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# State ex. rel. Thornburg v. Currency: The Battle over Drug War Money

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## *State ex rel. Thornburg v. Currency: The Battle Over Drug War Money*

Article IX, section 7 of the North Carolina Constitution directs that the clear proceeds of all penalties, forfeitures, and fines "collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools."<sup>1</sup> The North Carolina Racketeer Influenced and Corrupt Organizations (RICO) Act provides that all property used in the course of a "racketeering activity is subject to forfeiture to the State."<sup>2</sup> Since the North Carolina General Assembly enacted the state RICO Act in 1986,<sup>3</sup> the constitutionality of the Act has remained in doubt. The issue hinges on whether the North Carolina Constitution requires that the proceeds seized under the state RICO Act be paid to the individual counties' public school funds in contradistinction to the language of the Act itself, which mandates that the funds be paid to the State. In *State ex rel. Thornburg v. Currency*<sup>4</sup> the North Carolina Supreme Court declined to determine whether funds seized under the forfeiture provisions of the state RICO Act are subject to the reach of article IX, section 7.<sup>5</sup> Rather than addressing the constitutional issue, the court based its decision on rules of statutory construction. The court's decision in *Currency* leaves open the question of whether funds seized under the state RICO Act must be paid to

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1. The state RICO Act, codified in chapter 75D of the North Carolina General Statutes, defines racketeering in part as follows:

[T]o commit, attempt to commit, or to solicit, coerce, or intimidate another person to commit an act or acts which would be chargeable by indictment if such act or acts were accompanied by the necessary mens rea or criminal intent under the following laws of this State:

a. Article 5 of Chapter 90 of the General Statutes of North Carolina relating to controlled substances and counterfeit controlled substances.

N.C. GEN. STAT. § 75D-3(c)(1) (1987). Section 75D-4(a) of the North Carolina General Statutes provides:

(a) No person shall:

(1) engage in a pattern of racketeering activity or, through a pattern of racketeering activities or through proceeds derived therefrom, acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money; or

(2) conduct or participate in, directly or indirectly, any enterprise through a pattern of racketeering activity whether indirectly, or employed by or associated with such enterprise; or

(3) conspire with another or attempt to violate any of the provisions of subdivision (1) or (2) of this subsection.

N.C. GEN. STAT. § 75D-4(a) (1987).

2. The state RICO Act provides in part:

All property of every kind used or intended for use in the course of, derived from, or realized through a racketeering activity or pattern of racketeering activity is subject to forfeiture to the State.

N.C. GEN. STAT. § 75D-5(a)(1987).

3. Act of July 19, 1986, ch. 999, § 3, 1986 N.C. Sess. Laws 360 (codified at N.C. GEN. STAT. § 75D (1987)).

4. 324 N.C. 276, 378 S.E.2d 1 (1989).

5. *Id.* at 283, 378 S.E.2d at 4.

state law enforcement agencies in accordance with the Act or whether they must be turned over to the public schools in compliance with the North Carolina Constitution.

This Note analyzes the potential impact of the court's decision not to address the constitutional question in *Currency*. The Note evaluates the immediate and long term effects of this decision on the North Carolina RICO Act. The Note concludes that the court's abstention in *Currency* will contribute to the current trend in the North Carolina law enforcement field away from utilizing the forfeiture provisions of the state RICO Act in favor of using the federal RICO Act.

On December 11, 1986, Larry Parham failed to check out of his room in a timely manner at the Econo Lodge Motel in Graham, North Carolina.<sup>6</sup> The motel manager, after unsuccessfully trying to rouse Parham by telephone, used his master key to enter the room.<sup>7</sup> Observing Parham asleep on one bed and a handgun lying on the other, the manager called the local police department.<sup>8</sup> Three officers responded to the call.<sup>9</sup> As they passed by the window of Mr. Parham's room, one of the officers observed drug paraphernalia in plain view.<sup>10</sup> The officers entered the room and arrested Parham.<sup>11</sup> Upon searching the room the officers discovered, among other things, \$52,029 in United States currency, a Smith and Wesson magnum .44-caliber pistol, an Action Arms "UZI" assault machine gun, and 105 grams of cocaine.<sup>12</sup> Parham identified as his a Cadillac automobile parked in the motel lot.<sup>13</sup> He also identified as his the \$52,000, which he described as proceeds from a drug sale.<sup>14</sup> Parham told the officers that he traveled on a weekly basis between Florida and Graham, North Carolina in connection with drug sales.<sup>15</sup> Parham subsequently was charged with two counts of felony trafficking by possession of cocaine and one count of maintaining a vehicle for transporting controlled substances.<sup>16</sup>

On December 23, 1986, the State of North Carolina filed a document entitled "Complaint *In Rem* RICO Forfeiture Proceeding" pursuant to section 75D-5(a)<sup>17</sup> of the North Carolina General Statutes.<sup>18</sup> The action named as defendants the \$52,000, the Cadillac automobile, the .44-caliber pistol, and the assault machine gun.<sup>19</sup> Although a copy of the document was served on

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6. *Id.* at 278, 378 S.E.2d at 2.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. See *supra* note 2 for the text of the statute.

18. *Currency*, 324 N.C. at 278, 378 S.E.2d at 2.

