

Garden State CLE presents:

Give me back my guns:
Procedures for the forfeiture or return
of seized firearms.



Lesson Plan

Part I - Seizure of firearms - In general

a.) In New Jersey, firearms come into the possession of the prosecutor in a variety of ways, each of which has its own track for weapons disposition.

1.) Firearms possessed/owned by criminal suspects and retained as evidence. Typically, these weapons are kept by the State until case disposition and then destroyed. In the event of an acquittal, dismissal or diversion, they may be returned to the owner provided that none of the disqualifications in NJSA 2C:58-3(c) exists.

2.) Stolen/lost firearms – recovered from criminal suspects and owned by innocent victims. Following case disposition and time to appeal, these weapons may be returned to the rightful owners, provided that firearm can be legally possessed in the jurisdiction where the victim resides. (e.g. automatic weapons)

3.) Contraband – seized firearms that may not be possessed in New Jersey. These weapons automatically forfeit to the State and are usually destroyed. [NJSA 2C:64-1]

4.) Domestic Violence – Firearms that are seized or surrendered (see discussion below).



b.) The following are lawful justification for the seizure of firearms under New Jersey law:

1.) Contraband – NJSA 2C:64-1

The *New Jersey Code of Criminal Justice* recognizes a distinction between two kinds of contraband.

A.) Prima facie contraband includes controlled dangerous substances; firearms unlawfully possessed, carried, acquired or used; illegally-possessed gambling devices; untaxed cigarettes; and untaxed special fuel. *N.J.S.A. 2C:64-1a(1)*. Generally speaking, *prima facie* contraband is automatically forfeited once seized by the State, subject to certain limitations. See [N.J.S.A. 2C:64-2](#).

B.) Non-prima facie contraband, also known as derivative contraband, is itself innocent in nature but has been used or is intended to be used in furtherance of an unlawful activity or is the proceeds of illegal activities. *N.J.S.A. 2C:64-1a(2)-(4)*. To enforce forfeiture of derivative contraband the State must bring a civil action within ninety days of the seizure against the property sought to be forfeited. *N.J.S.A. 2C:64-3a*. In that action the State must prove by a preponderance of the evidence that the seized property was connected to unlawful activity. The “unlawful activity” must be an indictable offense and cannot be merely a d/p. The statute does not require that anyone ever be convicted of the underlying crime. The fact that a prosecution involving seized property terminates without a conviction does not preclude forfeiture proceedings against the property.



2.) Criminal Evidence

A.) Assuming a lawful search, nothing in the language of the Fourth Amendment supports any distinction between mere evidence, and contraband, fruits or instrumentalities of crime. Each may be seized by law enforcement based upon probable cause to believe that the item can be associated with a violation of the criminal law. *Warden v. Hayden*, 387 U.S. 294 (1967).



3.) Domestic violence case - NJSA 2C:25-21(d).

1.) In addition to a law enforcement officer's authority to seize any weapon that is contraband, evidence or an instrumentality of crime, a law enforcement officer who has probable cause to believe that an act of domestic violence has been committed shall:

(a) question persons present to determine whether there are weapons on the premises; and

(b) upon observing or learning that a weapon is present on the premises, seize any weapon that the officer reasonably believes would expose the victim to a risk of serious bodily injury. If a law enforcement officer seizes any firearm pursuant to this paragraph, the officer shall also seize any firearm purchaser identification card or permit to purchase a handgun issued to the person accused of the act of domestic violence.



4.) As part of a temporary restraining order (TRO) NJSA 2C:25-28(j).

Forbid the defendant from possessing any firearm or other weapon in 2C:39-1(r)

Order the police to search and seize such firearms or weapons.

Seize the defendant's Firearms purchaser identification card.

Seize the defendant's Permit to purchase.

Emergency relief may include forbidding the defendant from returning to the scene of the domestic violence, forbidding the defendant from possessing any firearm or other weapon enumerated in subsection r. of [N.J.S.2C:39-1](#), ordering the search for and seizure of any such weapon at any location where the judge has reasonable cause to believe the weapon is located and the seizure of any firearms purchaser identification card or permit to purchase a handgun issued to the defendant and any other appropriate relief.



5.) As part of a final restraining order (FRO) NJSA 2C:25-29(b).

NJSA 2C:25-29(b) - Bar from possessing, owning, controlling.

