

Albany County Department of Audit & Control

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Comptroller

Final Audit of the State and Federal Forfeiture Funds

of the

Office of the Albany County District Attorney

October 14, 2008

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AUTHORITY

Article 4 of the Albany County Charter establishes the Department of Audit & Control and an elected Comptroller as the chief fiscal and auditing officer of the County and shall have all the powers and perform all the duties conferred or imposed upon a Comptroller under the County Law.

SCOPE OF AUDIT

An audit of the State and Federal forfeiture funds was necessary due to the findings and recommendations of the Petty Cash Audit of May 8, 2008, which illustrated the fiscal mismanagement of County monies by the District Attorney's Office.

Petty Cash audit findings included:

- ❖ Lack of proper documentation and internal controls for expenditures
- ❖ Unwillingness or lack of ability to reconcile the account
- ❖ Improper use of the petty cash fund
- ❖ Violation of tax code
- ❖ Failure to follow instructions from the Comptroller's Office on how to properly maintain the petty cash account

It is important to note that the Office of District Attorney's personnel responsible for the administration of these accounts was cooperative and interested in developing a plan for compliance to align with the applicable, Federal and State laws, Albany County Purchasing and Procurement Policies and Procedures as well as adherence to the accounting procedures of Albany County.

Immediate steps were taken to protect and safeguard the County's assets by the administrator of the forfeiture accounts and the Office of District Attorney's forfeiture and seizure funds were quickly moved into the County's bank of record.

The Albany County Comptroller's Office audited the Federal and New York State forfeiture and seized asset accounts, the safe that was the focus of a review by the NYS Office of State Comptroller (OSC) in 2005 and the New York State Police review and evaluation of the evidence procedures in 2005 and the procedural operations for oversight of those funds.

OBJECTIVES

The objective of this audit report is to protect the County taxpayer's money, analyze the seized asset income and expenditures, provide guidance and recommend administrative and fiscal procedures to the Albany County District Attorney regarding the proper use of forfeited seized funds. To accomplish this task, auditors reviewed Federal and State legislation, guidelines for use of funds, the OSC Opinion Letter 95-08, the Suffolk County Comptroller's Audit of the Suffolk County District Attorney's Office in 2003 and the Department of Justice Audits of the King's County District Attorney and the Albany Police Department.

Fiscal records were provided by the District Attorney's Office for the years 2005, 2006, 2007 and 2008. These four years are the basis of the analysis and provide the information and data necessary to determine whether the asset forfeiture/seized funds were properly managed, documented and expended.

The analysis concentrated on monies received in each fiscal year. Additionally, a review was conducted of funds expended by specific categories as outlined in the U.S. Department of Justice guidelines (Salaries, Overtime, Buy Money, Travel and Food, Training, Communications and Computers, Weapons, Protective Gear, Surveillance Equipment, Office Improvements, Drug Education and Other Law Enforcement Expenses, which include vehicles, supplies and funds to other agencies).

Included in this audit is a description of allowable and unallowable expenses, unsupported documentation, the Permissible Use Policy and the basic principles of the forfeiture program as outlined by Federal and State law. Any interpretations of specific types of uses for seized monies are derived from Federal and New York State guidelines as well as County regulations concerning the proper use of such funds.

The report is not intended to cover all accounting requirements for all expenditures. It is to be used as a guide on proper procedures and present recommendations for future revenue and expenditure accountability.

REVIEW OF CASH AND SEIZED EVIDENCE FROM 2005 STATE COMPTROLLER'S REPORT

During the last days of the previous District Attorney's tenure, the former District Attorney notified the incoming District Attorney of the existence of approximately \$65,000.00 in cash as well as other evidence located in the safe located in the District Attorney's Office.

In 2005, the Albany County District Attorney requested that the New York State Police review their evidence handling procedures. The New York State Police issued an “Evidence Vulnerability” study for the District Attorney. The District Attorney also asked that the Office of the State Comptroller count and inventory the contents of the safe. In the State Comptroller’s findings, \$65,233.44 in cash, along with other evidence was noted to be in the possession of the District Attorney’s Office. The Office of the State Comptroller’s Staff noted that there was a safe deposit box in the possession of the District Attorney’s Office but did not count the contents.¹

The Assistant District Attorney overseeing the State and Federal forfeiture accounts does not have jurisdiction over the contents of the District Attorney’s safe, its contents or any evidence counted in the 2005 audit. The majority of this money does not come under the jurisdiction of the 1984 Federal Asset Forfeiture program or the 1990 New York State Forfeiture program.

The Assistant District Attorney charged with the administration of the District Attorney’s Office Forfeiture accounts would not have jurisdiction to proceed with forfeiture. This is due to the expiration of the statute of limitations relating to Federal and State forfeiture.

In July 2008, Albany County auditors began a review of the District Attorney’s Federal and State forfeiture bank accounts. Auditors were unable to determine whether the \$65,233.44 in cash counted by the Office of State Comptroller had been deposited in either the State or the Federal accounts, or whether it was turned over as abandoned property to the Office of the State Comptroller.

Further investigation determined that this money was still in the possession of the District Attorney’s Office and located in the safe in their basement evidence room. On August 26, 2008, County auditors inventoried the contents of the safe located in the basement of the County Courthouse. The District Attorney’s Director of Operations opened the safe and placed both manila envelopes and plastic evidence bags upon a table for review. Auditors noticed that the majority of the bags were actually unsealed manila envelopes and when opened, found unsealed evidence bags containing U.S. currency, drugs (marijuana, cocaine, etc) and three handguns. In most cases, the evidence bags were torn open (not cut open neatly). Auditors also noted during this review, that in many cases, the evidence tag identifying the contents was missing. At all times, at least two investigators from the District Attorney’s staff were present while three County auditors counted and verified the contents of the safe. All evidence bags were individually opened, counted and verified by two and sometimes three auditors, and then sealed. The seal was dated and signed by county auditors and returned to the safe by one of the investigators overseeing the process.

When the safe contents were counted and verified over a two-day period, it was apparent that over twenty five thousand dollars was not accounted for. Three manila evidence envelopes were empty. The District Attorney’s investigators and his Director of Operations were unable to determine where the rest of the missing cash and evidence

¹ OSC report to David Soares; <http://www.osc.state.ny.us/press/releases/apr05/5003.pdf> .

bags were located. The Comptroller and the District Attorney's Director of Operations discussed possibilities of where the missing envelopes might be located and set an appointment to search the old courthouse for the evidence bags the next day.

The Albany County Comptroller received a message from the Director of Operations the evening of August 27, 2008.

The Director of Operations and his staff found some of the missing evidence bags from the 2005 State Comptroller's report. They were found on a shelf in the evidence room.

On August 28, 2008, County audit staff who were to count the remaining bags was handed a black garbage bag containing more evidence envelopes. These envelopes also contained opened, unsealed evidence bags with currency, drugs and jewelry. Six County Auditors and the Director of Operations from the District Attorney's Office examined the contents and counted an additional \$18,954.15. Auditors compared their count with the State Comptroller's worksheets. Case numbers and/or names were matched with the 2005 State Comptroller's worksheets.

The contents of the newly found evidence bags were sealed, initialed and dated after County auditors completed their inventory and returned the counted evidence bags back to the black garbage bag. The black garbage bag was sealed with tape and given to the Director of Operations.

Findings: The audit of the safe contents over the three-day period found the following discrepancies:

- ❖ Evidence bag SU0121313 showing \$2,415.00 written on it and verified by the OSC auditors in their report as having \$2,415.00 in it on 1/5-1/7/05 was empty.
- ❖ Evidence bag with defendant's name, but no case number showing \$2,150.00 written on it and verified by the OSC auditors in their report as having \$2,150.00 in it on 1/5-1/7/05 was empty.
- ❖ Evidence bag 94-1330 verified by the OSC auditors in the report as having \$359.00 in it on 1/5-1/7/05 was empty.
- ❖ Evidence bag D850811 showing \$700.00 inventoried by the OSC and listed on their worksheets was missing.
- ❖ Evidence bag D860139 containing \$531.00 inventoried by the OSC and listed on their worksheets was missing.
- ❖ Evidence bag N 85-61A containing \$40.00 inventoried by the OSC and listed on their worksheets was missing.

As of the publishing of this audit, the Office of the District Attorney will not relate to the Albany County Comptroller's Office whether they have located the missing evidence bags and cash totaling \$6195.00.

County Comptroller's staff also verified the contents of the safe deposit box mentioned on the State Comptroller's report in 2005 that was never counted. Albany County

Comptroller's staff, accompanied by the Director of Administration from the District Attorney's Office counted the contents of safe deposit box 231 located at the State Street Branch Trustco Bank. This box contained unsealed, manila envelopes containing cash and evidence from 1979-1980 State Police seizures totaling \$17,232.40. The auditors had no evidence tape or evidence bags to seal the envelopes prior to locking the safe deposit boxes.

On September 2, 2008, the Comptroller and two auditors met with the District Attorney, his Director of Operations and his Communications Director to detail and explain the findings of the seized asset accounts. They also discussed the initial findings of the procurement card audit and possible criminal matters surrounding missing cash and evidence bags from the evidence safe and "box" referenced in the 2005 OSC safe audit.

It was also recommended to the District Attorney at this meeting that he prepare the legal documents necessary to request that the cash in the evidence safe, the evidence bags in the black garbage bag and the safe deposit box be transferred to a separate account pending any claims for abandoned property after independent investigation by the proper impartial authority.

The Comptroller's Office has set up a separate, interest bearing account for this purpose

At this meeting, the District Attorney agreed to reach out to the Superintendent of the New York State Police for an investigation into the missing cash and evidence bags from the safe and the "box" noted in the OSC report of 2005. On of September 11, 2008, in a conversation with First Deputy Perez of the New York State Police, it was revealed that the District Attorney or his staff had not approached the State Police on this matter.

On this same date, the Albany County Comptroller called Attorney General Andrew Cuomo to discuss concerns over the missing evidence and cash. The Comptroller and his staff familiar with the audit, met with members of the Attorney General's staff to discuss concerns about the missing cash and evidence bags.

The Attorney General's staff await the final audit.

Recommendations: The Comptroller's Office recommends having the money placed into the interest bearing account set up by the Albany County Comptroller's Office. This would secure the currency until it can be determined who should possess this abandoned, seized property. Options were given to the District Attorney as to how to handle the investigation into the missing funds. As of the release of this audit, the money and evidence bags remain locked in the evidence room in the basement of the Albany County Judicial Center.

FISCAL COMPLIANCE WITH STATE AND FEDERAL GUIDELINES. (NY STATE CPLR 1349)

The New York State Comptroller's Opinion 95-8 specifically addresses the placement of seizure funds. It states:

CIVIL PRACTICE LAW AND RULES, §1349; COUNTY LAW, §§550, 700: Forfeiture moneys distributed to a claiming authority or claiming agent under section 1349(2)(e) and (f) of the Civil Practice Law and Rules (CPLR) must be remitted to the custody of the county treasurer. These moneys constitute dedicated general fund revenues for use only for purposes of the claiming authority or claiming agent. Distributions of forfeiture moneys under section 1349(2)(h)(i) and (ii) of the CPLR must be deposited, respectively, in a "law enforcement purposes" or "prosecution services" subaccount of the general fund, and used only for law enforcement purposes in the investigation of penal law offenses or for the prosecution of penal law offenses.

Opinion 95-8 further states:

Among these fiscal controls is County Law, §550(2) which provides that the county treasurer shall receive and be the custodian of all moneys "belonging to the county or in which the county has an interest". County Law, §700(2), which generally prescribes the fiscal powers and duties of the district attorney, similarly requires that moneys "belonging to the county" be paid by the district attorney to the county treasurer. Further, although County Law, §705 provides for the establishment of a prosecution fund for the district attorney's office, this fund consists of an appropriation within the county budget and is held in the custody of the county treasurer (County of Putnam v State, 17 Misc 2d 541, 186 NYS2d 944; 25 Opns St Comp, 1969, pps 9 and 212). Thus, absent express statutory direction to the contrary, all moneys of the county received by the district attorney must be remitted to the county treasurer as custodian.

The desire to place additional resources in the hands of the prosecutorial and policy agencies in the fight against crime and the legal responsibility that the funds are not to be a supplantation of budgetary support does not mean that these goals are in conflict with the requirement that the funds be remitted to the County Treasurer. These funds are not to **replace** budgetary support but **enhance** budgetary support. However, these funds are not to be used to circumvent budgetary processes or replace normal budgetary oversight. Nor are these funds to be used in any manner not compliant with Federal or State laws.

ASSET FORFEITURE/SEIZURE GOALS, GUIDELINES, AND PRINCIPALS

The primary purpose of both the Federal and New York State asset forfeiture program is to help deter crime by depriving criminals of the profits from their illegal activities. The U.S. Department of Justice manual titled, *A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies*, provides specific guidance for law enforcement and prosecutorial agencies. Prosecuting agencies eligible to receive federally seized asset monies are required to follow the standards of accountability and fiscal integrity set forth in the manual. The New York State law allows for sharing with police, prosecutors, Office of Alcohol Substance Abuses Services (OASAS) and victims (when applicable). In both the Federal and State programs, law enforcement is the principle objective of forfeiture. ***Seized revenues are to be used exclusively to enforce the law, investigate crimes and prosecute criminal offenses.*** The monies are to be used to enhance not supplant County revenues.