19. *Id.*

Parham, he never filed an answer or otherwise appeared.<sup>20</sup> On January 19, 1987, the trial court entered an order of seizure under the state RICO Act directing the Sheriff of Alamance County to seize the currency, the automobile and the guns.<sup>21</sup> On January 21, 1987, the trial court entered an order allowing the City of Graham to intervene and file an answer.<sup>22</sup> In its answer, the city asked that the proceeds of the seized property, when forfeited, be paid to its Police Department pursuant to the state RICO Act.<sup>23</sup> On May 4, 1987, and May 6, 1987, the court entered orders allowing the Alamance County Board of Education and the Burlington City Board of Education (the school boards) to intervene and file answers.<sup>24</sup> In their answers, the school boards demanded that the proceeds be paid to the school fund of Alamance County under article IX, section 7 of the North Carolina Constitution.<sup>25</sup>

On June 8, 1987, the court heard arguments for final judgment of forfeiture.<sup>26</sup> The trial judge made findings of fact, concluded as a matter of law that "the provisions of Chapter 75D of the General Statutes are secondary to the criminal forfeiture provision of the Controlled Substances Act," and directed that the money be turned over to the schools.<sup>27</sup> Following the entry of an order pursuant to the findings of fact, the Burlington City Board of Education filed a motion for forfeiture in the three criminal cases pending against Parham in accordance with the Controlled Substances Act.<sup>28</sup> The State and the City of Graham appealed.<sup>29</sup> The North Carolina Supreme Court allowed the State's petition for discretionary review prior to determination by the court of appeals.<sup>30</sup>

A unanimous supreme court affirmed the trial court's decision.<sup>31</sup> The court declined to express an opinion as to the constitutionality of the state RICO forfeiture provisions.<sup>32</sup> Instead, the supreme court determined that the "specific language in N.C.G.S. § 75D-10 and the particular circumstances of the case" compelled them "to conclude that the forfeiture provisions of the Controlled Substances Act prevail over those of the RICO Act."<sup>33</sup> The court began its analysis by evaluating the particular circumstances of the case.<sup>34</sup> Writing for the supreme court, Justice Meyer noted that police seized the property discov-

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20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 278-79, 378 S.E.2d at 2.

24. *Id.* at 278, 378 S.E.2d at 2.

25. *Id.* at 279, 378 S.E.2d at 2.

26. *Id.*

27. *Id.* at 279, 378 S.E.2d at 3.

28. *Id.* at 280, 378 S.E.2d at 3.

29. *Id.*

30. *Id.*

31. *Id.* at 289, 378 S.E.2d at 8.

32. *Id.* at 283, 378 S.E.2d at 4. "The State contend[ed] that because forfeitures under the RICO Act are, in effect, restitution to law enforcement agencies, the property forfeited under the Act is not subject to article IX, section 7 of our Constitution." *Id.*

33. *Id.* at 284, 378 S.E.2d at 5.

34. *Id.*

ered during the search of Parham's motel room and the automobile under the authority of the Controlled Substances Act.<sup>35</sup> He also noted that the criminal charges pending against Parham were brought under the authority of the Controlled Substances Act.<sup>36</sup>

Justice Meyer next turned to the statutory language of the Controlled Substances Act and the state RICO Act.<sup>37</sup> He first examined the plain language in section 75D-10, which provides that "civil remedies under RICO are *cumulative, supplemental and not exclusive*."<sup>38</sup> Justice Meyer noted the language in the section stating that the state RICO forfeiture provisions are "*in addition to* the fines, penalties and forfeitures set forth in a final *criminal* conviction."<sup>39</sup> In conflict with this statute, chapter 90, article 5 of the North Carolina General Statutes provides for the "forfeiture of property involved in violations of the Controlled Substances Act."<sup>40</sup> "Construing the two statutes *in pari materia*," Justice Meyer read the "in addition to" language of section 75D-10 "to mean that the forfeiture provisions of the RICO Act do not prevent forfeiture under other applicable statutory provisions."<sup>41</sup> The supreme court concluded that when the "owner of the forfeitable property has been indicted and is awaiting trial on *criminal* charges under the Substances Act . . . the forfeiture provisions of that Act take precedence over the RICO Act forfeiture provisions."<sup>42</sup> Having decided that the Controlled Substances Act prevails over the state RICO forfeiture provisions, the court concluded that any judgment of property forfeiture would accrue to the public schools.<sup>43</sup>

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* North Carolina General Statutes § 75D-10 provides:

Civil remedies under this chapter are *cumulative, supplemental and not exclusive*, and are *in addition* to the fines, penalties and forfeitures set forth in a final judgment of conviction of a violation of the criminal laws of this State as punishment for violation of the penal laws of this State.

N.C. GEN. STAT. § 75D-10 (1987) (emphasis added).

39. *Currency*, 324 N.C. at 284, 378 S.E.2d at 5 (quoting N.C. GEN. STAT. § 75D-10 (1987)).

40. *Id.* at 284, 378 S.E.2d at 5. The following property is subject to forfeiture under the Controlled Substances Act:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of the provisions of this Article;

\* \* \*

(4) All conveyances, including vehicles, vessels, or aircraft, which are used or intended for use to unlawfully conceal, convey, or transport, or in any manner to facilitate the unlawful concealment, conveyance, or transportation of property described in (1) or (2) . . . ;

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this Article.

N.C. GEN. STAT. § 90-112(a) (1985).

41. *Currency*, 324 N.C. at 284, 378 S.E.2d at 5.

