements uncovered by the court and in all judgments, agreed or default, reviewed by the court, law enforcement costs were not detailed and forfeited assets were not apportioned to the fiscal bodies of the local units of government involved. Forfeited assets were sent to non-general, DTF accounts within Muncie; they were never directed to the Muncie general fund, and, although Delaware County would have been a consistent party because of civil and criminal prosecution costs as well as its police officers participating in DTF seizures along with Muncie police, staffing on raids being customarily 1/3 county and 2/3 city, forfeited assets were never directed to Delaware County's general fund. Attorney fees were never submitted for court determination, although the private attorney employment contract in force at the Prosecutor's Office at all times pertinent herein conditioned the fee on court approval, and Rule 1.5(a) of the Rules of Professional Conduct appears to support a court review.

(b) The handling of civil drug forfeitures amounts to fraud on the court.

Fraud on the court is defined in Black's Law Dictionary (B. Garner, ed., 8th Ed. 2004) as "a lawyer's . . . misconduct so serious that it undermines or is intended to undermine the integrity of the [judicial] proceeding." The secret agreements uncovered by the court, with their universal provisions to forebear filing of forfeiture actions or to dismiss existing forfeiture actions, constitute an egregious lack of candor with the court, and candor is necessary to preserve the integrity of the adjudicative process. These secret agreements, covering a period from 2000 to 2007, were intentionally drawn to avoid court supervision and adjudication of forfeitures as required by state law. This concealment was successful until uncovered by the court in 2008, following up on a chance comment by a DTF supervisor. The secret agreements show McKinney's and Hoffman's clear intent to profit from their special positions as public servants invested with a public trust. Invariably, while avoiding mention of attorney fees, the public money is directed away from general fund accounts into DTF accounts, from which McKinney's and Hoffman's 25% claims are paid.

With the permission of the Honorable John Feick, judge of division 4 of the Delaware Circuit Court, the court reviewed McKinney's conduct in cause 18C04-0612-MI-93, involving a seizure order. On December 21, 2006, McKinney obtained an order seizing the credit union account of Lacie Williams. The credit union was promptly faxed a copy of the court order. In mid-February, 2007, McKinney as private counsel negotiated a secret agreement obtaining funds from Williams and Adrian Kirtz. On March 8, 2007, the secret agreement having been filed with the

credit union, \$52,051.68 was removed from Williams' account, with a check for \$26,838.79 drawn to Williams' and Kirtz' attorney Jake Dunnuck and a check for \$25,212.89 drawn to "Muncie Drug Task Force". In accord with the secret agreement, the check was deposited to DTF account # 23120439071. On April 15, 2007, McKinney submitted an invoice for \$4,864.31, plus 25% of future auction proceeds. The \$4,864.31 was paid McKinney from DTF account 23120439071. The GMC Denali (a luxury vehicle), the 1993 Kawasaki motorcycle, and other personalty surrendered in the secret agreement negotiated by McKinney as private counsel in mid-February, 2007, have not yet been auctioned. It is clear, however, that McKinney seeks 25% of the proceeds.

The court notes McKinney drafted a court order seizing a credit union account. McKinney then negotiated and signed a secret agreement which was used to transfer money from the credit union account without the court's knowledge and in direct violation of the court order. The "forfeited" funds were transferred to a DTF account not authorized by the legislature for receipt of forfeited assets for local units of government and without any itemization or accounting for local law enforcement costs.

McKinney's actions are purposeful, deceitful, and directly against the interests of his clients, the Muncie Common Council and the Delaware County Council. He knowingly and willfully violated a court order and sought to conceal this action from the court. By his actions, McKinney intentionally subverted the check and balance system established by the Indiana General Assembly in civil drug forfeitures, substituting his judgment for that of the court as well as the fiscal bodies of Muncie and Delaware County.

The court notes that in the civil drug forfeitures which McKinney allowed to come to default or agreed judgment, he universally makes a statement which is untrue, which is either known by him to be untrue, or made by him with reckless disregard for the truth: the accounts he labeled general fund accounts and advised the court to place forfeited money into were not general fund accounts. If McKinney had initially actually believed they were general fund accounts, he certainly did not exercise due diligence as private counsel and certainly should have discovered they were not general fund accounts long before the expiration of ten (10) years, especially when the State Board of Accounts brought this to public attention each year. The information was given to the court by McKinney with the intent to deceive it. Never were the costs of law enforcement - city and county - detailed, which would be necessary before any apportionment of funds could be made as required by state statute. Never was a county general fund mentioned, although the county generally played a substantial role in seizures and also bore the cost of criminal and civil prosecutions.