In proceedings in which complaints for restraining orders have been filed, the court shall grant any relief necessary to prevent further abuse. In addition to any other provisions, any restraining order issued by the court shall bar the defendant from purchasing, owning, possessing or controlling a firearm and from receiving or retaining a firearms purchaser identification card or permit to purchase a handgun pursuant to [N.J.S.2C:58-3](#) during the period in which the restraining order is in effect or two years whichever is greater

NJSA 2C:25-29(b)(16) - Search for additional firearms

In addition to the order required by this subsection prohibiting the defendant from possessing any firearm, the court may also issue an order prohibiting the defendant from possessing any other weapon enumerated in subsection r. of [N.J.S.2C:39-1](#) and ordering the search for and seizure of any firearm or other weapon at any location where the judge has reasonable cause to believe the weapon is located. The judge shall state with specificity the reasons for and scope of the search and seizure authorized by the order.



Part II - Criteria for return of fire arms & permits seized as part of a DV case

a.) NJSA 2C:25-21(d)(3) carries a statutory presumption that seized weapons and permits will be returned except upon an order of the Family Court.

b.) Both the burden of production and proof is on the State. The forfeiture proceedings are to be conducted in a summary fashion and the burden of proof is upon the State to show, by a preponderance of the evidence, that forfeiture is legally warranted. [State v. Cordoma, 372 N.J.Super. 524, 533 (App. Div. 2004).]



c.) To qualify for firearm and permit return, your client will have to meet the following FIVE criteria:

1. There has been a demand and notice sent to the for a forfeiture hearing in Family Court within 45 days of seizure. If the prosecutor does not institute an action within 45 days, the seized weapons must be returned to the owner. [NJSA 2C:25-21 (d)(3)]; [The 45 day limitation begins to run when either the seized weapons are turned over to the prosecutor or the prosecutor is notified of the seizure. State v. Saavedra, 276 NJ Super. 289, 294 (App. Div. 1994); State v. McGovern, 385 NJ Super. 428 (App. Div. 2006); In re Seized firearms ID of Hand, 304 NJ Super. 360 (App. Div. 1997)]

2. The underlying criminal complaints (if any) were resolved as not guilty, or dismissed with insufficient evidence to indict (or expunged) [NJSA 2C:25-21 (d)(3)]; [But dismissal is no bar to forfeiture proceedings. State v. Volpini, 291 NJ Super. 401 (App. Div. 1996)]

3. Underlying TRO or FRO (if any) dismissed or Court determines a domestic violence situation no longer exists [NJSA 2C:25-21(d)(3)];]; [But dismissal is no bar to forfeiture proceedings. State v. Volpini, 291 NJ Super. 401 (App. Div. 1996)]

4. The firearm can be lawfully possessed in New Jersey (i.e. not prohibited/contraband);

5. No disqualifications under NJSA 2C:58-3(c) [NJSA 2C:25-21(d)(3)].



d.) NJSA 2C:58-3(c) provides as follows:



Who may obtain. No person of good character and good repute in the community in which he lives, and who is not subject to any of the disabilities set forth in this section or other sections of this chapter, shall be denied a permit to purchase a handgun or a firearms purchaser identification card, except as hereinafter set forth. No handgun purchase permit or firearms purchaser identification card shall be issued:

(1) To any person who has been convicted of any crime, or a disorderly persons offense involving an act of domestic violence as defined in section 3 of [P.L.1991, c. 261 \(C.2C:25-19\)](#), whether or not armed with or possessing a weapon at the time of the offense; [See also [18 U.S.C.A. § 922\(g\)\(9\)](#), the Lautenberg Amendment to the Gun Control Act. See *State v. Wahl*, 365 N.J.Super. 356 (App. Div. 2004), holding that a disorderly persons' offense meets the definition of a "misdemeanor crime of domestic violence" under federal law. See also *State v. SA*, 290 NJ Super. 240 (App. Div. 1996) (federal law prohibits return of weapons)]

(2) To any drug dependent person as defined in section 2 of P.L.1970, c. 226 ([C.24:21-2](#)), to any person who is confined for a mental disorder to a hospital, mental institution or sanitarium, or to any person who is presently an habitual drunkard; [See *State v. Freysinger*, 311 N.J.Super. 509 (App. Div. 1998)]