USES OF FORFEITURE/SEIZURE FUNDS

Prosecutorial Agencies shall retain forfeited assets specifically for official use and must be maintained in two separate Federal and State accounts. These funds must be used to ***increase*** the resources of the agency. The U.S. Department of Justice *Guide* and NYS CPLR 13A specifically state that resources shall not be used to replace or supplant the resources of the receiving agency.²

In other words, the receiving agency must benefit directly from these funds. The U.S. Department of Justice *Guide* states, “*If, for example, a police department receives \$100,000 in sharing money only to have their budget cut by \$100,000 by the city council, the police department has received no direct benefit. Rather the city as a whole, has received the benefit. The Department of Justice may terminate sharing with the law enforcement agencies that are not permitted by their governing authority to benefit directly from the sharing.*”³

Additionally, New York State CPLR 1349 (h) 3 states that “*all monies distributed to the “claiming agent” (police) and the “claiming authority” (District Attorney) pursuant to paragraph (h) of subdivision 2 of this section shall be used to enhance law enforcement efforts and not in supplantation of ordinary budgetary costs including salaries of personnel and expenses of the claiming authority or claiming agent during the fiscal year in which this section takes effect.*”

² NY State CPLR 1349 (h) 3 and *A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies*, 1994, p.14.

³ *A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies*, 1994, p.14.

Federal Forfeiture Program

The Federal Comprehensive Crime Control Act of 1984 instituted the national asset forfeiture program. This program authorizes the sharing of Federal forfeiture proceeds with cooperating State and Local law enforcement agencies. Proceeds are distributed to the office based upon the level of direct participation of the District Attorney's Office in the investigation. In accordance with Federal policies, proceeds from Federal forfeitures can only be used for law enforcement expenditures. Priority must be given to programs such as law enforcement operations that will result in further seizures and forfeitures.

Additionally, the Federal Comprehensive Crime Control Act of 1984 has withstood hundreds of challenges in court to its rules, regulations and procedures of the federal asset forfeiture program.

According to the U.S. Department of Justice, "*law enforcement agencies are permitted to use up to 15 percent of shared funds received during the last two fiscal years to support drug abuse treatment, drug and crime prevention education, housing and job skills programs, or other nonprofit community-based programs or activities, which are formally approved by the chief law enforcement officer – e.g., chief, sheriff, or prosecutor – as being supportive of and consistent with a law enforcement effort, policy, and/or initiative. Law enforcement agencies may not transfer cash to non-law enforcement agencies or private nonprofit organizations. Law enforcement agencies may either 1) directly pay specific expenses on behalf of the recipient agency/organization or 2) reimburse the agency/organization by check for itemized expenditures.*"

Other examples of permissible use of federal funds are noted in the 1998 addendum to the USDOJ *Guide*.⁴

State Forfeiture Program

Under NY State CPLR 1349, the use of forfeiture funds is restricted. Section 1349(2)(e), as noted, provides that the distribution under that provision is "*in satisfaction of actual costs and expenses incurred in the investigation, preparation and litigation of the forfeiture action*". Similarly, section 1349(2)(f) provides that the distribution under that provision is "*in satisfaction of actual costs incurred for protecting, maintaining and forfeiting the property ...*".⁵

The Office of the State Comptroller rendered an opinion on problems arising in Suffolk County regarding the placement and use of State forfeiture funds. Specifically, the uses of seizure funds for programs such as youth programs were addressed. The New York

⁴ *A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies, 1994, (1998 Addendum) p.9-12.*

⁵ NYS Comptroller opinion (95-8)

State Comptroller states, “*The statute expressly provides that these moneys are to be used for law enforcement purposes in the investigation of penal law offenses (CPLR, §1349[2][h][i]) or for the prosecution of penal law offenses (CPLR, §1349[2][h][ii]). Youth programs and similar expenditures, although they may be indirectly and generally associated with law enforcement, do not, in our opinion, relate to the investigation or prosecution of penal law offenses. Therefore, it is our opinion that section 1349(2)(h) moneys may not be used for those purposes.*”⁶

The following analysis of revenues and expenditures was conducted for the period January 1, 2005 – July 31, 2008. All data was provided to the Albany County Comptrollers Office by the Albany County District Attorney’s Office, the Office of the State Comptroller, the New York State Division of Criminal Justice Services and the U.S. Marshall’s Service.

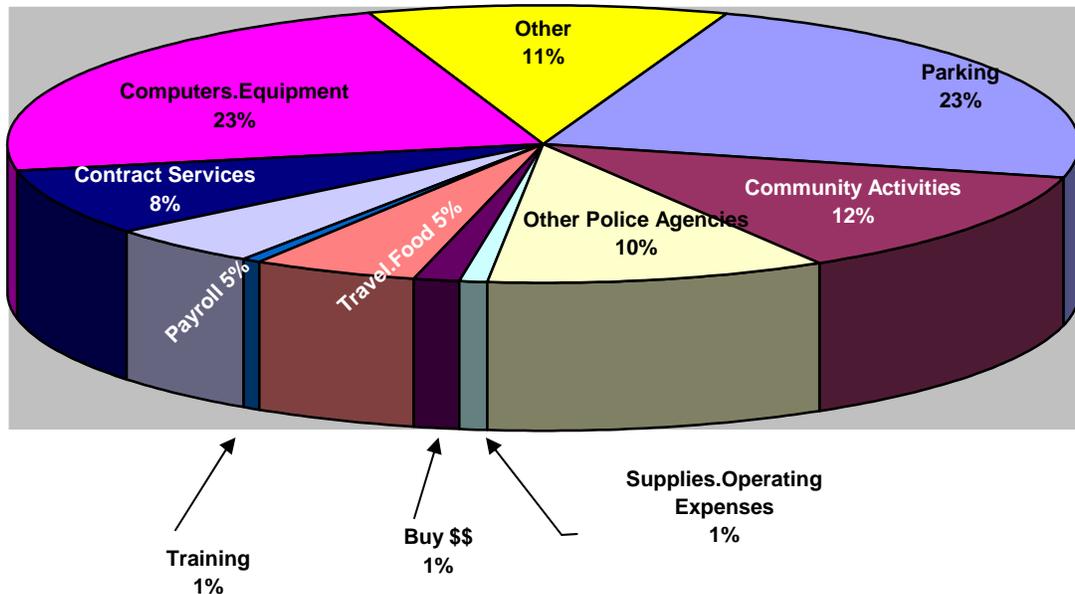
The following categories, adopted by the Federal Forfeiture Program, were used by our office to determine the proper use of both Federal and State funds.

- ❖ Unallowable Expenses
- ❖ Undocumented Expenses
 - Extravagant Expenses
- ❖ Internal Controls

⁶ Ibid.

NEW YORK STATE FORFEITURE REVENUES AND EXPENDITURES

Total Expenditures by Category State Forfeiture Funds 1/1/05-7/31/08



Findings

Findings: Bank Statements

Examination of the records for the State seizure account revealed the following:

The State seizure account was not reconciled. The balance as per the bank statement on January 20th, 2005 was \$87,819.51 with no outstanding checks. The balance as per the check register at the same date was \$86,640.19. Auditors matched the cancelled checks from 01/01/2005 to 07/22/2008 with the bank statements and check register. Several check amounts were written in the check register incorrectly. Counter checks were not recorded. A deposit of \$44.00 on 05/26/2006 was not recorded. Debits by Trustco Bank for checks were not recorded. A chargeback fee of \$10.00 on 03/05/2008 was not recorded.

As at 07/22/2008, the balance in the check register was \$504,337.66. The balance on the bank statement was \$508,063.02 with outstanding checks of \$703.70, net balance of \$507,359.32. Having verified all entries in the register and cancelled checks against the bank statements (allowing for the errors that were found in the register), it is concluded that the balance on the bank statement less the outstanding checks is correct.

Recommendations: The County Comptroller's Office recommended that the State forfeiture account be transferred to the Albany County's bank of record (Bank of America) to protect the taxpayer's money with positive pay and ensure that adequate third party collateralization was in place.

Bank Statements must be reconciled to the checkbook on a monthly basis. Interest must be recorded in the checkbook register on a monthly basis. Any debits should be recorded to the exact wording used to write the check. For example, instead of writing "U/C Boys" in the checkbook register, the exact person's name should be recorded. Careful accounting must be adhered to when recording debits such as the purchase of checks that are automatically debited from the account.

Findings: Parking (\$62,155.00 / 23% of total expenditures) A review of the State forfeiture revenues and expenditures identified several serious issues. For example, funds were used for services that were not supportive of prosecutorial goals and objectives. 23% or \$62,155.00 of all forfeited state funds was used to pay for the daily parking fees for 20 employees. This practice began prior to January 1, 2005 and was continued under the present District Attorney. Payment for parking while on official travel or for short term emergency use is an allowable expense, long-term expenditures for parking circumvents the budget process.

County employees with paid parking spots pay a nominal weekly charge for County owned and contracted spots. The District Attorney's practice of providing free parking for some employees, not others creates the appearance of favoritism.

There was no explanation or justification presented in the record to substantiate the value of such parking expenses to the goal of prosecuting cases and depriving criminals of the profits of their illegal activities. As stated earlier, expenditures should relate to the goals guidelines of both the Federal and State asset forfeiture program. These expenditures do not. Additionally, these free parking spaces paid for by asset forfeiture funds may be considered as taxable benefit pursuant to IRS rules and regulations. Lastly, this expense was incurred without a contract for services. Since the yearly amount exceeds \$10,000.00, the County Procurement Policy was ignored.

Recommendations: The Albany County District Attorney's Office should adhere to the parking guidelines established by Albany County. The District Attorney should pursue a request to the County Executive and the Department of Management and Budget or the Department of General Services to have the 20 spaces absorbed into the contract the County of Albany has with Maiden Lane, Inc. These employees would have a weekly fee taken from their paycheck and the County would pay the additional expense. These employees would then pay their fair share as with any County employee who has parking paid for out of County funds.

Employees should receive an amended W-2 to reflect the taxable benefit or reimburse the county for the parking fees paid out of the state seizure account.

Findings: Community Activities (\$33,027.00 / 12% of total expenditures) The use of forfeiture funds to pay for various community activities such as community watch and youth programs is laudable, but pursuant to Opinion 95-8 by the NY State Comptroller these expenses are unallowable. It states, “*the statute expressly provides that these moneys are to be used for law enforcement purposes in the investigation of penal law offenses (CPLR, §1349[2][h][i]) or for the prosecution of penal law offenses (CPLR, §1349[2][h][ii]). Youth programs and similar expenditures, although they may be indirectly and generally associated with law enforcement, do not, in our opinion, relate to the investigation or prosecution of penal law offenses. Therefore, it is our opinion that section 1349(2)(h) moneys may not be used for those purposes.*”⁷ Examples of unallowable expenditures allotted for community expenses include:

\$7,297.27 spent on mini flashlights and whistles emblazoned with the words “**P. David Soares: Your Albany County DA**” and a phone number.



(Custom printing on flashlights and whistles below)

Actual
Image
from
Proof



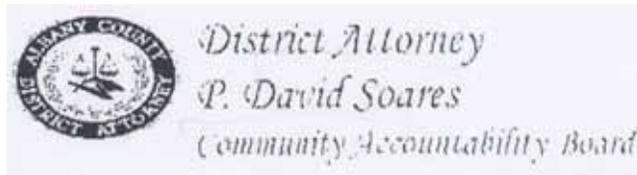
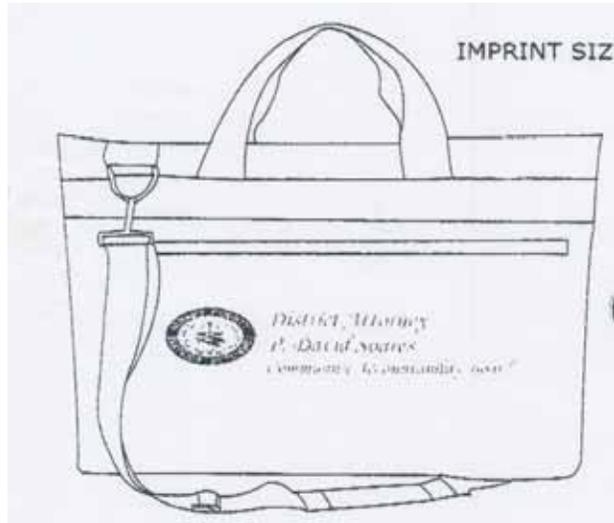
- ❖ Over \$12,000.00 spent on t-shirts for the “Enough” program and \$750.00 for the design of the shirt. It should be noted that this expense did not follow Albany County’s Procurement Policies and Procedures.
- ❖ Over \$6,000.00 spent on T-shirts for neighborhood watches and other youth programs such as “Bring it to the Courts.” Since Opinion 95-8 does not allow youth programs and similar programs to be funded with state forfeiture funds,

⁷ Office of the New York State Comptroller, Opinion 95-8, <http://www.osc.state.ny.us/legal/1995/legalop/op95-8.htm>.

payrolling the referees for this program is also not allowed. (\$540.00 plus an additional \$840.00 reimbursed to petty cash fund).

- ❖ \$837.00 for 600 polyester briefcases emblazoned with the District Attorney logo and the name of District Attorney David Soares as well as “Community Accountability Board”.