42. *Id.*

43. *Id.* at 284-85, 378 S.E.2d at 5. In determining that "any judgment of property forfeiture . . . entered against Larry Parham as a result of convictions on the criminal charges against him pursuant to the Controlled Substances Act would accrue" to the public schools, *id.*, the supreme court noted that North Carolina General Statutes § 90-112(d1) provides:

"Notwithstanding the provisions of subsection (d), the law enforcement agency having custody of money that is forfeited pursuant to this section *shall pay it to the treasurer or proper*

The North Carolina Supreme Court first had the opportunity to interpret the scope of article IX, section 7 over one hundred years ago in *Katzenstein v. Railroad Co.*<sup>44</sup> The action was brought under a civil statute<sup>45</sup> that allowed aggrieved private parties to sue for a penalty.<sup>46</sup> Defendant excepted on the ground that under the North Carolina Constitution<sup>47</sup> all penalties must be given to the county school fund.<sup>48</sup> Addressing the issue of whether the civil statute was a "penal law" for constitutional purposes, the supreme court drew a "distinction between those penalties that accrue to the state, and those that are given to the person aggrieved."<sup>49</sup> Justice Graves, writing for the majority, noted that many penalties exist that may not be collected by private parties and it is "this class of penalties that is given to the County school fund."<sup>50</sup> Based on this distinction, the *Katzenstein* court concluded that the civil statute was not a "penal law" and therefore was not subject to the reach of article IX, section 5.<sup>51</sup>

Ten years after *Katzenstein*, in *Hodge v. Railroad*,<sup>52</sup> the Supreme Court of North Carolina again addressed the reach of article IX, section 7 in the context of a civil statute.<sup>53</sup> Unlike the civil statute in *Katzenstein*, however, the statute in *Hodge* provided that suit was to be brought in the "name of the State of North Carolina."<sup>54</sup> Plaintiff filed suit in the name of the State.<sup>55</sup> Defendant moved to dismiss the complaint on the ground that no cause of action had accrued to plaintiff; rather, the cause of action had accrued to the State of North Carolina.<sup>56</sup> The North Carolina Supreme Court noted that the clear expression of the legislative intent was that "the penalty should be sued for and recovered by the State."<sup>57</sup> The court concluded that the constitution "devotes such penalties and forfeitures to the school fund."<sup>58</sup>

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*officer authorized to receive fines and forfeitures to be used for the school fund of the county in which the money was seized."*

*Id.* (quoting N.C. GEN. STAT. § 90-112(d1) (1985)).

44. 84 N.C. 688 (1881).

45. The statute at issue provided:

It shall be unlawful for any railroad company operating in this state, to allow any freight they may receive for shipment, to remain unshipped for more than five days, unless otherwise agreed between the railroad company and the shipper, and any company violating this section, shall forfeit and pay the sum of twenty-five dollars for each day said freight remains unshipped to any person suing for the same.

*Id.* at 689.

46. *Id.* Plaintiff complained that he delivered a package to defendant railroad company for shipment and that the company unlawfully allowed the freight to remain unshipped for more than five days. *Id.*

47. See *supra* text accompanying note 1.

48. *Katzenstein*, 84 N.C. at 691, 693.

49. *Id.* at 693.

50. *Id.*

51. *Id.* Article IX, § 5 is the predecessor to article IX, § 7.

52. 108 N.C. 24, 12 S.E. 1041 (1891).

53. *Id.* at 25, 12 S.E. at 1041.

54. *Id.*

55. *Id.* at 26, 12 S.E. at 1041.

56. *Id.*

57. *Id.*

58. *Id.*

In *Cauble v. City of Asheville (Cauble I)*<sup>59</sup> and *Cauble v. City of Asheville (Cauble II)*<sup>60</sup> the North Carolina Supreme Court interpreted the scope of article IX, section 7 in the context of a city ordinance.<sup>61</sup> Under the ordinance, the City issued citations and collected penalties for violations of overtime parking regulations.<sup>62</sup> Cauble alleged that he and the residents of the City "had paid fines for overtime parking which constituted penalties or fines collected for a 'breach of the penal laws of the State.'"<sup>63</sup> Therefore, Cauble argued, "pursuant to article IX, section 7 of the North Carolina Constitution, [the fines] belonged to the county to be 'used exclusively for maintaining free public schools.'"<sup>64</sup> The City of Asheville contended that the ordinances involved were not "'penal laws of the State' and that any proceeds derived from violations of the ordinances [we]re civil in nature."<sup>65</sup> Cauble conceded that the proceeds were civil in nature, but maintained that "violations of town ordinances have been made criminal by virtue of [North Carolina General Statutes section] 14-4."<sup>66</sup> The Supreme Court of North Carolina agreed with Cauble, holding that all fines "'collected upon prosecutions for violations of the *criminal laws* of the State, whether for violations of . . . ordinances made criminal by [section 14-4], or by other criminal statutes . . . belong to the common school fund of the county.'"<sup>67</sup>

In *Mussallam v. Mussallam*<sup>68</sup> the North Carolina Supreme Court adopted

59. 301 N.C. 340, 271 S.E.2d 258 (1980).

60. 314 N.C. 598, 336 S.E.2d 59 (1985).

61. *Cauble I*, 301 N.C. at 340-41, 271 S.E.2d at 258-59; *Cauble II*, 314 N.C. at 599-600, 336 S.E.2d at 60-61.