(3) To any person who suffers from a physical defect or disease which would make it unsafe for him to handle firearms, to any person who has ever been confined for a mental disorder, or to any alcoholic unless any of the foregoing persons produces a certificate of a medical doctor or psychiatrist licensed in New Jersey, or other satisfactory proof, that he is no longer suffering from that particular disability in a manner that would interfere with or handicap him in the handling of firearms; to any person who knowingly falsifies any information on the application form for a handgun purchase permit or firearms purchaser identification card; [*State v. Cordoma*, 372 NJ Super. 524 (App. Div. 2004) (psychiatrically unfit)]

(4) To any person under the age of 18 years for a firearms purchaser identification card and to any person under the age of 21 years for a permit to purchase a handgun;

(5) To any person where the issuance would not be in the interest of the public health, safety or welfare; [In re JDW, 149 N.J. 108 (1997); See also NJSA 2C:25-21(d)(3)]

(6) To any person who is subject to a restraining order issued pursuant to the “Prevention of Domestic Violence Act of 1991,” [P.L.1991, c. 261 \(C.2C:25-17 et seq.\)](#) prohibiting the person from possessing any firearm;

(7) To any person who as a juvenile was adjudicated delinquent for an offense which, if committed by an adult, would constitute a crime and the offense involved the unlawful use or possession of a weapon, explosive or destructive device or is enumerated in subsection d. of section 2 of [P.L.1997, c. 117 \(C.2C:43-7.2\)](#);

(8) To any person whose firearm is seized pursuant to the “Prevention of Domestic Violence Act of 1991,” [P.L.1991, c. 261 \(C.2C:25-17 et seq.\)](#) and whose firearm has not been returned; [See In re Weapons of CLH, 443 NJ Super. 48 (App. Div. 2015).]

(9) To any person named on the consolidated Terrorist Watch-list maintained by the Terrorist Screening Center administered by the Federal Bureau of Investigation.



e.) Case Law

a.) Assault weapons

State v. Six-shot colt .357, 365 NJ Super. 411 (Chn. Div. 2003).

A close reading of the statute [NJSA 2C:25-21(d)(3)] provides the following four general theories under which the State can proceed to seek authorization for forfeiture:

- (1) Violation of the laws governing the use, possession or ownership of weapons;
- (2) Grounds provided for in the initial rejection or later revocation of the permits or licenses to possess or carry weapons (2C:58-3);
- (3) That the owner is unfit to possess weapons; or
- (4) That the owner poses a threat to the public in general or a person or persons in particular.

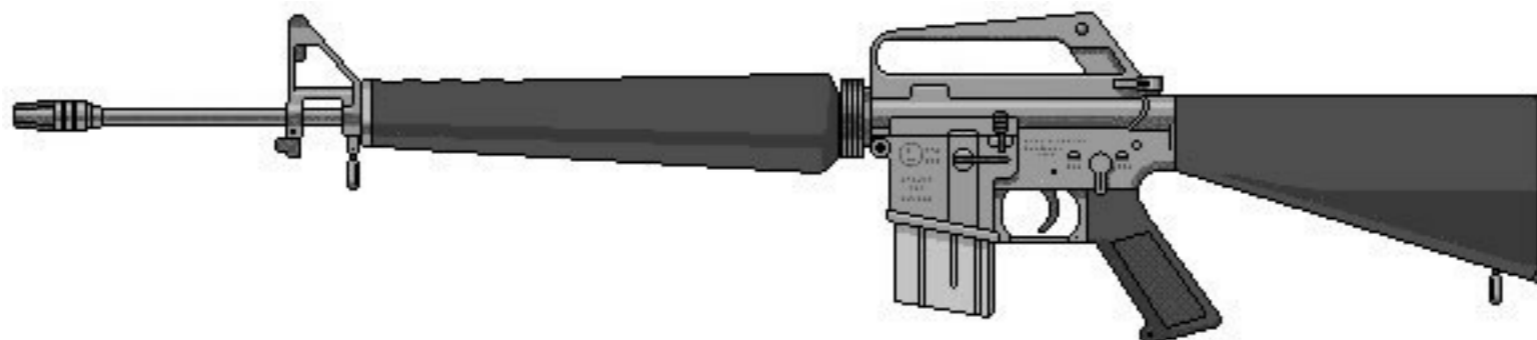
Where the underlying domestic violence complaint is dismissed, [the established case law] directs that we proceed *in para materia* with N.J.S.A. 2C:58-3c(5), which authorizes a weapons denial:

To any person where the issuance would not be in the interest of the public health, safety or welfare.