Actual
Image
from
Proof



- ❖ \$2,700.00 in cash donations to the EANDC. Federal guidelines prohibit cash donations of any kind. In addition, since this expenditure is not a direct expenditure related to the “enforcement and prosecution of penal law” as stated in CPLR 1349, it is not allowed.
- ❖ The three years and seven months of the District Attorney’s use of the New York State forfeiture account, allocated only 1% for training and 1% for drug buys while allocating 12% on community activities that could create the appearance of campaign expenditures and 23% on parking for selected employees.

Recommendations: The District Attorney should adhere to the State Comptroller’s decision not to use state seizure money to fund these expenditures. The \$12,000 expenditure for T-Shirts for the “Enough” program was also purchased without following the county procurement policy. In some cases Federal Forfeiture money can be used but the District Attorney’s Office must abide by all procedures outlined in the U.S. Dept of Justice *Guide* concerning the use of Federal Forfeiture funds. This includes obtaining prior approval from the Department of Justice before expending these moneys.

The District Attorney should consider allocating more of his state forfeiture expenditures for training and other police agency support rather than providing parking for selected employees and making unallowable contributions and questionable community expenditures.

Findings: Travel/Food (\$13,402.00 / 5% of total expenditures) Expenses and reimbursement for official travel is an allowable expense when documented with receipts and/or an explanation of the purpose of the travel. Currently, Albany County does not have a travel policy authorizing the use of per diems for official travel. The recommended procedure is to submit receipts with a County voucher. In many cases, tax was charged for hotel stays even though the County is tax exempt. The audit also found instances where travel expenses lacked proper documentation. For example, The District Attorney signed a \$1,000.00 cash advance check to himself for a trip to Dallas, TX on August 16, 2007 and cashed it at the State Street branch of Trustco Bank the same day. The District Attorney's Office could not produce original itemized receipts when the initial audit began and several weeks later, provided his personal bank statement, (even though he received cash for the trip) showing purchases were made while traveling in TX with his personal debit card. The only itemized receipt auditors could obtain was from contacting the hotel accountant in Dallas who sent auditors the hotel records that accounted for \$413.85 of the \$1,000.00. The remainder of the circled items on the bank statement totaled \$298.20. A personal check from the wife of the District Attorney was written to the State Seizure account for \$265.35 on August 21, 2008 and a \$22.60 deposit of cash was made on the same day. This was one month after the initial audit commenced and one year after the trip was taken. This example illustrates the problem with the practice of cash advances for official travel. (Check image below also see page 18)



Auditors also found instances where alcohol was purchased and reimbursed for out of the State forfeiture fund. A check was written for \$1000.00 (Check # 1096) for cash for a trip to Orlando, FL where the remainder was applied to a trip to Boston, MA. Receipts were submitted for meals that included some alcohol purchases. It should be noted that the receipts for this trip totaled more than the \$1000.00 cash advance. Due to the number of agencies and employees involved on this trip, the handling of receipts became problematic resulting in poor accountability of travel expenditures that fell under these trips.

On December 21, 2007, a check was written to The Old Daily Inn for \$522.50 (\$502.50 and \$20.00 tip) for a Christmas party. Another check was written to an office employee to reimburse her for expenses relating to this holiday party for \$127.86. These expenses include soda, cups, plastic cutlery, decorations, two gift cards to Williams – Sonoma (\$10.00 and \$15.00) and two gift cards to Marshall’s (\$10.00 and \$15.00).

On January 23, 2008, a check was written for a parking ticket received while traveling in Ft. Lauderdale, Fl while working on the steroids case. This is an unallowable expense and should be paid out of personal funds.

On April 24, 2008, a check was written for \$85.00 to Savrana’s Pizza for an “office gathering”.

Recommendations: Until the County adopts an official travel policy for meals, original receipts for expenses incurred while on official travel must be submitted with an accompanying voucher. Proper documentation must be a priority and original, itemized receipts submitted on a County voucher must accompany all requests for reimbursements for official travel. The Albany County Comptroller’s Office recommends that the expenses for the holiday Christmas party and the pizza party be reimbursed to the State Seizure fund in a timely fashion. The parking ticket should also be reimbursed to the State Seizure account.

Findings: Purchase of Gift Cards with State Funds (\$1,007.00, \$1000.00 cash value, \$7.00 fees) With the surge in cyber crimes, the use of Master Card or Visa gift cards can be a useful tool for investigators. In the case of the Albany County District Attorney’s Office, the purchase of credit card gift cards were used so investigators could purchase illegal drugs over the internet in the steroid case. Caution must be exercised when using these cards, however. The receipts for these purchases were not readily available and auditors had to wait several days until receipts could be produced. In addition, when purchasing these cards, it is important to read the fine print. The District Attorney’s Office did not take into account that the gift cards they purchased, when inactive, deducted money from the remaining balance until the cards had a zero balance. The District Attorney’s Investigators purchased \$698.04 in steroids and left a balance of \$301.96 on the card. As a result, this \$301.96 was forfeited to the bank issuing them.

The District Attorney's Office must take care to protect forfeiture funds. Careful documentation as to what evidence is purchased must be maintained. In actuality, since these cards are essentially cash, thorough documentation of all purchases made with these cards must be kept in the future.

Recommendations: The purchase and use of such cards for investigative purposes is an allowable expense only if careful documentation of the use of these cards is kept. Additionally, these cards must be secured in safe or a lock box with access limited to authorized individuals. Lastly, since forfeiture funds are essentially the "people's money", the District Attorney's Office must investigate the penalties associated with use these type of cards and shop for the card that best suits their needs. In this case, \$301.00 that could be put to good use has been forfeited in penalties to the bank. As with the Federal fund, \$117.25 was lost due to not reading the fine print.

Findings: Contract Services (\$20,874.00) The District Attorney's Office did not follow Albany County guidelines when obtaining attorneys for professional services or items over \$10,000.00. An attorney in Florida was paid \$7,388.00 for legal services and an Albany attorney was paid \$8,000.00 to aid the office in a grant-writing proposal. No contracts were provided which outlined the scope of services by the outside attorneys. 1099's were not issued for these services.

Recommendations: The Albany County Legislature has adopted the following conditions under which, and the manner in which, procurements of professional services shall be made: ⁸

PROFESSIONAL SERVICES AND CONSULTANTS (RFP):

- A. \$.00 - \$ 2,999.99: Minimum of one vendor written price quote with award recommendation being made by the department head, and with the approval of the Purchasing Agent and the award being made by the County Executive
- B. \$ 3,000.00 - \$19,999.99: Minimum of three vendor written price quotes with the award recommendation being made by the department head, and with the approval of the Purchasing Agent and award being made by the County Executive.
- C. \$20,000.00 - \$99,999.99: Written **Request for Proposal** with award recommendation by the department head with approval from the Purchasing Agent and the award of contract being made by the Contract Administration Board.
- D. \$100,000.00 - and over: Written **Request for Proposal** with the award recommendation by the department head with approval from the Purchasing Agent and the award of the contract being made by the County Legislature.

PURCHASES OF COMMODITIES, EQUIPMENT OR GOODS:

⁸ Albany County Purchasing and Contracts Policy and Procedures Manual (adopted November 1994)
http://alconet/admin_fin/financial/purchasing_procedures_manual.pdf

- A. \$.00 - \$999.99 Awarded at the discretion of the Purchasing Agent
- B. \$1,000.00 - \$3,999.99: Minimum of two vendor submitted written, e-mail, or facsimile price quotes
- C. \$4,000.00 - \$9,999.99: Minimum of three vendor submitted written, email or facsimile price quotes
- D. \$10,000.00 - and over: Sealed bids in conformance with General Municipal Law, Section 103

Findings: Payroll (\$12,374.00) The use of State Forfeiture funds for payroll is an allowable expense when certain procedures are followed. Careful documentation of hours must be maintained and all laws governing the expenditure of funds for payroll must be followed. In some cases timesheets were provided to auditors for the documentation of hours while in other cases, Albany County District Attorney's office did not properly document interns' hours. In one case, the only documentation given to auditors was a fax cover sheet with a handwritten note from the intern saying that she worked 78 hours. Further examination of the timesheets that were provided indicate that on at least two occasions, holiday time was paid to an hourly intern when this benefit is not extended to temporary, hourly employees. Most importantly, no 1099 forms were issued to any intern paid out of the state seizure fund. This is in direct violation of tax code.

Recommendations: If it is determined that seizure funds are to be used for payroll expenses, the District Attorney's Office should handle payroll issues through a transfer to their departmental budget from their seizure account and through Human Resources. Both State and Federal guidelines only allow employment for a maximum of one year with some exceptions. The office would still maintain control of the seizure funds. The Department of Management & Budget must not violate Federal or State law by using seizure funds to supplant budgetary funding for the department.

It is also recommended that the Assistant District Attorney charged with overseeing this account assist in preparing 1099 forms for the interns paid out of the State forfeiture fund.

Findings: Equipment/Computers (\$60,516.56) The purchase of equipment for use by the District Attorney's Office is an allowable expense. However, there is no transaction ledger or log to inventory items purchased through seized funds. The lack of a procurement log makes it difficult to identify county owned property purchased with these funds. Additionally, it is unclear from the documentation provided by the District Attorney's Office, which equipment and computer purchases should have either gone through the County bidding process or purchased off the state contract. Our analysis shows that \$29,109.46 of the \$60,516.56, should have either been bid through the County Procurement Policy or purchased through State Contract.⁹

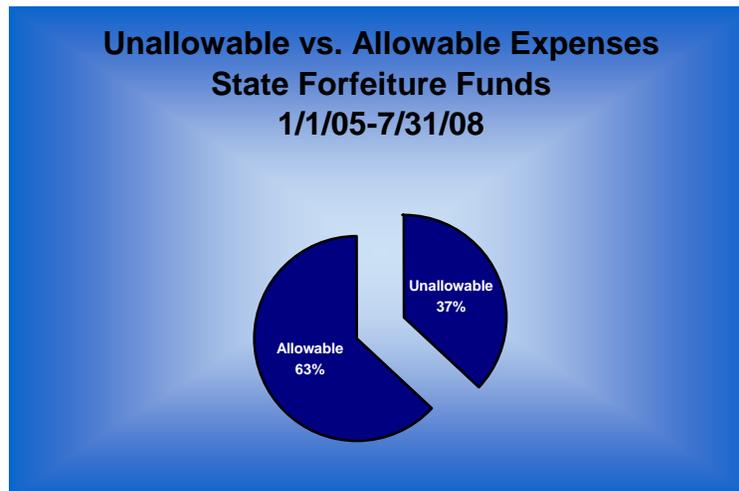
⁹ Check #338 Comp USA \$7001.46, Check #345 \$12,793.00 I-2, Inc, and Check #1208 \$9,315.00 Environmental Systems Research Institute.

Recommendations: As with contract services, the Albany County District Attorney’s Office should adhere to County purchasing procedures and guidelines. An equipment log should be kept so items purchased with seized funds are properly recorded as fixed assets belonging to the County.

Findings: Supplantation/Co-Mingling of Funds In February 2007, a check was issued from the State Seizure account for \$840.00 as per a memo from the Director of Operations. The memo asked for a check from the forfeiture account to reimburse the petty cash account for purchases related to the Community Accountability Board and referees to pay for “Bring it to the Courts”. It is unclear why this request was made when reimbursements to the Petty Cash Account are approved by the County Comptroller’s Office. The Petty Cash account was essentially reimbursed twice. (This practice could explain the overages on the petty cash account in the past). The District Attorney’s Office could not produce original receipts to support this reimbursement.

Recommendations: This practice should be discontinued immediately. The Office of the District Attorney must recognize that the Petty Cash fund is for immediate unplanned purchases while the seizure accounts must be treated similarly to the manner in which their budgeted expenses are treated. This includes following all county guidelines and policies relating to finance and accounting.