62. *Cauble I*, 301 N.C. at 341, 271 S.E.2d at 258-59. Pursuant to North Carolina General Statutes § 60A-301, the City of Asheville enacted Ordinance 376 which provided:

It shall be unlawful for any person or operator to cause, allow, permit or suffer any vehicle registered in his name, or under his control, to be parked overtime or beyond the lawful periods of time as above set forth.

*Id.* at 340-41, 271 S.E.2d at 258.

63. *Id.* at 341, 271 S.E.2d at 259.

64. *Id.*

65. *Id.* at 342, 271 S.E.2d at 259.

66. *Id.* North Carolina General Statutes § 14-4 provides:

*Violation of local ordinances misdemeanor.*—if any person shall violate an ordinance of a county, city, or town, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars (\$50.00), or imprisoned for not more than thirty days.

N.C. GEN. STAT. § 14-4 (1987).

67. *Cauble I*, 301 N.C. at 343, 271 S.E.2d at 260 (quoting *Board of Educ. v. Henderson*, 126 N.C. 689, 692, 36 S.E. 158, 159 (1900)). The City of Asheville distinguished overtime parking fines "from the case where the violation of a city ordinance has been prosecuted to judgment and a fine imposed." *Id.* The City noted that "[h]ere the disputed proceeds result from payments *voluntarily* made by violators upon citations for overtime parking." *Id.* The payments received by the city "were not 'fines' since they were not paid as a result of a criminal conviction." *Id.* at 344, 271 S.E.2d at 260. The City of Asheville concluded that the proceeds were civil "penalties," not "fines," and therefore were not subject to the reach of the North Carolina Constitution. *Id.* The North Carolina Supreme Court concluded that the City's distinction between fines and penalties was unduly restrictive. *Id.* It held that "[t]he crux of the distinction lies in the *nature* of the *offense* committed, and not in the *method* employed by the municipality to collect fines for commission of the offense." *Id.* The supreme court concluded that the "fines collected for overtime parking constitute[d] fines collected for a breach of the penal laws of the State." *Id.* at 345, 271 S.E.2d at 261. The court reaffirmed this result six years later. See *Cauble II*, 314 N.C. 598, 601-02, 336 S.E.2d 59, 61-62 (1985).

68. 321 N.C. 504, 364 S.E.2d 364 (1988).

a more technical, yet more expansive, reading of article IX, section 7.<sup>69</sup> At issue was whether the forfeited proceeds from an appearance bond in a child-custody case were subject to the reach of article IX, section 7 of the North Carolina Constitution.<sup>70</sup> Both parties agreed that the bond was a civil bond, imposed in a civil proceeding.<sup>71</sup> Plaintiff wife interpreted article IX, section 7 "to mean that the clear proceeds of penalties, forfeitures, and fines go to the school fund only if they arise from criminal cases."<sup>72</sup> "Since this was a civil case," she argued, "no penal laws ha[d] been breached and therefore section 7 does not apply to allow the [School] Board to collect the proceeds of the forfeited bond."<sup>73</sup>

The supreme court rejected plaintiff's interpretation and instead announced its own interpretation of section 7. The court construed "penal laws" to include "two distinct funds for the public schools."<sup>74</sup> The first category includes "the clear proceeds of all penalties and forfeitures in all cases, regardless of their nature, so long as they accrue to the state."<sup>75</sup> Consistent with the narrow, restrictive reading of "penal laws," the second category includes "the clear proceeds of all fines collected for any breach of the criminal laws."<sup>76</sup> Referring to the second category, the court noted that a violation of the criminal laws is unquestionably a "breach of the penal laws."<sup>77</sup> While the intent behind the first category is less obvious, the court stated that "penal laws" in the context of article IX, section 7 "means laws that impose a monetary payment for their violation. . . . regardless of whether the . . . proceeding is civil or criminal."<sup>78</sup> In determining whether a payment falls within the parameters of the first category, the court stated that the distinguishing factor is whether it was "designed to penalize the wrongdoer or compensate a particular party."<sup>79</sup> A monetary payment intended to penalize the wrongdoer thus falls within the first category and is therefore a "penal law" for constitutional purposes; a monetary payment intended to compensate a particular party does not fall within the first category (nor the second category) and therefore is not a "penal law" for constitutional purposes.<sup>80</sup>

Applying this reasoning, the *Mussallam* court concluded that the purpose of the appearance bond was to punish rather than to compensate.<sup>81</sup> Thus, the

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69. *Id.* at 508-09, 364 S.E.2d at 366-67.

70. *Id.* at 504, 364 S.E.2d at 364-65.

71. *Id.* at 506, 364 S.E.2d at 365.

72. *Id.* at 508, 364 S.E.2d at 366.

73. *Id.*

74. *Mussallam v. Mussallam*, 321 N.C. 504, 508-09, 364 S.E.2d 364, 366-67 (1988).

75. *Id.* at 509, 364 S.E.2d at 367.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 510, 364 S.E.2d at 367.

80. *Id.* at 509-10, 364 S.E.2d at 366-67. In defining these two categories, the supreme court cited a law review article by Professor D. Lawrence. *Id.* at 509 (citing Lawrence, *Fines, Penalties, and Forfeitures: An Historical and Comparative Analysis*, 65 N.C.L. REV. 49 (1986)). It appears that the supreme court's new interpretation of article IX, § 7, and more specifically, its new definition of "penal laws" have their origin in this law review article. See *infra* text accompanying notes 120-27.

81. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367.



bond fell "within the parameters of the first category,"<sup>82</sup> and the Board of Education was entitled to the forfeited proceeds pursuant to article IX, section 7.<sup>83</sup>

The North Carolina Supreme Court clearly was not obligated to address the constitutional issue in *Currency*. "It is well established that appellate courts will not pass upon constitutional questions, even when properly presented, if there is some other ground upon which the case can be decided."<sup>84</sup> The justification for this rule is that "the authority of the court to declare an act of the Legislature in conflict with the Constitution arises out of and as an incident of its duty to determine and adjudge the rights of parties to the litigation before it."<sup>85</sup> By deciding *Currency* on the basis of statutory interpretation, the court merely was complying with this established doctrine. However, the court was not prohibited or otherwise restricted from addressing the constitutional issue before it. *Currency* afforded the supreme court the opportunity to clarify an area of the law which has remained ambiguous since the enactment of the state RICO Act in 1986. *Currency* was the first case that dealt with the constitutional issue to reach the court. Thus, while the court was not obliged to address the constitutional question in *Currency*, it certainly would have been helpful had it done so.

Notwithstanding the above caveat, the supreme court's decision not to address the constitutional issue in *Currency* is significant in three respects. First, the court in *Currency* declined to determine the applicability of article IX, section 7 of the state constitution to the North Carolina RICO Act. Second, the court did not decide whether *Mussallam* extends to the state RICO Act. Finally, the court did not address the issue of whether *Mussallam* applies to civil statutes other than the state RICO Act.

Constitutional reservations have plagued the state RICO Act ever since its adoption in 1986. Despite the constitutional mandate provided in article IX, section 7, the North Carolina General Assembly clearly intended that the state RICO forfeiture proceeds *not* go to the public schools.<sup>86</sup> Several legislators ar-

82. *Id.*

83. *Id.* at 510, 364 S.E.2d at 367.

84. *State v. Crabtree*, 286 N.C. 541, 543, 212 S.E.2d 103, 105 (1975).

85. *Id.*

86. See Note, *North Carolina RICO: A Critical Analysis and User's Guide*, 66 N.C.L. REV. 445, 456 (1988). North Carolina General Statutes § 75D-2(b) provides:

[T]he purpose and intent of this Chapter is: to deter organized unlawful activity by imposing civil equitable sanctions against this subversion of the economy by organized unlawful elements; to prevent the unjust enrichment of those engaged in organized unlawful activity; [and] to restore the general economy of the State . . . .

N.C. GEN. STAT. § 75D-2(b) (1987). Representative Wicker argued that RICO forfeiture proceeds should go to law enforcement agencies, not the public schools. *Durham Morning Herald*, July 6, 1985, at 6A, col. 1. State Bureau of Investigation Director Robert Morgan explained the importance of earmarking RICO forfeiture proceeds for law enforcement:

Buy money for drugs is important right now. . . . In the days of moonshine investigations, the sheriff would go out and buy a little liquor, arrest the guy right then and get his money back.

But if you do that with drugs, you only end up with the little guy, not the big distributors. . . . And with cocaine costing about \$3,000 an ounce, we may put out \$40,000 before we even make an arrest.

*Id.*; see Note, *supra* note 86, at 456.

gued that the Act clashed with article IX, section 7 of the state constitution.<sup>87</sup> The Senate Judiciary IV Committee, which sent RICO to the floor, also was aware of the constitutional problem but was unable to resolve the issue. Instead it opted to leave the question to the courts.<sup>88</sup>

As a result of the constitutional concerns affiliated with the state RICO legislation, state law enforcement authorities have been reluctant to utilize the Act's forfeiture provisions. Instead, state law enforcement authorities have implemented a sharing program involving federal authorities.<sup>89</sup> Authorized by Congress in 1984, the program permits federal agents to share with state and local authorities the assets forfeited by drug dealers.<sup>90</sup> According to standard procedure, after local or state police have seized drug assets, they are allowed to bring in federal drug agents to "adopt" the seizure.<sup>91</sup> By calling in federal agents, state authorities are able to circumvent the state constitutional mandate and recover a portion of the forfeited proceeds through the federal sharing provision.<sup>92</sup>

Shortly after the legislature enacted the North Carolina RICO Act, the Attorney General's Office filed several test cases in an effort to resolve the constitu-

87. Raleigh News and Observer, July 12, 1986, at 5C, col. 2. Senator Warren argued that the RICO Act clashed with the state constitution. *Id.* Despite the constitutional concerns, the RICO Act was passed by a unanimous vote of the general assembly. *Id.*

88. *Id.* Senator Winner, who acknowledged that the Senate Judiciary IV Committee was unable to resolve the constitutional issue, stated that "the courts would have to decide whether the assets properly could be given to the state instead of public schools." *Id.* Senator Warren replied: "I don't know what the courts will say, but I know what the constitution says." *Id.*

89. See Raleigh News and Observer, January 7, 1990, at 1A, col. 1.

90. The federal statute provides that "when property is civilly or criminally forfeited . . . the Attorney General may . . . transfer the property to any . . . state or local law enforcement agency which participated directly in the seizure or forfeiture of the property. 21 U.S.C.A. § 881(e)(1)(A) (West Supp. 1988).