[The defendant's] conduct in knowingly possessing the assault firearm contrary to the laws governing use, possession or ownership of weapons, is a sufficient and specific basis under [N.J.S.A. 2C:25-21\(d\)](#) for the court to order a forfeiture. There is no necessity for the court to enter into an analysis of whether the additional element of possession of an assault weapon makes [the defendant] “unfit.” The violation of the laws concerning possession of the assault rifle, in and of itself, is an independent basis for forfeiture under the statute. Clearly a finding that the defendant has violated the gun laws such as to be a basis for forfeiture under 2C:25-21(d), would constitute a basis for finding that his continued possession of weapons or his firearms ID card would not be in the interest of public health, safety or welfare.

[The defendant's] selective compliance with the gun laws and violation of the law and declared policy of this state concerning possession of assault weapons works as a basis for the forfeiture of all the firearms which were seized during the domestic violence incident, along with his firearms purchasers identification card. Though not a factor in this decision, the court is also mindful that [the defendant] is facing indictable charges for the possession of the assault rifle, for which any conviction would result in the same disposition by operation of law



In re CLH's weapons, 443 NJ Super. 48 (App. Div. 2015)

The trial court found that five of the weapons seized from C.L.H. and his wife's home under the Prevention of Domestic Violence Act were assault firearms. C.L.H. has not challenged that finding on appeal, and because it is supported by substantial credible evidence in the record, we do not disturb it. Those weapons are contraband and can never lawfully be returned to C.L.H. Because the five assault firearms were seized pursuant to the Prevention of Domestic Violence Act and cannot be returned to C.L.H. under the Domestic Violence Forfeiture Statute, he is expressly disqualified from obtaining a handgun purchase permit or firearms purchaser identification card under the Gun Control Law, [N.J.S.A. 2C:58-3\(c\)\(8\)](#), and thus from regaining possession of his seventy-one other firearms and his firearms purchaser identification card held by the prosecutor.

To the extent the trial judge determined forfeiture to be “not equitable,” because C.L.H. was not a defendant in the domestic violence complaint, we think he erred. The law is well settled that the Family Part has the authority to order a weapon forfeiture following the dismissal of a domestic violence complaint regardless of whether the dismissal was voluntary or for lack of evidence.



b.) Health, safety and welfare



In re Weapons of FM, 225 NJ 487 (2016).

The judge here, relying on the Second Amendment to the United States Constitution, stated that forfeiture of F.M.'s weapon and identification card required “more than just a showing that some danger might exist.” While our law governing regulation of handgun purchase and possession is circumscribed by the Second Amendment to the United States Constitution, a limitation to the right to bear arms is the “public health, safety or welfare” disqualifier. This disqualifier requires a showing by a preponderance of the evidence that possession of a firearm by the affected individual “would not be in the interest of the public health, safety or welfare.”

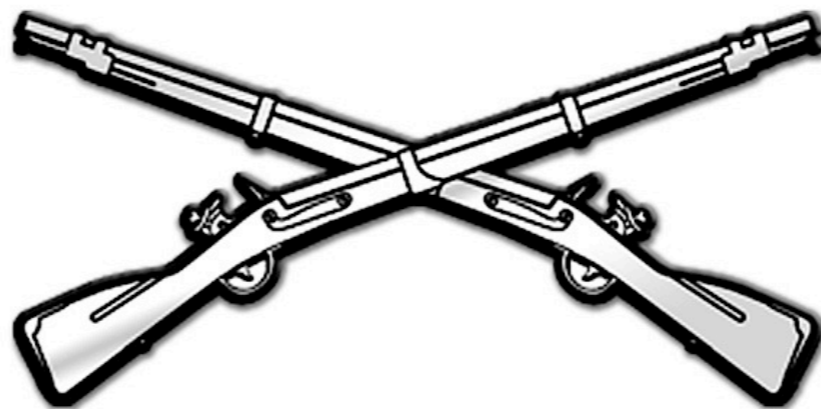
The Family Part here concluded that the State failed to meet its burden of proving that possession of a firearm by F.M. would not be “in the interest of the public health, safety or welfare.” In reaching this conclusion, the court found that [the ex-wife] was not credible; the experts relied too heavily on [the ex-wife's] version of events; the experts had not diagnosed F.M. with a disorder; and F.M. had never used a gun inappropriately. The Family Part also found that the divorce had been finalized, thereby reducing the occasion for conflict.