Summary of Unallowable, Undocumented and Extravagant State Forfeiture Expenditures



37% of all State forfeited funds were considered unallowable undocumented or extravagant expenditures. The unallowable expenditures were due to:

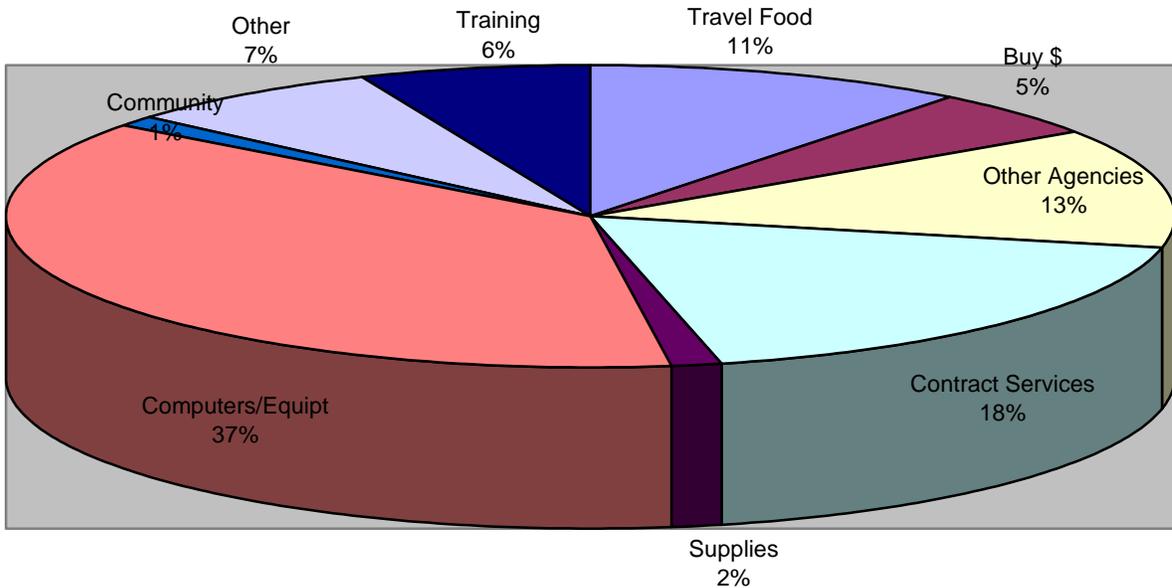
- ❖ Parking expenses having no relationship with prosecuting or enforcing penal law violations/ Failure to follow County Parking procedure.
- ❖ Failure to follow New York State Opinion 95-8 regarding CPLR 1349

- The funding of youth programs with State seizure money
- ❖ Improper/extravagant expenditures such as :
 - Payment of parking ticket (\$45.00)
 - Food, expenses and gifts for parties.
 - T-shirts, flashlights, whistles, etc.
 - Embroidered jackets, hats, shirts for employees
 - Engraved plaques for outgoing employees
- ❖ Lack of receipts and supporting documentation for Soares check of \$1,000.00
- ❖ Lack of receipts for \$840.00 check written to petty cash account

FEDERAL FORFEITURE REVENUES AND EXPENDITURES

The United States Department of Justice Guide provides a description for permissible (allowable) uses concerning forfeited seized funds. Their policy states that Federal seized, forfeited funds are, “*subject to laws, rules, regulations and orders of the state and local jurisdiction governing the use of public funds available for law enforcement purposes.*”

Federal Forfeiture Expenditures by Category
1/1/05-7/31/08



Findings

Findings: Bank Statements The Federal account was not reconciled. The balance as per the bank statement on January 20th, 2005 was \$1,551.50 with no outstanding checks. The balance as per the check register on this same date was \$1,520.03. Auditors compared the cancelled checks from 01/01/2005 to 07/22/2008 (ending statement date) with the bank statements against the check register. Several check amounts were written in the check register incorrectly. A charge on 09/21/2005 by Trustco Bank for checks of \$18.08 was omitted from the check register. As of 07/22/2008 the balance in the check register was \$22,970.98. The balance on the bank statement was \$23,304.39 with no outstanding checks. Having verified all entries in the register and cancelled checks against the bank statements (allowing for the errors that were found in the register), it is concluded that the balance on the bank statement is correct. For reconciliation purposes, the balance on 07/22/2008 of \$23,304.39 on the bank statement should be used.

Recommendations: As with the state account, bank statements must be reconciled to the checkbook on a monthly basis. Interest must be recorded in the checkbook register on a monthly basis. Any debits should be recorded to the exact wording used to write the check. As with the state account, instead of writing "U/C Boys" in the checkbook register, the exact person's name should be recorded. Careful accounting must be adhered to when recording debits such as the purchase of checks that are automatically debited from the account.

Findings: Travel and Per Diems (\$ 4,116.00 expended) Although travel is considered an allowable expense, the District Attorney's Office has implemented no standard reporting procedure for travel expenses. In many cases, tax was charged for hotel stays even though the County is tax exempt. Currently, Albany County does not have a travel policy authorizing the use of per diems for official travel. The recommended procedure is to submit receipts with a county voucher. In addition, travel expenses were paid from multiple accounts for a single trip. (County budget, Federal forfeiture account, State forfeiture account). This practice makes tracking of expenses difficult and accountability of expenses problematic. An example that illustrates this problem is outlined below:

- ❖ A check for \$264.00 was issued on 5/16/07 from the Federal Seizure account (3 people, 2 days of travel = \$44.00 per person, per day) for the District Attorney and two other employees to attend a wire tap conference in Syracuse on 5/16/07-5/17/07.
- ❖ The District Attorney submitted a receipt for food in the amount of \$19.71 from the Colorado Mine Co. in Syracuse, NY dated 5/17/07 at 12:12 pm from the trip in the December 2007 petty cash reimbursement, even though he was paid a per diem for that trip. (see Attachment A)

This mixing of accounts raises the potential problem for supplantation of Federal, State and County funds. This is discouraged practice by the U.S. Department of Justice.

Recommendations: The Albany County Comptroller's office is providing a sample travel voucher currently in used by other law enforcement agencies who utilize seized funds for travel expenses. This will assist the District Attorney's office ability to track and properly account for this type of expenditure. Tax-exempt forms must be presented to hotels/motels when traveling on official business. Until the County adopts an official travel policy for meals, original receipts for expenses incurred while on official travel must be submitted on return.

Any overpayments under the travel per diem should be reimbursed to the Federal forfeiture account.

Findings: Purchase of Gift Cards with Federal Funds (\$1,007.00, \$1000.00 cash value, \$7.00 fees) as with the State forfeiture accounts, the Albany County District Attorney's Office, purchased Master Card/Visa credit card gift cards so investigators could purchase illegal drugs over the internet in the steroid case. In this case, \$882.75 worth of steroids was purchased including \$25.00 for shipping. \$117.25 was left on the cards and forfeited to the bank issuing them. Again, the District Attorney's Office must take care to protect forfeiture funds. Careful documentation as to what drugs were purchased and the amount used on each card must accompany all receipts. In actuality, since these cards are essentially cash, thorough documentation of all purchases made with these cards must be maintained in the future.

Recommendations: Please see the State finding on purchasing gift cards. As with the State gift card purchases, money was forfeited to the bank issuing the cards. In this case, \$117.25 was lost to fees and penalties.

Findings: Supplantation/Co-Mingling of Accounts: Check # 178 was written to the petty cash account in the amount of \$143.95. As with the similar issue raised in the examination of the State account, it is unclear why this request was made when reimbursements to the Petty Cash Account are approved by the County Comptroller's Office. The Petty Cash account was essentially reimbursed twice. (This practice could explain the overages on the petty cash account in the past).

- ❖ **Leased vehicle payments:** The Albany County District Attorney leases two vehicles through the State and Federal forfeiture accounts. One vehicle, a 2008 Dodge Charger is made available for use by an investigator in the District Attorney's Office and the other, a 2006 Dodge Caravan is made available for the "Bring it to the Courts" program. This is problematic and is a clear case of supplantation. The lease and payments began with State funds in November of 2007 and were switched to the Federal account in June 2008. This practice is unallowable as per Federal guidelines.

Recommendations: As with the State account, the Office of the District Attorney must recognize that the petty cash fund is for immediate, unplanned purchases while the seizure accounts must be treated similarly to the manner in which their budgeted expenses are treated. This includes following all County guidelines and policies relating

to finance and accounting. The mixing of payments between the Federal and State Accounts must be discontinued.

INTERNAL CONTROLS: FEDERAL AND STATE ACCOUNTS

Findings: A summary of the findings are as follows:

- ❖ The Albany County District Attorney had instances where the expenditures in many instances lacked supporting documents, invoices and receipts.
- ❖ It took several weeks, and in some cases over a month for supporting documentation to be provided to the Comptroller's Office.
- ❖ The administrator of these accounts writes reimbursement checks to himself and signs the check. The District Attorney also has duplicated this practice.
- ❖ No equipment/purchase log (required by Federal Government *Guide*)
- ❖ No policy manual to ensure compliance with County, State and Federal fiscal procedures
- ❖ A check for \$25.00 (#184) was spent. There was no record of the transaction, no returned check was available from the bank and the administrator did not know why the check was written.

Recommendations:

- ❖ The practice of the signatory signing his or her own reimbursement checks must immediately be discontinued. This practice is discouraged as it demonstrates an absence of segregation of duties and gives the appearance of impropriety even though in most cases, proper documentation was provided. The District Attorney should consider adding a third signatory who is available to sign reimbursement checks.
- ❖ Yearly, the administrator of the account should request a print out of all payments wired to their Federal account for reconciliation. This print out can be obtained from the U.S. Marshal's Service.
- ❖ The administrator of this account should insist on receipts, invoices and contracts prior to reimbursing any expenses to be paid from seizure accounts
- ❖ A log of purchases must be maintained as required by the Federal *Guide*. This is also recommended for the state account to record and account for all equipment and items acquired.
- ❖ A policy manual must be developed.
- ❖ Bank accounts should be reconciled monthly.
- ❖ The Albany County Comptroller's Office should audit these accounts on a yearly basis.

SUMMARY OF EXAMINATION

- ❖ The Comptroller's Office found \$6,195.00 in cash and three evidence bags missing from the safe located in the evidence room of the Albany County District Attorney's Office. This money was originally counted and documented in the New York State Comptrollers' report initiated by the District Attorney regarding the proper handling of evidence procedures in 2005.
 - Failure to apply the New York State Police vulnerability study guidelines to previously seized evidence and currency (pre -2005)
- ❖ The Albany County Office of District Attorney is in desperate need of a fiscal officer familiar with accounting principles and Albany County financial procedures.
- ❖ The Comptroller's Office found instances of inappropriate use of the State and Federal Forfeiture funds throughout the period audited. The most obvious of these is \$62,155.00 spent for monthly parking to Maiden Lane over the time period audited.
- ❖ Seizure funds were used for the purchase of unallowable expenses including office team softball shirts (\$348.00), proprietary items such as flashlights, whistles and tote bags (\$7297.27), a parking ticket received in Florida (\$25.00 plus a \$20.00 late fee), a pizza party (\$85.00) and the 2007 Office Christmas party (\$650.36)
- ❖ The District Attorney's Office has no travel policy or procedures consistent with current County guidelines
- ❖ The County Procurement Policy and Procedures when obtaining goods and services was not followed.
- ❖ \$2,000.00 spent out of Federal and State forfeiture funds to purchase Master Card gift cards for the steroid case. The fine print was never read when obtaining these cards and \$419.21 of State and Federal money was lost in penalties and fees to the bank. Poor documentation was kept on purchases with these cards, which are essentially treated as cash.
- ❖ No monthly internal reconciliation of bank accounts with receipts and invoices
- ❖ Federal and State forfeiture funds are kept in separate checking accounts in the name of the Albany County District Attorney. CPLR 1349, and the NY state Comptroller's Opinion 95-8 which governs forfeiture funds, states that these funds should be deposited into a "prosecution services" sub account of the County's General Fund.
- ❖ Individuals issued checks from account for services rendered without adherence to tax code (no form 1099 and no W-2 forms) or County payroll guidelines for temporary employees. (Holiday pay given to temporary employees)

- ❖ Circumvention of the County Procurement Policy with several purchases of computer equipment, t-shirts and contract services.
- ❖ Tax charged on various items that should have been tax exempt.
- ❖ Lack of documentation and accountability regarding most purchases with State and Federal funds. In some cases, auditors waited several months to obtain the records needed to validate purchases.
- ❖ No transaction ledger or log documenting purchases as fixed assets.
- ❖ No audit forfeiture procedure manual
- ❖ Supplantation between County budgeted funds and seizure accounts.
- ❖ Co-mingling of State and Federal Expenses
- ❖ The person issuing the checks should not be handling the deposit and reconciliation functions if there is to be any checks and balances on the financial management of the accounts.
- ❖ The Office of the Albany County Comptroller found that there was no one office in New York State that could provide the assistance, oversight and compliance recommendations for the handling of forfeit/seized assets for District Attorneys and Police agencies. The Comptroller will be suggesting State legislation to create an office that reports to the Attorney General for the oversight and control of forfeited and seized assets.

Attachment A



COUNTY OF ALBANY
OFFICE OF THE DISTRICT ATTORNEY
ALBANY COUNTY JUDICIAL CENTER
6 LODGE STREET
ALBANY, NEW YORK 12207
(518) 487-5460 - FAX (518) 487-5093

P. DAVID SOARES
DISTRICT ATTORNEY

MARK B. HARRIS
CHIEF ASSISTANT DISTRICT ATTORNEY
CHERYL K. FOWLER
DEPUTY CHIEF ASSISTANT
DISTRICT ATTORNEY

April 4, 2008

Re: Per diem for travel

Syracuse Trip 5/16/07
NYPT CLE on Wiretaps
For three people, for 2 days of travel, the total is \$264.00

✓ #157

Albuquerque Trip 10/18/07
NAPB Training
For two people, for 3 days of travel, the total is \$225.00

✓ #174

A handwritten signature in black ink, appearing to be "L. J. Jones".