91. *Id.*

92. The federal sharing provision recently was challenged. See *United States v. Alston*, 717 F. Supp. 378 (M.D.N.C. 1989), *aff'd sub nom. United States v. Winston-Salem/Forsyth County Bd. of Educ.*, No. 88-7664 (4th Cir. May 4, 1990) (1990 W.L. 56103). In *Alston* Winston-Salem police officers arrested defendant and seized \$10,638 in cash under the Controlled Substances Act. *Id.* at 379. The officers called in a federal agent of the Drug Enforcement Administration (DEA) to adopt the seizure. *Id.* Immediately thereafter, the DEA commenced administrative forfeiture proceedings. *Id.* After complying with the applicable statutes and regulations, the DEA declared the cash to be forfeited to the United States government. *Id.* Eighty-five percent of the forfeited cash subsequently was returned to the Winston-Salem Police Department pursuant to the federal sharing provision. *Id.* Following the dismissal of the action against defendant, the superior court judge ordered the Winston-Salem Police Department to return the cash to the defendant. *Id.* The government filed suit seeking declaratory relief based on the conflicting orders of the superior court judge and the administrative declaration of forfeiture entered by the DEA. *Id.* Addressing the issue of whether article IX, § 7 of the state constitution conflicted with federal forfeiture statutes, the trial court held:

"[Section 7] applies only to forfeitures resulting from a breach of the *penal laws of North Carolina*, and has absolutely no application to forfeitures proceeding from a breach of any federal law." The cash was administratively forfeited because the government concluded that probable cause existed and that the money was used in violation of § 881(a)(6), a federal law. When cash is forfeited under these circumstances, "local law enforcement may share in the proceeds."

*Id.* at 381 (citations omitted). Thus, for the time being at least, state authorities will be allowed to continue using the federal sharing program to circumvent article IX, section 7 of the state constitution. See also Raleigh News and Observer, Jan. 7, 1989, at 12A, col. 6 (discussing *Alston* and the battle between the schools and law enforcement over drug money).

tional issue.<sup>93</sup> *Currency* is the only one of these cases that reached the North Carolina Supreme Court.<sup>94</sup> An opinion on the constitutional issue could have produced several possible results. At one extreme, a decision that the state RICO Act did not contravene the state constitution and that drug money forfeitures belong to law enforcement authorities would have freed state authorities from having to call in federal agents to adopt seizures conducted exclusively by local or state police. From a practical standpoint, state authorities would be able to keep all of the assets seized under the state RICO forfeiture provisions, rather than having to share with federal agents. The stakes were not as high for the school board. Although the schools annually receive approximately thirty million dollars in criminal fines and forfeitures, they have not benefited from proceeds collected under the state RICO Act due to the widespread use of the federal sharing program.<sup>95</sup> A ruling that the state RICO Act was constitutional would have resulted in its increased use, but the schools would have lost no more than they already were losing to law enforcement agencies.

At the other extreme, a decision that RICO was unconstitutional would have meant that local and state police would be unable to retain funds seized under the state RICO Act; they would be forced to continue using the federal sharing program. For the schools, this would have meant the continued circumvention of the state constitution. Regardless of the outcome, a decision in *Currency* based upon the constitutional issue would have clarified an area of the law that has remained ambiguous since the enactment of the state RICO Act in 1986. Unfortunately, *Currency* failed to provide such clarification. Although the North Carolina Supreme Court believed that *Currency* was important enough to warrant its interception from the court of appeals, it declined to address the constitutional issue at the heart of the controversy.

Another shortcoming of *Currency* is its failure to clarify whether *Mussallam* extends to the state RICO Act. *Mussallam* adopted a new definition of "penal laws" for constitutional purposes in the context of a civil proceeding arising out of a dispute over the forfeited proceeds of an appearance bond.<sup>96</sup> Prior to *Mussallam*, the term "penal laws" was open to at least two interpretations. The narrow, restrictive interpretation equated "penal laws" with criminal laws.<sup>97</sup> This definition of "penal laws" meant "that the clear proceeds of penalties, forfeitures and fines go to the school fund only if they arise from criminal cases."<sup>98</sup> The *Cable* cases could be construed to support this narrow interpretation of "penal laws."<sup>99</sup> Although the proceeds derived from violations of the

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93. Telephone interview with Charles Hensey, Special Deputy Attorney General at the North Carolina Department of Justice (Jan. 16, 1990).

94. *Id.*

95. Raleigh News and Observer, Jan. 7, 1990, at 12A, col. 6.

96. *See supra* text accompanying notes 68-80.

97. The trend of modern authority has equated "penal laws" with criminal laws. *See* R. LELAND, *AMERICAN CONFLICTS LAW* 49, at 92 (3d ed. 1977).

98. *Mussallam v. Mussallam*, 321 N.C. 504, 508, 364 S.E.2d 364, 367 (1988).