The court in each case did rely on McKinney's representations in his capacity as an attorney, and the court was entitled to do so. As a result, the court was induced to act contrary to law, directing forfeited assets where they had no lawful right to go. As a consequence, the integrity of the local judicial system has been damaged, and the fiscal bodies of our local units of government have been denied their rightful funds. See Rule of Professional Conduct 3.3(a): "A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

The measure of damages is clear. It is the difference between the value of what would have gone into the general fund of the unit of government had the law been followed and what was actually received. McKinney can blame others for his actions, but, at the end of the day, McKinney had control of the forfeited assets and directed where they went. He is ultimately

responsible for his actions. McKinney was ready and willing to use the legitimacy and authority of the judicial system in pursuit of civil drug forfeitures, but he was unwilling to submit his actions to judicial scrutiny. His actions, considered jointly or severally, constitute a fraud on the court.

The court is also concerned with other actions of McKinney which, while not rising to fraud on the court, cause concern. McKinney's constant lack of candor with the court as an attorney is also shown in his consistent omission of fees in orders submitted to the court. The court deems this to be purposeful conduct on his part, arising from his 1999 disciplinary troubles over court-ordered fees. Thereafter, attorney fees were not submitted for court determination, although McKinney's private attorney employment contract conditioned his fee on court approval. This does not mean McKinney did not have fee collection in mind when orders were submitted to the court. Shortly thereafter, he submitted his claims for payment from DTF accounts.

The court notes that McKinney's conduct in civil forfeitures and companion criminal cases gives rise to an inference of conflict of interest. A deputy prosecutor prosecuting a criminal action while also proceeding with a civil forfeiture involving the same defendant raises serious questions involving financial interest and whether it results in conveying the impression that justice is for sale. In the Tommy Christie case, McKinney was both deputy prosecutor in the criminal action and private counsel prosecuting the civil asset forfeiture case. Christie pled to a reduced charge. Months later, substantial assets were forfeited by Christie in an agreed judgment signed by McKinney, private counsel. The court has noted other cases where secret agreements are made by McKinney as private counsel and criminal charges are reduced by other deputy prosecutors.

The court has noted the apparent appearance of impropriety in a case involving McKinney as private counsel in a civil forfeiture obtaining a default judgment from pro tem judge Ronald Henderson. Henderson had been a fellow deputy prosecutor at the time of the subject seizure, also engaged in private prosecution of civil forfeitures and receiving fees from DTF accounts. The order signed by Henderson directing forfeited assets directly to the DTF instead of a general fund account appears to be clearly contrary to the statutory directive.

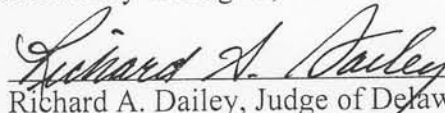
In the Jack O. Simmons case, substantial sums of money were forfeited via a secret agreement signed by McKinney as private counsel. The secret agreement was submitted to a probate court in an adjacent county, but never submitted to this court, where the forfeiture action was filed and remains pending. As in other cases, substantial "forfeited" assets were transferred to the DTF contrary to legislative requirements, all without the knowledge and approval of the court, yet another example of McKinney's lack of candor with the court.

The court notes that Mark R. McKinney, in 2007, while full-time Delaware County Prosecuting Attorney, handled three (3) civil drug forfeitures as private counsel, submitting claims and obtaining payment in two (2) of the cases. These cases involve Kelvin Lampkins, 18C04-0608-MI-77, Brad Chappell, 18C04-0706-MI-49, and Adrian Kirtz and Lacie Williams, 18C04-0612-MI-93, which also involved a secret agreement negotiated in mid-February, 2007, and signed by McKinney as private counsel. In the Matter of Jack R. Riddle, 700 N.E.2d 788 (Ind. 1998), stands for the proposition that one may not engage in private practice while serving as a full-time prosecutor. See also I.C. 33-39-6-6(b)(2).

(c) Procedures to ensure future proper handling of civil forfeitures:

The court, with the valued input of Neal Moore, Executive Director of the Indiana Criminal Justice Institute, Presiding Judge Marianne Vorhees, fellow Circuit Judges John Feick, Robert L. Barnet, and Chris Teagle, the assistance of State Board of Accounts Field Officers William F. Vinson and Stephanie Heath, Delaware County Auditor Judy Rust, Muncie City Controller Mary Ann Kratochvil, Delaware County Clerk Steven Craycraft and Chief Deputy Clerk Romanelle Marine, Muncie Police Chief Deborah Davis, Sheriff George Sheridan, City and County police officers Mark Vollmar and Phil Clark, attorneys Charles R. Clark, Joseph Hunter, Steven Murphy, Kenjatta P. Cox, Don Dunnuck, and deputy prosecutors Jeffrey Arnold and Eric Hoffman, has included a copy of proposed local rules to ensure the proper future handling of civil forfeitures in Delaware County, attached as court's exhibit 2.

Dated at Muncie, Indiana, this 18th day of August, 2008.


Richard A. Dailey, Judge of Delaware Circuit Court 2