Attachment A Continued

CLAIM FORM

TAX EXEMPT TAX ID NO. ▷ 14 - 6002563		LEAVE THIS SPACE BLANK		
SOLD TO COUNTY OF ALBANY, NEW YORK		RECEIVED FOR AUDIT	AMOUNT	
CLAIMANT <u>David Soares</u>		ORDER	EXTENSIONS	
ADDRESS <u>Albany County Judicial Center, 6 Lodge Street</u>		CLAIM APPROVED THIS DATE		
OFFICE OR DEPARTMENT <u>District Attorney's Office</u>		DATE PAID <u>12/20/07</u>	CHECK NO. <u>8394</u>	
CODE <u>4016</u>		AUDITOR		
P.O. NO.	QUANTITY	DESCRIPTION OF ITEMS OR WORK PERFORMED <small>LIST INVOICE OR SALES SLIP NUMBERS IF AVAILABLE</small>	UNIT PRICE	AMOUNT
		Dinner (wiretap conf.)	18.25	18.25
		toll (wiretap conf.)	.85	.85
		toll (wiretap conf.)	5.25	5.25
		toll (wiretap conf.)	4.45	4.45
		food (wiretap conf.)	3.18	3.18
			TOTAL	\$31.98

Claims must be reached in DUPLICATE to head of department for which services or materials are furnished

CERTIFICATE OF CLAIMANT

I, _____ do hereby certify

that I am _____ (if individual, leave blank; if partner, write "a member of the firm [naming the firm]"; if corporation, title of officer and name of corporation) and that this claim is true and correct and that the amount claimed is due, owing and unpaid, that the services were actually necessarily made or the supplies or equipment actually delivered and that the consideration has passed to the County of _____ State taxes for which the County is exempt are included in the purchase price. Certified true and correct.

NOTICE TO INDIVIDUAL

If this claim is being submitted for payment to an individual any reason other than reimbursement of expenses (including your Fed. Tax ID No. or your Social Security No.)

Federal Tax Identification No. or Social Security No. _____

Sign →

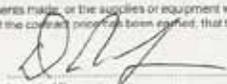
x 

Dated: _____ 2006

CERTIFICATE OF APPROVAL BY DEPARTMENT HEAD OR OFFICER THROUGH WHOM CLAIM ORIGINATED

I hereby certify that the services enumerated in this claim were actually rendered by the persons named; the disbursements made, or the supplies or equipment were actually delivered, accepted, counted and inspected by me and are satisfactory and of the quantity and quality specified in such claim; that the contract price has been paid; that the services, disbursements, supplies or equipment were necessary and have been or will be, applied to the use of this department.

Dated: 12/20 2006


Head of Department

CLAIM NO. _____

Attachment A Continued

N. SYRACUSE, NY

1464621

Menu Items

Wine

Dress

Turkey Deli

Broccoli

Apple Cider

Gilled

COLORADO
MINE CO.
STEAKHOUSE

COLONIE, NY

SERVER	GUESTS	TABLE	W/W NAME

CALL US FOR WINE LIST AT 315-436-1000

W. GLYCHIA

TEL 1472 CHW 1194 357 2
MAY17'07 12:37PM

1 DIET PEPSI	1.99
1 CLUB SODA	1.99
1 TURKEY DELI	1.79
1 400 SOUP	1.99
1 CRESSAR SALAD	1.40
SUBTOTAL	10.16
TAX	0.10
LEAD TOTAL DUE	10.26

CASH 25.00
CHANGE DUE 5.29

~~40 CHECK CLOSED~~
~~MAY17'07 12:37PM~~

VICTIM WITNESS UNIT

Cont. on wire taps
in Syracuse NY
w/ Eric + Frank

paid w/
Cash

- PPS needs to have imls

United States Attorney's Office - NDNY
<http://www.usdoj.gov/usao/ny/>

Gift Certificates for All Occasions

Attachment B



P. DAVID SOARES
DISTRICT ATTORNEY

COUNTY OF ALBANY
OFFICE OF THE DISTRICT ATTORNEY
ALBANY COUNTY JUDICIAL CENTER
6 LODGE STREET
ALBANY, NEW YORK 12207
(518) 487-5460 – FAX (518) 487-5093

MARK B. HARRIS
CHIEF ASSISTANT DISTRICT ATTORNEY
CHERYL K. FOWLER
DEPUTY CHIEF ASSISTANT
DISTRICT ATTORNEY

October 2, 2008

Michael F. Conners
Albany County Comptroller
County of Albany
Department of Audit and Control
112 State Street
Albany, New York 12207

Dear Mr. Conners:

I am writing to you with regard to the Office of the Albany County Comptroller's audit of the Albany County District Attorney's Office State and Federal Forfeiture Funds.

The receipts and other records in the possession of your office pursuant to this audit were provided for the purpose of the audit only and must not be disclosed without the consent of the Albany County District Attorney. Please direct any FOIL requests to our office for review and approval.

Of special concern are documents that apply to ongoing investigations, whose disclosure could endanger individuals or law enforcement objectives.

Thank you for your time and attention in this matter.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "P. David Soares", written over a horizontal line.

P. David Soares

Attachment C

(Email response to District Attorney)

-----Original Message-----

From: Conners, Michael

Sent: Friday, October 03, 2008 5:39 PM

To: Soares, David; [REDACTED]

Subject: Receipt of your October 2, 2008 letter about our Seizure/Forfeiture accounts

Dear Mr. District Attorney,

Thank you for having Chris D'Alessandro hand deliver your letter of yesterday about possible FOIL requests. If we receive any such requests, we will forward them to the Albany County Clerk for the proper handling of the FOIL. I am sure you are familiar with the process and understand how it works.

We look forward to receiving your response to the draft so that we may correct any errors before it is released. If we receive your response electronically by close of business Saturday, October 4, 2008 (by 5:00 PM), it will be included within the final audit. As previously mentioned you are invited to join me at 1:30 PM Monday, October 6, 2008 for the formal public briefing.

We would like to schedule a meeting to review the preliminary results of the Procurement Card Interim Audit and to arrange for the audit of the grants under your control.

Finally, I again wish to thank you for the level of cooperation extended to our audit team by Mr. Baynes. It was a remarkable improvement from the Petty Cash Audit. I look forward to supporting your budgetary requests with the Albany County Legislature to handle parking and other budget items you may need. We also will be supportive of the automobile requests Chris D'Alessandro asked Chairman Morse to speak to us about on your behalf.

Respectfully,

Michael F. Conners, II

Attachment D

-----Original Message-----

From: Soares, David

Sent: Sat 10/4/2008 2:46 PM

To: Conners, Michael

Subject: RE: Receipt of your October 2, 2008 letter about our Seizure/Forfeiture accounts

Dear Mr. Conners:

We have recently uncovered new information which we will be including in our response to your Draft Audit Report. We are exercising due diligence in confirming this information. While I appreciate your offer of including our response in your final report regrettably, we will not be able to submit our aforementioned response electronically by your 5:00 p.m. deadline. We are working as quickly as we can to finalize our response and will forward it to you upon its completion.

As for your request for a meeting to discuss the preliminary results of a Procurement Card Interim Audit, I will have Mary Milham contact your office. By receipt of this correspondence, I am on notice as to your offices intentions in pursuing a new audit of the grant programs managed by my office. As you are aware, I have had to commit prosecutorial, investigative, and administrative resources to assist your office with these various audits. I would appreciate a briefing as to the scope of your newest audit as well as any future audits so that I may allocate my resources accordingly.

Thank you for your consideration.

Respectfully,

P. David Soares

Attachement E

From: Conners, Michael

Sent: Sat 10/4/2008 4:27 PM

To: Soares, David

Cc: [REDACTED]

Subject: Finalized Response to the Draft Seizure Accounts

Dear Mr. Soares,

When might we expect the finalized response to the draft audit? Have you found the missing money and missing evidence bags?

We look forward to discussing the schedule with Mary Milham for the Procurement Cards Interim Audit. The most serious problems with that we discussed with you in our September 2, 2008 meeting.

The audit of the grants under your control was transmitted to you in the Petty Cash Audit Recommendations. If time is an issue, we would be glad to discuss scheduling that segment of the audit.

Respectfully,

Michael F. Conners, II



OFFICE OF THE DISTRICT ATTORNEY

P. DAVID SOARES

ALBANY COUNTY JUDICIAL BUILDING

ALBANY, NEW YORK 12207

(518) 487-5460

(518) 487-5093 – FAX

RESPONSE TO SEPTEMBER 24, 2008 DRAFT AUDIT OF ALBANY COUNTY
DISTRICT ATTORNEY'S FORFEITURE ACCOUNTS

OVERVIEW

The Mission of the Office of the Albany County District Attorney is to prosecute criminals and to help law enforcement prevent crime. Money forfeited by criminals supports this mission.

At their core, many of the issues cited by the draft audit are not accounting issues – they are philosophical issues about the scope of this office's work. We have chosen a comprehensive, pro-active approach to fighting crime – not just prosecuting criminals but also preventing crime before it occurs. Auditors and others may disagree with this approach – but we believe in our mission and the way we are pursuing it.

When we help neighborhood watch groups buy two-way radios and flashlights, educate at-risk youth about the criminal justice system or engage local communities in helping stop gang violence, we are fighting crime and fulfilling our pro-active vision of the responsibilities of the District Attorney – following the direction chosen by the people of Albany County.

Historical background is essential here. We maintain two forfeiture accounts, one for federal funds and one for state funds. We must note that although these forfeiture accounts existed under previous administrations, this is the first time that these funds have ever been audited by the Office of the Albany County Comptroller. Nor has there ever been an audit published of other county agencies that have asset forfeiture accounts.

Our forfeiture programs have been extraordinarily successful. As a result of the District Attorney's enhanced forfeiture programs under the current administration, resulting in an increase in net funds over the last four years, over one million dollars in seized assets have been forfeited by drug dealers, gamblers and thieves during the period covered by

this audit. This money has been used to combat drug addiction, to support officer safety, to develop innovative anti-gang programs and to further investigations that have successfully gone to the top of the criminal food chain.

Although the forfeiture accounts have never been audited in the history of the Albany County District Attorney's office, this audit only covers the four calendar years of the Soares administration. Many of the issues cited by the County Comptroller involve longstanding policies and procedures inherited from prior administrations that have never been scrutinized by an outside auditor.

The County Comptroller has based his comments in this audit on his interpretation of non-binding opinions. It is very important to note that these opinions are based on audits of other jurisdictions and may not be applicable to our operation. In contrast, our practices are based on federal and state guidelines supplemented by the deliberations of the Forfeiture Law Advisory Group (FLAG) which we have participated in since 2001.

FLAG is comprised of Assistant District Attorney's and other law enforcement personnel from around New York State responsible for forfeiture programs. The Advisory Group meets routinely to discuss legal issues and develop forfeiture strategies, practices and policies. In New York, in the absence of written guidelines from the state, these meetings take on a heightened importance. Our policies have been guided by the discussions and opinions proffered at these FLAG meetings.

It is worth noting that Anthony Pasciuto, who was retained as a consultant by the County Comptroller for the purpose of this audit, has also been a participant in FLAG.

TWO STANDARDS OF ACCOUNTING

In 2004 Mr. Pasciuto was retained by the Albany Police Department to assist them in defending their asset forfeiture program.

Mr. Pasciuto, in defending the APD practices, wrote a report (to be referred to as APD Report) giving his opinion as to allowable expenses and proper procedures for the APD's forfeiture program. The County Comptroller specifically cites Mr. Pasciuto's report as a source upon which he is relying. In reviewing Mr. Pasciuto's APD report and the current audit report, we find a variety of contrasting positions:

- ❖ APD combined their state and federal forfeiture funds into a single bank account. Mr. Pasciuto determined that the commingling of state and federal forfeiture funds was proper because APD made an accounting at the end of the year attributing expenditures from each account.
 - In contrast the District Attorney does maintain separate bank accounts for each forfeiture fund but has now been accused by Mr. Pasciuto of commingling because payments for the lease of a vehicle have been drawn from each of these separate accounts. This criticism throws into question the County Comptroller's definition of co-mingling.

- ❖ The APD Report utilizes the same federal guidelines cited by the Comptroller in assessing the appropriateness of both federal and state expenditures. In the APD report, Mr. Pasciuto argues that there are “gray areas” to be “left to local interpretation.”
 - In the County Comptroller’s report, Mr. Pasciuto argues that the federal guidelines are very restrictive limiting local discretion. Throwing into question their classification of allowable and unallowable expenses.

- ❖ In the APD report, Mr. Pasciuto argues that Federal forfeiture funds may **not** be placed in a City, County or State general fund account.
 - In the County Comptroller’s audit, Mr. Pasciuto argues these funds should be deposited into a sub-account of the County’s General fund.

- ❖ In the APD report, a review of “Buy Money” expenditures was limited in the interest of confidentiality, noting that “detectives working undercover could be jeopardized when asking for receipts for expenditures” and “once monies are distributed a certain level of trust in the Detective’s discretion must be assumed.”
 - In contrast the County Comptroller’s report criticized the Office of the District Attorney for taking “several days” to turn over all receipts from the use of gift cards acquired to make undercover internet purchases of illegal drugs. The County Comptroller also recommends that “Careful documentation as to what drugs were purchased or the amount used on each card must accompany all receipts.”

- ❖ In the years 2001-2003 APD spent \$17,299 from its forfeiture fund on attendance at community meetings, retirement parties and fundraisers. Examples: \$1,250 to the Capital District YMCA, \$100 for Leukemia/Lymphoma function, \$100 for retirement party, and \$250 for a Special Olympics event. Mr. Pasciuto states that these expenditures “may be an allowable expense if such use is in the best interest of the Albany Police Department.” This conclusion is based partly on the fact that “federal guidelines are vague in this area, but the vagueness allows for flexibility to local agencies.” The APD report further recommends that such expenditures would “help with public relations for the department.”
 - In contrast the County Comptroller finds that various District Attorney expenditures are “unallowable” because they fund “community activities,” and as such cannot utilize forfeiture dollars. See further discussion below.