99. The argument against construing the *Cable* cases as supportive of the position that "penal laws" means criminal laws is that the court did not address the issue of whether civil laws also could be "penal laws." *See* Appellee's Brief at 8, *Currency* (No. 8715SC1175). According to the argu-

city ordinances were civil in nature, the *Cable* court emphasized that "G.S. 14-4 specifically makes *criminal* the violation of a city ordinance."<sup>100</sup> The court concluded that a person who violates the ordinance "also breaches the penal law of the State. Consequently, fines collected for overtime parking constitute fines collected for a breach of the penal laws of the State."<sup>101</sup> In reaffirming its prior holdings, the court concluded that fines "collected upon prosecutions for violations of the *criminal laws* of the State" belong to the schools.<sup>102</sup>

Another possible interpretation of "penal laws," prior to *Mussallam*, has been set forth by Professor Lawrence in an influential law review article. Professor Lawrence argues that an "expansive rather than a restrictive understanding of the term 'penal laws' better furthers the probable policy behind section 7—to assist in supplying a stable source of funds for local school systems."<sup>103</sup> Professor Lawrence contends that the section 7 drafters intended penal laws to include much more than criminal laws.<sup>104</sup> The better understanding for constitutional purposes, he argues, is that a "penal law" is any law that imposes a monetary payment for punishment on the violator.<sup>105</sup> To support his thesis, Professor Lawrence looks to the legislative intent of the section 7 drafters.<sup>106</sup> "[T]hat intent," he argues, "is most likely to be discovered through a better understanding of the historical circumstances surrounding insertion of the provision in the Constitution and by a close reading of those court cases that interpreted the provision soon after its adoption."<sup>107</sup> Professor Lawrence relies on *Katzenstein*<sup>108</sup> and *Hodge*<sup>109</sup> as two cases that were "roughly contemporary with the adoption of the 1875 language" to support his argument.<sup>110</sup> Although both cases "involved statutory penalties recoverable by civil, rather than by criminal actions, . . . in both cases the court apparently assumed that the penalties in question were potentially subject to section 7. This assumption necessarily meant that the court also assumed that the laws imposing the penalties were penal."<sup>111</sup>

*Currency* offered the court the opportunity to extend the *Mussallam* reasoning to the state RICO Act. At the time *Currency* reached the supreme court, it was unclear whether the new definition of "penal laws" was applicable to the

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ment, the *Cable* cases merely reiterated the longstanding rule that penal laws include criminal laws; the cases did not decide that penal laws no longer include civil laws. *Id.* Thus, after the *Cable* cases, "penal laws" still could be interpreted to include criminal laws *plus* civil laws. *Id.*

100. *Cable v. City of Asheville*, 301 N.C. 340, 345, 271 S.E.2d 258, 261 (1980) (emphasis added).

101. *Id.* (citations omitted).

102. *Id.* at 343, 271 S.E.2d at 260 (citing *Board of Educ. v. Henderson*, 126 N.C. 689, 692, 36 S.E. 158, 159 (1900)).

103. Lawrence, *Fines, Penalties, and Forfeitures: An History and Comparative Analysis*, 65 N.C.L. REV. 49, 62 (1986).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. 84 N.C. 688 (1881); see *supra* text accompanying notes 44-51.

109. 108 N.C. 24, 12 S.E. 1041 (1891); see *supra* text accompanying notes 52-58.

110. Lawrence, *supra* note 103, at 62.

111. *Id.* at 62-63.

state RICO Act. *Mussallam* involved an *in personam* civil bond.<sup>112</sup> By contrast, *Currency* involved a civil statute, considered *in rem* and remedial.<sup>113</sup> The State vigorously urged the court to limit or reject the *Mussallam* reasoning.<sup>114</sup> Alternatively, it argued that "because forfeitures under the RICO Act are, in effect, restitution to law enforcement agencies, the property forfeited under the Act is not subject to article IX, section 7."<sup>115</sup> In response to the State's first argument, the court reaffirmed *Mussallam* by restating the definition of "penal laws."<sup>116</sup> In reply to the State's second argument, however, the court did not express an opinion as to whether forfeitures under RICO are restitutionary in nature.<sup>117</sup> More importantly, the court declined to state an opinion "as to the constitutional validity of the RICO forfeiture provisions."<sup>118</sup>

A final shortcoming of *Currency* is its failure to clarify whether *Mussallam* extends to civil statutes other than the state RICO Act. In *Currency* the court was not asked to address the constitutional issue in the context of civil statutes other than RICO; however, the court's decision not to discuss the applicability of *Mussallam* to the RICO Act has left unanswered many questions concerning the status and future treatment by the court of dozens of other civil statutes.<sup>119</sup>

If *Mussallam* is applicable to civil statutes, the most important question left unanswered is which statutes will be affected and which statutes will remain undisturbed. The court in *Mussallam* adopted Professor Lawrence's definition of "penal laws."<sup>120</sup> A number of conclusions advocated by Professor Lawrence flow from this definition. For example, Professor Lawrence's underlying premise is that "penal laws" should be interpreted in such a manner that "better furthers the probable policy behind section 7—to assist in supplying a stable and sufficient source of funds for local school systems."<sup>121</sup> To this end, he offers several suggestions<sup>122</sup> that, if accepted, would have their greatest impact "on

112. *Mussallam v. Mussallam*, 321 N.C. 504, 506, 364 S.E.2d 364, 365 (1988).

113. See Amicus Curiae Brief of Appellant at 3-4, *Currency* (No. 7PA88).

114. See *id.*

115. *Currency*, 324 N.C. at 282, 378 S.E.2d at 4.

116. *Id.* at 283, 378 S.E.2d at 5.

117. *Id.* at 283, 378 S.E.2d at 4.