These opinions offered by Anthony Pasciuto in the APD report and relied on by the County Comptroller stand in stark contradiction to those determinations contained in their audit of the Office of the District Attorney. These inconsistencies call into question the validity of the County Comptroller’s findings. **In our business, we strive to apply one standard of justice. To us, it appears the County Comptroller is applying two standards of accounting.**

SAFE

On January 4th 2005 the District Attorney requested that the New York State Comptroller audit the contents of the office safe. On January 5-7, a team of auditors from the Office of the NYS Comptroller came in and documented the safe's contents.

In August 2008, auditors from County Comptroller's Office counted the contents of the safe and came up with a total that was different than the count achieved by the State Comptroller's Office. The following day the County Comptroller counted the monies again and came up with a total that was greater than at the end of the previous day.

In neither count did the County Comptroller open all the envelopes contained in the safe.

At this point, there is no clear determination as to the total value of the contents of this safe. To resolve this issue, the District Attorney is retaining a certified forensic auditor to conclusively determine the total value of the contents of this safe.

This uncertainty about the contents is a matter of great concern. If there are funds missing, the District Attorney will request an outside law enforcement agency to investigate this issue thoroughly and to follow all possible avenues of inquiry. The cooperation of all members of this office will be complete and unequivocal. We will call on all other parties to show the same level of cooperation.

FISCAL COMPLIANCE

The District Attorney firmly believes that the expenses outlined by the County Comptroller as unallowable are in fact allowable expenses – crime-fighting expenses. This office reiterates that the opinions expressed in the audit by the County Comptroller are based on their own interpretation of statutes and non-binding opinions. Each area in controversy is described below.

LAW ENFORCEMENT ACTIVITIES vs. COMMUNITY ACTIVITIES

The County Comptroller classifies various District Attorney expenditures as “unallowable” because they fund “community activities,” and as such cannot utilize forfeiture dollars. We take exception to the County Comptroller's classification of these programs.

Before discussing the particular categories of expenses to which the County Comptroller objects, it would be beneficial to describe the parameters of “community activities” versus “law enforcement purposes.” The Department of Justice published “A Guide to Equitable Sharing of Federally Forfeited Property” in 1994; DOJ currently posts the guide online to assist local authorities. Since the state has provided very little guidance with regard to permissible forfeiture expenditures, this federal guide is commonly used throughout New York State as a reference for district attorneys and police departments.

In appendix B the guide gives case studies of local forfeiture expenditures and advises whether they are proper or improper.

In one example, a police department spends \$10,000 on a “youth drug education program” including t-shirts, meals, travel and parties. This was ruled a proper use of funds.

In a second example, a county sheriff’s office used over \$3,000,000 in forfeiture funds to participate in a public/private drug abuse education program that created and distributed materials to local schools. This was also ruled a proper use of funds.

Based on a review of the applicable standards, seen through the lens of the authority and experience of a prosecutor’s office, the following categories are law enforcement related.

MAKING CRIME PAY: In our post 9-11 world, concerned citizens represent the first line of defense. In fact, Federal guidelines have shifted to allow expenditures for citizen groups as part of homeland security initiatives. The Office of the District Attorney, recognizing the significant role that our citizens play in public safety, has supported and will continue to support those efforts by providing neighborhood walk and watch groups with two-way radios, flashlights, whistles and t-shirts throughout the county. Not simply “community organizations,” these neighborhood watch groups were established to fight and prevent crime – clearly a law enforcement purpose; indeed, they are the eyes and ears of police and have provided invaluable tips leading to arrests and seizures.

ENOUGH: The District Attorney’s program to remove illegal guns from the street, is classified by the County Comptroller as a community program. As a three tier gun reduction strategy, focusing on citizen tips to arrest gun-wielding criminals and the abatement of gang activity, it has already contributed to the removal of over 80 guns and automatic weapons from the streets of Albany County’s most crime-scarred neighborhoods. Its success speaks to the appropriateness of these expenditures and highlights the County Comptroller’s failure to appreciate the District Attorney’s commitment to being tough on crime and smart on prevention.

COMMUNITY ACCOUNTABILITY BOARD (CAB): The Albany County DA created CAB to divert low-level quality of life crimes from the already overburdened court system. This program is now an integral piece of the criminal justice system, recognized by the Office of Court Administration, which routinely refers cases to the CAB. The CAB lowers the courts’ case load by over 300 defendants annually, thereby saving the taxpayers hundreds of thousands of dollars in criminal justice expenses and providing thousands of hours in community service. Since CAB enjoys formal status as part of the criminal courts, expenditures for this program are allowable as law enforcement related.

BRING IT TO THE COURTS is part of the District Attorney’s strategy of being tough on crime and smart on prevention. The members of this program are 150 of the most at-risk adolescents in Albany County. The monies used help keep kids off the streets at least one night a week and on the weekends where they receive anti-violence education and

job skills as part of this program. Taken in the context of Albany's acute gang problem, this program goes to the heart of crime prevention; it is not simply "a community activity." In addition, this program is explicitly recognized by the NYS Department of Criminal Justice Services which provides the bulk of the funding for Bring It to the Courts, further buttressing its status a law enforcement initiative.

PARKING

The Guide to Equitable Sharing also provides examples of other expenses that are allowable with forfeited funds. In Appendix B the guide approves the purchase of a property tracking system because "the system is clearly of benefit to the efficient operation of the agency." In the next example the purchase of weapons for an agency is allowable because it "enhances the ability of the agency to do its job."

In this context, the District Attorney objects to the conclusion that parking was a non-allowable expense for employee convenience. Under the current administration, staff members are required to respond at a moment's notice to crime scenes, local courts, and victim/witness/defendant interviews. Vehicle parking is necessary to achieve this goal. The County refused prior administration requests for additional parking spaces in the county garage. In pursuit of office efficiency, the prior administration then authorized the asset forfeiture account administrator to pay for employee parking in a surface lot for all staff requesting it, out of forfeiture funds. This policy was continued by this administration. These employees are expected to use their private vehicles for work purposes and the provision of parking assists them in fulfilling their work functions.

STATE TRAVEL

The District Attorney works with state agencies that use the federally established per diem system, which sets dollar figures for individual cities based on the respective cost of travel. An employee can then spend this amount at her own discretion up to the amount of the per diem. This obviates the need to collect receipts for food purchases on the road, making for an efficient system that places responsibility of the government traveler to manage his expenses. In the absence of a detailed county travel policy, the District Attorney began utilizing the state per diem system in recognition of some of the difficulties addressed by the County Comptroller's audit.

Contrary to the assertion in the draft audit, the reimbursement for the Dallas interviews travel expenses did not fall \$22.60 short. A cash deposit for that amount was made on the same day the personal check was deposited into the state account. A copy of same has been provided to the County Comptroller under separate cover.

MISCELLANEOUS

In December of 2008 the District Attorney funded an end of the year, in-office staff meeting during the lunch hour; it was a holiday themed event, but in the eyes of the

office, it was a working lunch where business was discussed and employees were provided with food and awards to improve office morale.

The pizza from Sovrana's was purchased on April 24, 2008, "bring your child to work day," where lunch was provided to the children, allowing their parents to continue with their assignments.

On page eleven of the draft audit, paragraph three, the check register is incorrectly described as containing the phrase "U/C Boys." This should read "U/C Buys," i.e. undercover purchases of illicit drugs.

The second bullet point on page twenty-three cites auditors waiting "several months" for records and the lack of documentation for "most purchases." Since only 55 days passed between the initial audit visit and the presentation of the draft report, it is hard to fathom how "several months" could have gone by. Nevertheless, the District Attorney complied with the request for records immediately and provided other documents within weeks of the audits inception, and would seek further documentation as requested during the course of the audit. Secondly, the assertion that documentation for "most" of the purchases was not provided is false. These two claims are belied by the remainder of the audit (*e.g.*, p. 21, "it took several weeks, and in some cases over a month for supporting documentation").

GIFT CARDS FOR DRUG PURCHASES

Four Visa gift cards to make undercover drug purchases were purchased for a total of \$2,014. The use of gift cards was necessitated by a need for secrecy and reluctance by the investigator or the Assistant District Attorney to provide their own credit card numbers to known criminals. The County Comptroller questions the unutilized balances on these cards of \$327. The drug buys for which these cards were utilized have led to an investigation that has thus far resulted in the forfeiture of \$512,500.

CONTRACT SERVICES

The audit also notes that attorneys were retained without their services being put out to bid. Often, in time-sensitive law enforcement investigations, we are not able to take the time to request bids, review bids and select the lowest bidder. In these instances, the District Attorney retained quality professionals with specific skills who provided good value to the citizens of the county.

Mr. Ginsberg came highly recommended by another prosecutor during ongoing litigation which necessitated immediate representation. Mr. Luibrand is a highly regarded local attorney with whom the District Attorney did not have any conflicts of interest at the time of his retainer (finding a lawyer with both qualifications is very difficult). Both attorneys gave the District Attorney a reduced rate as a professional courtesy.

PAYROLL

The County Comptroller, while finding that using forfeiture funds for temporary workers' payroll was proper, criticizes the procedures followed by our office in administering these payments. The District Attorney has previously concluded that issuing payroll through these accounts becomes unwieldy and makes it difficult to comply with county payroll requirements. Accordingly, we have discontinued this practice for the preceding two years.

EQUIPMENT/COMPUTERS

The County Comptroller recommendation that a log be instituted for equipment purchased with forfeiture funds is well taken. Though some of the computers purchased were processed through the Office of Information Services, there are other items that have not been logged-in properly. The District Attorney will seek the assistance of Information Services in cataloging remaining items and will develop a system going forward.

JACKETS, HATS, SHIRTS for EMPLOYEES

As part of the DA's philosophy, Investigators and Assistant District Attorney's now respond to crime scenes and actively aid in criminal cases. Since our prosecutors and investigators respond to automobile fatalities, arsons, homicides, rapes, at any time, 24 hours a day, and since our employees dress in standard business attire, these articles were purchased to identify our employees at these crime scenes and to ensure their safety by distinguishing them from private citizens. Additionally, in some investigative sites, such as fires, clothing can get stained or destroyed. The clothing was provided so that personal clothing of employees is not ruined and to maintain professional appearances in all circumstances.

OUT OF STATE TRAVEL

In addition to the above discussion of alleged travel issues with the state forfeiture account, which we incorporate here by reference, there are questions about the tax-free status of these expenditures. Many times, businesses in other states will not accept the Albany County tax exempt forms. In fact, the New York State Comptroller recognizes in its own travel manual that out-of-state taxes will not be exempted and can be reimbursed for travelers. Additionally, because there is no forfeiture credit card, employees using their own personal credit cards for travel are often denied use of the tax exempt forms because they are not using a government issued credit card or check.

LEASED VEHICLES

Vehicles are an allowable expense for law enforcement purposes. The audit criticizes this office for making lease payments in different months from the two different accounts, as a case of supplantation of funds. While the District Attorney does not agree with this

conclusion, we will make lease payments from only one account in the future, in the interest of easier tracking and categorizing of expenses.

FISCAL CONTROLS

The Albany County District Attorney has recruited a panel of financial experts including CPA's, budget directors, state auditors and executives to assist the office in evaluating the County Comptroller's audits and to make recommendations for the efficient and effective management of the accounts under our purview. Several of the suggestions made by the County Comptroller have been adopted, or are in the process of implementation. Others, such as their classification of what constitutes a community activity, have not been met with agreement.

We thank the Albany County Comptroller for identifying some issues and for his service; however we look forward to working with our financial practices working group to improve these programs and to institute best practices for the Albany County District Attorney's Office.

CONCLUSION

All the expenditures deemed unallowable by the County Comptroller were made for law enforcement purposes. Additionally, these purchases were all made in accordance with the applicable federal and state guidelines. We find it difficult to conceive how the County Comptroller can rely on the APD reports and the consultation of Mr. Pasciuto to arrive at the conclusion that our legitimate law enforcement expenditures were not allowable, when the same consultant previously endorsed *non*-law enforcement expenditures by the APD, such as procurements at local bars like Martels and other examples included as Appendix A.

To repeat, in our business, we strive to apply one standard of justice. To us, it appears that the County Comptroller is applying two standards of accounting.

APPENDIX A

Sample List of Beneficial 2001 – 2003

Community, Professional and Charitable Items

<u>Check Number</u>	<u>Date</u>	<u>Vendor</u>	<u>Amount</u>
1584	2/6/01	Friends of Sol Greenburgh Retirement	\$100.00
1593	2/24/01	Leukemia Lymph Function	\$100.00
1631	6/10/01	Jack Neilson Police Function	\$60.00
1669	9/27/01	HAC – Police Function	\$25.00
1691	10/29/01	Robert Wolfgang Community Function	\$60.00
1741	3/5/02	DRSA Capital Region	\$35.00
1757	4/12/02	LaSalle School	\$150.00
1769	4/24/02	Robert Wolfgang Police Function	\$102.55
1789	5/20/02	Prison Families	\$24.00
1809	8/1/02	Special Olympics	\$250.00
1873	3/12/03	LaSalle School	\$125.00
1951	9/25/03	N.Y.W. Fund	\$400.00
<u>Total</u>			\$1,501.55

These items are deemed allowable because they benefit the ongoing overall community and law enforcement relations. Many may question these items, however the financial review deems these expenditures as beneficial.

Sample List of 2001 – 2003

Food, Photo & Other Items

<u>Check Number</u>	<u>Date</u>	<u>Vendor</u>	<u>Amount</u>
1635	6/21/01	Country Engraving	\$150.00
1651	8/16/01	Cash	\$30.00
1655	8/27/01	Martel's	\$528.00
1662	9/6/01	O'Sullivan's	\$112.13
1665	9/13/01	JM Elario Photo	\$1,850.00
1696	11/26/01	Police Function	\$447.22
1711	12/21/01	Deli Plus	\$310.00
1715	1/13/02	O'Sullivan's	\$123.50
1723	1/17/02	O'Sullivan's	\$126.25
1728	2/1/02	Deli Plus	\$140.00
1731	2/11/02	Frame of Mind	\$236.75
1739	3/1/02	Gallery Origin	\$750.00
1759	4/17/02	Deli Plus	\$175.50
1768	4/22/02	Albany Downtown	\$400.00
1773	4/25/02	Price Chopper	\$29.16
1774	5/1/02	American Sport	\$592.00
1782	5/14/02	Buda Boy Sport	\$282.52
1878	3/19/03	Adirondack Beverage	\$576.00
Total			\$6,859.03

These items are less than 2% of the total expenditures for 3 years. Many of these items are allowable and justifiable based on interviews with the department officials. Many other items under \$100.00 are not listed because they are allowable, for example – attendance at retirement and community occasions representing the Department of Public Safety and the Albany Police Department.

RESPONSE TO DISTRICT ATTORNEY'S REMARKS

The core of Mr. Soares argument to the draft audit is based on the claim that the audit does not deal with accounting issues but deals with “philosophical issues” on the interpretation of the use of forfeiture funds. In his response, the District Attorney claims that the opinion by the State Comptroller is non-binding when this is not based upon the law.

In a meeting on August 8, 2008, the Acting County Attorney confirmed our interpretation of CPLR 1349 and the related State comptroller Opinion. The Acting County Attorney reiterated to our office in an email on October 10, 2008 the following statement, **“Opinion ... 95-8 observes that CPLR Secs.1349(2)(h)(i) and (ii) expressly provide that forfeiture funds “are to be used for law enforcement purposes in the investigation of penal law offenses or for the prosecution of penal law offenses.”** *The opinion interprets those sections stating, “Youth programs and similar expenditures, although they may be indirectly and generally associated with law enforcement, do not, in our opinion relate to the investigation or prosecution of penal law offenses.”* *“Agency opinions, although not binding on courts, are considered highly persuasive for purposes of statutory interpretation,” writes Mr. Denning.*

While the District Attorney is entitled to his opinion, the audit is based on facts.

- The factual findings of our audit of Federal and State Forfeiture Accounts
- The State Comptroller’s opinion (95-8) which strictly outlines the use of State forfeiture funds
- The U.S. Department of Justice *Guide* as mentioned in the report
- The body of New York State Law CPLR 1349
- County Procurement Policy, County rules and regulations
- Generally Accepted Auditing Principals
- The State Comptroller’s worksheets outlining the count of the safe in 2005
- Outside Counsel’s Opinion Letter, attached

The response outlined by the District Attorney contains no documentation proving his argument disputing our audit.

The District Attorney’s argument against the audit is primarily based upon an attack on Mr. Pasciuto, former head of the New York State Police Forfeiture Program instead of responding to the findings. Mr. Pasciuto worked for the Albany Police Department to organize and maintain the ledgers of the Federal and State forfeiture accounts, the information regarding the use of State forfeiture accounts, specifically the interpretation of the laws pertaining to its use by the legal experts at the New York State Comptroller’s Office, were not used in his initial 2004 report.

Mr. Pasciuto was hired by the Office of the Albany County Comptroller to assist audit of the Federal Forfeiture Program of the District Attorney’s Office. His expertise was invaluable on the Federal portion of the audit. The State Forfeiture Accounts, where the

majority of abuse took place, was performed by other members of the Comptroller's audit staff. Mr. Pasciuto is considered an expert throughout the state on the issue of abandoned, seized property, which the District Attorney did not respond to in his statement.

Our responses to the District Attorney's spin of facts within the findings of the audit are outlined below:

Safe

The District Attorney's contention that there were three different counts of his evidence safe August 26th, 27th and 28th of 2008, is spin. The reason for the different evidence safe counts is that the District Attorney's Office could not produce all of the evidence bags and money to be counted on the first and second day. The District Attorney's Office has still not produced all the evidence bags or money counted by his staff in 2005 and verified by the New York Office of State Comptroller's audit staff.

The work sheets from the audit team of the New York State Office of State Comptroller's, which Mr. Soares embraced in 2005, are now in his own words, inconclusive. What is inconclusive is what happened to the missing evidence and missing money.

Mr. Soares does not explain why there are empty evidence bags, missing evidence bags and missing money that were in his Office's possession in 2005 and documented on the New York State Office of the State Comptroller's work sheets. The District Attorney's spin is an attempt to divert attention from the fact that his office has lost evidence and money from a supposedly secure evidence safe and evidence room.

The facts are not in his favor and have not changed.

The claim that the comptroller did not open every envelope is **false**. On the first day's counting, the staff of the District Attorney controlled the safe and the evidence bags that were counted. On the second day, the Comptroller removed the evidence bags and shelving from the safe to determine that all bags were removed from the safe and counted.

The Comptroller's office opened **every** bag in the safe, in some cases more than once. Even items that did not contain cash were opened and resealed by the audit team.

Unlike the District Attorney's staff the County comptroller's staff sealed each envelope and initialed and dated the seals.

LAW ENFORCEMENT ACTIVITIES vs. COMMUNITY ACTIVITIES

While the District Attorney is correct that the state provides very little guidance and oversight regarding state forfeiture funds, the law is very clear regarding the expenditure of state forfeiture funds. *“The statute expressly provides that these moneys are to be used for law enforcement purposes in the investigation of penal law offenses (CPLR, §1349[2][h][i]) or for the prosecution of penal law offenses (CPLR, §1349[2][h][ii]).* The District Attorney is the chief law enforcement official in Albany County. It is his obligation to uphold the laws of New York State. It is clear that the expenditures made by the District Attorney are, for prevention, allowable under the Federal guidelines, not the State guidelines no matter how well intentioned. **The District Attorney must not use state forfeiture funds for any expenditure that does not directly relate to the prosecution or investigation of penal law.**

There appears to be some confusion in the District Attorney’s Office about separating Federal rules from State rules for use of Forfeiture Funds. The audit is clear that many of his community expenditures might be allowable under the Federal program. The example the District Attorney uses to support his use of state funds are from the *Federal Guide*. The *Federal Guide* is to advise on the use of Federal Funds, not State Funds.

The Comptroller’s Office is aware that it much easier to purchase these community items without complying with the rules and regulations that every other County Department and separately elected official complies. That does not make it right nor does it protect the County’s money.

The Office of the District Attorney has several other means to support these community activity expenditures (Federal forfeiture funds, grants and the County budget). The District Attorney must follow the law regarding the expenditure of state funds.

Putting the District Attorney’s name on items he gives out with taxpayers’ money raises questions about possible campaign violations.

The District Attorney is not exempt from following all County rules, regulations and NYS General Municipal Law. Failure to plan does not exempt his office from following the law. Emergency purchases can be coordinated with the Purchasing Department.

Parking Again, the District Attorney uses Federal rules, applying them to state forfeiture funds and ignores the issue that the service was not bid, there is no contract and is considered a taxable benefit for some of his employees. The District Attorney’s response demonstrates that laws, rules and regulations that are inconvenient do not apply to his office.

Miscellaneous The District Attorney’s argument that his “holiday themed” party was a team building event does not change the fact that it was a party paid for by taxpayers. Food, gifts and decorations were purchased with taxpayers money. Federal and State

forfeiture guidelines and Albany County policies and procedures do not allow this practice. This money must be paid back to the seizure account.

The pizza party for “Bring you Sons and Daughters to Work Day” is a nice gesture but is unallowable under CPLR 1349.

The phrase several months has been removed from the document and changed to “over a month” however, the point of the finding has not changed. Items not mentioned in the report are that the Porco receipts took weeks to receive and were found in a box of the house of Dave Rossi and Chris Baynes had to contact many vendors for duplicate receipts because he did not have them in his possession. Expenditures should be accompanied by original receipts.

Gift Cards for Drug Purchases The District Attorney misses the point completely. The ends do not justify the means. Financial controls improve the operation of the office. If his staff do not need to follow up on small matters, larger problems are sure to follow.

Out of State Travel The District Attorney again is not following County rules and regulations. Per Diems are not allowable under current County guidelines and the \$19.41 that the District Attorney received as a reimbursement from a meal he was paid a per diem must be reimbursed.

Contract Services: Any purchase that falls within the bidding requirements must be bid under the county rules and regulations. All rules and regulations must be followed, no matter how inconvenient they are to the District Attorney. There are provisions to deal with emergencies under the County Purchasing Policy. The District Attorney’s Office must follow Federal Tax law and issue 1099s to these individuals.

Jackets, Hats, Shirts for Employees The County Budget has ample procedures for dealing with the purchase of uniforms. The District Attorney is not exempt from County Budgetary or Procurement procedures.

Fiscal Controls: The District Attorney, by his response, continues to demonstrate the Office of District Attorney fails to follow Albany County Policies and Procedures. Rather than fixing fiscal management problems in the Office of the District Attorney, Mr. Soares delays implementation of recommendations to improve the handling of money in his office.

Conclusion: The District Attorney’s assumption that the audit is based upon another auditee’s defense of their activities is not only a red herring designed to change the topic of the factual findings of his office but sinks to an ad homonym attack on Mr. Pasciuto.

The audit is based upon:

- The factual findings of our auditors

- The State Comptroller's opinion (95-8) which strictly outlines the use of State forfeiture funds
- The U.S. Department of Justice *Guide* as mentioned in the report
- The body of New York State Law CPLR 1349
- County Procurement Policy, County rules and regulations
- Generally Accepted Auditing Principals
- The State Comptroller's worksheets outlining the count of the safe in 2005
- Outside Counsel's Opinion Letter, attached.

The audit's major finding concerns the loss of evidence and money from evidence safe and evidence room. Auditors also found several instances of abuse of the State Forfeiture Funds by the Office of District Attorney.

The District Attorney's attempt to discredit the findings in the audit and divert attention from the missing evidence and cash in the safe under his control and the misuse of state seizure money fails on the matter of law and on the matter of the facts.

No amount of spin can reverse the District Attorney's demonstrated disregard of the rules, procedures and laws referenced in this audit. The audit speaks for itself as does the District Attorney's practices that violate the law, NYS Comptroller's Opinion, the Acting County Attorney's Opinion or Outside Counsel's Opinion.

Respectfully,

Michael F. Conners, II
Albany County Comptroller

Legal Opinion of Attorney

August 14, 2008

Honorable Michael Conners
Albany County Comptroller
112 State Street
Room 930
Albany, New York 12207

Re: Custody/Use of Forfeiture Proceeds

Dear Mr. Conners:

This opinion letter is respectfully submitted per your request. **Questions:** (1) May the District Attorney or police agencies/County Sheriff retain forfeiture monies without remitting these funds to the County Department of Management and Budget?

(2) May forfeiture monies be expended for purposes other than the investigation and/or prosecution of Penal Law offenses?

Synopsis: (1) Forfeiture monies distributed to a claiming authority (i.e., District Attorney) or a claiming agent (i.e., police agency/County Sheriff) under CPLR §§1349(2)(e) & 1349(2)(f) must be remitted to the custody of the County Department of Management and Budget. Such funds are part of the dedicated general fund revenues of the County and may only be used for the investigation or prosecution of Penal Law offenses (see 1995 Opinion of State Comptroller #95-8 - - Exhibit "A" annexed).

(2) Forfeiture proceeds under CPLR §§1349(2)(h)(i) & 1349(2)(h)(ii) must be deposited, respectively, in "law enforcement purposes" or "prosecution services" subaccounts of the County's general fund and may only be used for investigation (by a claiming agent) or prosecution (by a claiming authority) of Penal Law offenses (see 1995 Opinion of State Comptroller #95-8 - - Exhibit "A" annexed).

Discussion: CPLR §1349 provides detailed instructions for disposition of property recovered by a claiming authority or claiming agent through forfeiture. Under Article 13-A of the CPLR, a District Attorney is a "claiming authority" and municipal police/County Sheriff are "claiming agents" (CPLR §1310[11]&[12]; see also, CPL§1.20[34][a]-[v]). The Office of District Attorney is an administrative unit within the County (County Law §351[1]) and therefore subject to the general fiscal and budgetary controls prescribed for

such administrative units (see, 1979 Attorney General [Informal Opinions] at 134 and 149 - - Exhibits "B" and "C" annexed). Pursuant to Albany County Charter §502(e), the Commissioner of the Department of Management and Budget shall "(c) receive and have custody of *all* public funds belonging to or handled by the County. . ." and County Law §700(2) mandates that monies "belonging to the County" be paid by the District Attorney to the County. Albany County Charter §403 establishes the office of Department of Audit and Control headed by the Albany County Comptroller who "shall ... have all the powers and perform all the duties conferred or imposed upon a Comptroller under the County Law". County Law §577(1)(j) mandates that the Comptroller shall "... (j) at least once a year review *all* books and records, vouchers and other papers pertaining to the money, funds and property of the County and render a report thereon . . . as to whether proper books and records have been kept and *all* monies and property of the County accounted for..."