118. *Id.*

119. Examples of other North Carolina statutes that are enforced by state agencies or officers and "impose civil penalties for their violation" include environmental statutes; see, e.g., N.C. GEN. STAT. § 143-215.6 (1983) (water quality); *id.* § 143-215.17(b) (water use); *id.* § 143-215.36(b) (dam safety); *id.* § 143-215.91(a) (discharges of hazardous substances); *id.* § 19-6 (1983) (moral nuisance); *id.* § 75-15.2 (1985) (unfair competition); *id.* § 105-236 (1985) (revenue laws); see also Lawrence, *supra* note 103, at 50 (discussing other civil fines statutes).

120. See Lawrence, *supra* note 103, at 62.

121. *Id.*

122. Professor Lawrence invites the legislature to adopt the following guidelines:

First, "penal laws" are those that impose a monetary payment upon violators. Second, the terms "fines," "penalties," and "forfeitures" include any payment imposed for the purpose of punishment, even those associated with damage awards to private litigants. To this point, the reach of the constitutional provision is extensive. However, the third conclusion is that the provision includes only those fines, penalties, and forfeitures that accrue to the state; punitive monetary payments that are paid directly to private litigants are unaffected by its requirements. Fourth, of the total proceeds that do accrue to the state, only collection costs as permitted by the general assembly, may be deducted before the moneys are turned over to local school systems. Fifth, the provision applies to any penalty that accrues

civil penalties now imposed by or for the benefit of a variety of state agencies, which are now retained by state government."<sup>123</sup> For example, Professor Lawrence concludes that the "terms 'fines,' 'penalties,' and 'forfeitures,' include any payment imposed for the purpose of punishment, even those associated with damage awards to private litigants."<sup>124</sup> He limits this conclusion, however, by stating that it "includes only those fines, penalties, and forfeitures that accrue to the state; punitive monetary payments directly to private litigants are unaffected by its requirements."<sup>125</sup>

The extent to which the court in *Mussallam* intended to embrace Professor Lawrence's conclusions when it adopted his definition of "penal laws" is an open question. It is possible that the court fully intended to embrace Professor Lawrence's premise that the desired objective is to increase the funds received by the schools through section 7. It is equally likely that it intended to adopt his premises in a more limited, watered-down form. As a result of the court's decision not to address this issue in *Currency*, the fate of funds collected under civil statutes is in doubt.

The *Currency* case offered the North Carolina Supreme Court the opportunity to decide whether funds seized under the state RICO Act must be paid to state law enforcement agencies in accordance with the Act or whether they must be turned over to the public schools as directed by the North Carolina Constitution. The supreme court rejected this opportunity by holding that the forfeiture provisions of the Controlled Substances Act take precedence over the state RICO Act forfeiture provisions. In light of the new meaning given to article IX, section 7 in *Mussallam*, such a result is disappointing. Although *Mussallam* introduced the most straightforward and structured reading of article IX, section 7 to date, it gave rise to more questions than it could answer. By declining to decide whether *Mussallam* extends to the state RICO Act, the court has left the fate of proceeds collected under the Act and other civil statutes in a state of uncertainty.

It was easy for the court to adopt Professor Lawrence's definition of "penal laws" in *Mussallam*; it will be much more difficult for it to determine its correct application in a diverse number of contexts. Having adopted a broad, expansive interpretation of article IX, section 7 in *Mussallam*, the court will have to decide the extent to which it endorses the underlying policy affiliated with such an interpretation.<sup>126</sup> If *Mussallam* was intended to further the probable policy behind article IX, section 7 by assisting "in supplying a stable and sufficient source of funds for local school systems," the court must also determine whether this

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to state government, not just those that are susceptible to collection in the several counties. Last, section 7 does not extend to civil penalties voluntarily paid to local governments by ordinance violators, even when the city or county had the power, under the ordinance, to criminally prosecute the violator.

*Id.* at 82.

123. *Id.*

124. *Id.*

125. *Id.*

126. See *supra* text accompanying notes 96-102.

same policy should be applied to the state RICO Act.<sup>127</sup> At a time when education is funded by "large amounts of state and local moneys," and the law enforcement agencies are fighting an uphill battle against the all powerful drug trade, disrupting the funding of local police may be inappropriate.<sup>128</sup>

As a practical matter, the court's decision in *Currency* has produced the same result that a decision based on the constitutional question in favor of the schools would have produced. As long as the federal sharing program remains an alternative to the state RICO Act, state authorities will be able to circumvent the state constitution and retain forfeiture proceeds at the expense of the public schools.<sup>129</sup> To the extent that the state RICO forfeiture provisions were used before *Currency*, they are now a dead letter. *Currency* sent a message to state and local police that any proceeds collected under the state RICO forfeiture provisions will go to the schools.<sup>130</sup> Although the fate of forfeited proceeds collected under the state RICO Act is still an open question, state authorities have no incentive to use the forfeiture provisions of the Act when they are certain to receive funds collected under the federal provision.

While a question remains as to whether the policy of the state constitution or the objectives of the RICO Act should prevail, the legislature certainly did not intend for the RICO forfeiture provisions to lie idle. Unfortunately, that will be the result until either the legislature acts to amend the state constitution or the supreme court is invited to revisit this issue.

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127. See Lawrence, *supra* note 103, at 62 for a discussion of the supporting policy.

128. *Id.*

129. See *supra* text accompanying notes 89-92.

130. Telephone interview with Charles Hensey, Special Deputy Attorney General at the North Carolina Department of Justice (Jan. 16, 1990).