With respect to forfeiture distributions pursuant to CPLR §1349(2)(h)(i) &(ii), the statute mandates that forfeiture monies must be deposited, respectively, to a "law enforcement purposes" and/or a "prosecution services" subaccount of the County's general fund. A plain reading of CPLR §1349 reveals that there are no provisions permitting a claiming authority or claiming agent to retain custody and control of these forfeiture proceeds to expend as they see fit pursuant to their discretion. Simply put, forfeiture funds are not to be held by the District Attorney or police agency/County Sheriff but must be turned over to the custody of the Commissioner of the Department of Management and Budget as general fund revenue so that appropriate fiscal audit and accountability can be assured.

Finally, CPLR §1349(3) requires that "all monies distributed to the claiming agent and the claiming authority pursuant to paragraph (h) of subdivision two of this section shall be used to enhance law enforcement efforts *and not in supplantation of ordinary budgetary costs including salaries of personnel, and expenses of the claiming authority or claiming agent during the fiscal year ...*". No provision is made which allows forfeiture monies to be expended other than for the investigation/prosecution of Penal Law offenses (CPLR §1349[2][h][i]&§1349[2][h][ii]).

Conclusion: All forfeiture monies must be remitted to the County Department of Management and Budget. No forfeiture funds may be utilized for any purpose (no matter how laudable) other than for investigation/prosecution of Penal Law offenses. Accordingly, the posited questions must both be answered in the negative.

Respectfully submitted,

Ray Kelly, Esq.
RAK/rar
Enclosure

Acting County Attorney's Email

From: Denning, Craig
Sent: Friday, October 10, 2008 1:47 PM
To: Devoe, Kristin
Cc: Conners, Michael
Subject: RE: Forfeiture Funds

That's correct, Opn St Comp 95-8 observes that CPLR Secs.1349(2)(h)(i) and (ii) expressly provide that forfeiture funds "are to be used for law enforcement purposes in the investigation of penal law offenses or for the prosecution of penal law offenses." The opinion interprets those sections stating: "Youth programs and similar expenditures, although they may be indirectly and generally associated with law enforcement, do not, in our opinion relate to the investigation or prosecution of penal law offenses."

Agency opinions, although not binding on courts, are considered highly persuasive for purposes of statutory interpretation.

Craig A Denning
Deputy County Attorney
Albany County Dept. of Law
112 State Street, RM 900
Albany, NY 12207
447-7110

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-----Original Message-----

From: Devoe, Kristin
Sent: Friday, October 10, 2008 11:49 AM
To: Denning, Craig
Cc: Conners, Michael
Subject: RE: Forfeiture Funds

Mike would like to have an email clarifying the discussion we had yesterday regarding our position that state forfeiture moneys under CPLR1349 are to be only used for the prosecution, enforcement and litigation of penal law. In addition, the opinion (95-8) further interprets that the moneys are not to be used for youth programming. How much weight does the state Comptroller's Opinion hold?

Kristin Devoe
Albany County Comptrollers Office
112 State St Rm 930
Albany, NY 12207

State Comptroller's Opinion (95-8)

This opinion represents the views of the Office of the State Comptroller at the time it was rendered. The opinion may no longer represent those views if, among other things, there have been subsequent court cases or statutory amendments that bear on the issues discussed in the opinion.

COUNTIES -- Powers and Duties (use of forfeiture moneys)

COUNTY TREASURER -- Powers and Duties (custody of forfeiture moneys)

DISTRICT ATTORNEY -- Powers and Duties (remittance of forfeiture moneys)

MUNICIPAL FUNDS -- Forfeiture Moneys (use of)

POLICE AND POLICE PROTECTION -- Police Department (remittance of forfeiture moneys)

CIVIL PRACTICE LAW AND RULES, §1349; COUNTY LAW, §§550, 700: Forfeiture moneys distributed to a claiming authority or claiming agent under section 1349(2)(e) and (f) of the Civil Practice Law and Rules (CPLR) must be remitted to the custody of the county treasurer. These moneys constitute dedicated general fund revenues for use only for purposes of the claiming authority or claiming agent. Distributions of forfeiture moneys under section 1349(2)(h)(i) and (ii) of the CPLR must be deposited, respectively, in a "law enforcement purposes" or "prosecution services" subaccount of the general fund, and used only for law enforcement purposes in the investigation of penal law offenses or for the prosecution of penal law offenses. Moneys distributed pursuant to section 1349(2)(h) may not be used for youth programs.

You have requested our opinion concerning certain provisions of section 1349 of Article 13-A of the Civil Practice Law and Rules (CPLR), as added by L 1990, ch 655, which provide for the disposition of property obtained from successful civil forfeiture actions.

Specifically, you ask whether moneys realized through forfeiture and paid pursuant to sections 1349(2)(e) and (f) are distributable to and held in the custody of the district attorney as the "claiming authority" and police department as the "claiming agent", or whether the funds are to be treated as a county general fund revenue. You also ask whether the moneys distributed pursuant to section 1349(2)(h)(i) and (ii) may be used for purposes not directly related to law enforcement investigation and prosecution, such as youth programs. Finally, you ask for clarification of the phrase "... all costs and disbursements taxable under the provisions of this chapter", as used in section 1349(e).

Subdivision (1) of section 1349 requires that a judgment or order of forfeiture issued pursuant to Article 13-A include provisions for the disposal of the property found to have been forfeited. Subdivision (2) of section 1349 provides, in pertinent part, that when the

judgment or order of forfeiture directs that the "claiming authority" sell the forfeited property, the proceeds of the sale and any other moneys realized as a consequence of any forfeiture pursuant to article 13-A be "apportioned and paid" in a descending order of priority as prescribed in paragraphs (a) through (h) of subdivision (2). Paragraphs (e) and (f) of subdivision 2 provide that the moneys be "apportioned and paid" as follows:

(e) In addition to amounts, if any, distributed pursuant to paragraph (d) of this subdivision, fifteen percent of all moneys realized through forfeiture to the claiming authority in satisfaction of actual costs and expenses incurred in the investigation, preparation and litigation of the forfeiture action, including that proportion of the salaries of the attorneys, clerical and investigative personnel devoted thereto, plus all costs and disbursements taxable under the provisions of this chapter;

(f) In addition to amounts, if any, distributed pursuant to paragraph (d) of this subdivision, five percent of all moneys realized through forfeiture to the claiming agent in satisfaction of actual costs incurred for protecting, maintaining and forfeiting the property including that proportion of the salaries of attorneys, clerical and investigative personnel devoted thereto; [emphasis added].

Paragraph (h) provides that:

(h) All moneys remaining after distributions pursuant to paragraphs (a) through (g) of this subdivision shall be distributed as follows:

(i) seventy-five percent of such moneys shall be deposited to a law enforcement purposes subaccount of the general fund of the state where the claiming agent is an agency of the state or the political subdivision or public authority of which the claiming agent is a part, to be used for law enforcement use in the investigation of penal law offenses;

(ii) the remaining twenty-five percent of such moneys shall be deposited to a prosecution services subaccount of the general fund of the state where the claiming authority is the attorney general or the political subdivision of which the claiming authority is a part, to be used for the prosecution of penal law offenses. [emphasis added].

For purposes of section 1349, a district attorney is a "claiming authority" and county police officers are "claiming agents" (CPLR, §1310[11], [12]; see also Criminal Procedure Law, §1.20[34][c]).

As a rule, the district attorney's office constitutes an administrative unit within the county (County Law, §351[1]; see also *Kelly v McGee*, 57 NY2d 522, 457 NYS2d 434) and is subject to the general fiscal and budgetary controls prescribed for such administrative units (see, e.g., 1979 Atty Gen [Inf Opns] 134, 149; see also *Caputo v Halpin*, 78 NY2d 117, 572 NYS2d 287). Although the County Law does not make specific reference to county police departments, we believe municipal police departments would similarly constitute administrative units within the municipality, subject to general fiscal and

budgetary controls (see, e.g., Town Law, §§103[1], 150; Village Law, §§5-500 [1], 8-800).

Among these fiscal controls is County Law, §550(2) which provides that the county treasurer shall receive and be the custodian of all moneys "belonging to the county or in which the county has an interest". County Law, §700(2), which generally prescribes the fiscal powers and duties of the district attorney, similarly requires that moneys "belonging to the county" be paid by the district attorney to the county treasurer. Further, although County Law, §705 provides for the establishment of a prosecution fund for the district attorney's office, this fund consists of an appropriation within the county budget and is held in the custody of the county treasurer (*County of Putnam v State*, 17 Misc 2d 541, 186 NYS2d 944; 25 Opns St Comp, 1969, pps 9 and 212). Thus, absent express statutory direction to the contrary, all moneys of the county received by the district attorney must be remitted to the county treasurer as custodian.

Section 1349(2)(e) and (f) provide that forfeiture funds are paid "in satisfaction of" certain actual costs and expenses originally financed with county moneys. There is no indication that these funds are received for the personal benefit of the claiming authority or agent, or any third party. Consequently, we believe it is clear that these funds are received for the benefit of the county, and constitute moneys "in which the county has an interest" and moneys "belonging to the county" within the meaning of County Law, §§550 and 700. While the claiming authority or claiming agent is the initial recipient of the distribution, there is no indication in these provisions that the claiming authority or agent is to retain custody and directly expend these moneys. Accordingly, it is our opinion that the district attorney as claiming authority and the police department as claiming agent are required to remit all moneys received under CPLR, §1349(2)(e) and (f) to the custody of the county treasurer in accordance with County Law, §§550(2) and 700 as a general fund revenue(1).

The use of these moneys, however, is restricted. Section 1349(2)(e), as noted, provides that the distribution under that provision is "in satisfaction of actual costs and expenses incurred in the investigation, preparation and litigation of the forfeiture action". Similarly, section 1349(2)(f) provides that the distribution under that provision is "in satisfaction of actual costs incurred for protecting, maintaining and forfeiting the property ...". A primary purpose of these provisions, which superseded a prior statutory scheme, is to ensure that the claiming authority and claiming agent recover some of the costs and expenses incurred in connection with the forfeiture action, in order to provide an incentive to utilize the State forfeiture statute (see, e.g., Governor's Memorandum in Support of bill enacted as L 1990, ch 655, 1990 Legislative Annual, p 315; Memorandum of Attorney General to the Governor dated July 17, 1990 for L 1990, ch 655). In view of this purpose, we believe it is evident that these distributions are intended to be general fund revenues dedicated solely for the use of the claiming authority or claiming agent, which are to be appropriated for such purposes at the request of the claiming authority or claiming agent.

Therefore, it is our opinion, based on the language and legislative intent of the 1990 amendment, that the use of the moneys distributed under section 1349(2)(e) and (f) is intended to be restricted for the benefit of the claiming authority and claiming agent. We find no intent, however, to supersede the general statutory scheme that provides for custody of these county moneys with the county treasurer.

With respect to distributions pursuant to section 1349(2)(h)(i) and (ii), the statute expressly provides that these moneys must be deposited, respectively, to a "law enforcement purposes" and a "prosecution services" subaccount of the general fund. Thus, these funds clearly are not held by the claiming authority or claiming agent, but rather are held in the custody of the county treasurer as a general fund revenue. The statute expressly provides that these moneys are to be used for law enforcement purposes in the investigation of penal law offenses (CPLR, §1349[2][h][i]) or for the prosecution of penal law offenses (CPLR, §1349[2][h][ii]). Youth programs and similar expenditures, although they may be indirectly and generally associated with law enforcement, do not, in our opinion, relate to the investigation or prosecution of penal law offenses. Therefore, it is our opinion that section 1349(2)(h) moneys may not be used for those purposes.

Finally, it appears that the phrase "costs and disbursements taxable under this chapter", as used in CPLR, §1349(e), refers to the costs and disbursements allowable under various provisions of the CPLR (e.g. articles 81, 82, 83) in connection with the forfeiture action.

April 18, 1995

Joseph R. Caputo, County Comptroller
County of Suffolk

1. In reaching this conclusion, we recognize that proposed legislation, which would amend County Law, §700 and CPLR, §1349 to provide expressly that moneys realized as a consequence of any forfeiture must be deposited in an "asset forfeiture fund" in the custody of the chief fiscal officer, was passed by the Assembly in 1994 (see Assembly Bill No. 8338) and reintroduced in the Assembly in 1995 (see Assembly Bill No. 1582). We also note, however, that it is well established that "the failure of the Legislature to pass an amendment is at best a dubious foundation for drawing inferences of legislative intent" (*General Building Contractors of New York State, Inc. v Roberts*, 118 AD2d 173 at 176, 504 NYS2d 292 at 294, lv denied 68 NY2d 612, 510 NYS2d 1026; see also *Clark v Cuomo*, 66 NY2d 185, 495 NYS2d 936; *Hospital Association of New York State v Axelrod*, 113 AD2d 9, 494 NYS2d 905, appeal discontinued and withdrawn 68 NY2d 754, 506 NYS2d 1041). Therefore, we do not believe that these bills have significant probative value, and certainly are not dispositive of the current state of the law.