First, we note that the judge incorrectly stated the applicable standard when he held that the State, to prevail on its motion to forfeit F.M.'s weapon and identification card, was required to prove “more than just a showing that some danger might exist.” In fact, the State was required only to show by a preponderance of the evidence that F.M.'s possession would not be “in the interest of the public health, safety or welfare.”

Furthermore, the Family Part erred by interpreting [N.J.S.A. 2C:58-3\(c\)\(5\)](#) as requiring that F.M. suffer from a “disorder.” As noted above, [N.J.S.A. 2C:58-3\(c\)\(5\)](#) is meant to address “individual unfitness, where, though not dealt with in the specific statutory enumerations, the issuance of the permit or identification card would nonetheless be contrary to the public interest.” [N.J.S.A. 2C:58-3\(c\)\(5\)](#) was not designed to disqualify only an individual who possesses a diagnosable disorder. Such mental illnesses are addressed in two separate provisions of the statute. Thus, even though F.M. might not be disqualified from possessing a firearm under [parts of the statute], he may nonetheless be disqualified under [N.J.S.A. 2C:58-3\(c\)\(5\)](#) because of, for example, elements of “narcissistic, anti-social, or [paranoid personality disorder](#)” as explained [by the expert witness.]

In re Application of ZL, 440 NJ Super. 351 (App. Div. 2015)

Finally, the facts of this case compel the conclusion that the order upholding denial of the permits was proper. The 1998 incident was not isolated and aberrational, as appellant claims. Five times, between 2003 and 2011, police officers responded to appellant's home on complaints by his wife of domestic disputes. Each such complaint, despite appellant's characterizations, wherein appellant's spouse felt compelled to require police assistance, is imbued with the potential for violent reaction. The presence of a firearm in such a household enhances the potential for such reactions to become lethal.



Part III - DV Weapons Forfeiture procedure NJSA 2C:25-21(d) **(3).**

Weapons seized in accordance with the “Prevention of Domestic Violence Act of 1991”, shall be returned to the owner except upon order of the Superior Court.

The prosecutor who has possession of the seized weapons may, upon notice to the owner, petition a judge of the Family Part of the Superior Court, Chancery Division, within 45 days of seizure, to obtain title to the seized weapons, or to revoke any and all permits, licenses and other authorizations for the use, possession, or ownership of such weapons pursuant to the law governing such use, possession, or ownership, or may object to the return of the weapons on such grounds as are provided for the initial rejection or later revocation of the authorizations, or on the grounds that the owner is unfit or that the owner poses a threat to the public in general or a person or persons in particular.

A hearing shall be held and a record made thereof within 45 days of the notice provided above. No formal pleading and no filing fee shall be required as a preliminary to such hearing. The hearing shall be summary in nature. Appeals from the results of the hearing shall be to the Superior Court, Appellate Division, in accordance with the law.

If the prosecutor does not institute an action within 45 days of seizure, the seized weapons shall be returned to the owner.



After the hearing the court shall order the return of the firearms, weapons and any authorization papers relating to the seized weapons to the owner if the court determines the owner is not subject to any of the disabilities set forth in N.J.S.2C:58-3c. and finds that the complaint has been dismissed at the request of the complainant and the prosecutor determines that there is insufficient probable cause to indict; or if the defendant is found not guilty of the charges; or if the court determines that the domestic violence situation no longer exists. Nothing in this act shall impair the right of the State to retain evidence pending a criminal prosecution. Nor shall any provision of this act be construed to limit the authority of the State or a law enforcement officer to seize, retain or forfeit property pursuant to chapter 64 of Title 2C of the New Jersey Statutes.



Part IV - Disposition of seized weapons in a DV case - NJSA 2C:25-21(d)(3).

If, after the hearing, the court determines that the weapons are not to be returned to the owner, the court may:

(a) With respect to weapons other than firearms, order the prosecutor to dispose of the weapons if the owner does not arrange for the transfer or sale of the weapons to an appropriate person within 60 days; or

(b) Order the revocation of the owner's firearms purchaser identification card or any permit, license or authorization, in which case the court shall order the owner to surrender any firearm seized and all other firearms possessed to the prosecutor and shall order the prosecutor to dispose of the firearms if the owner does not arrange for the sale of the firearms to a registered dealer of the firearms within 60 days; or

(c) Order such other relief as it may deem appropriate. When the court orders the weapons forfeited to the State or the prosecutor is required to dispose of the weapons, the prosecutor shall dispose of the property as provided in [N.J.S.2C:64-6](#).

(4) A civil suit may be brought to enjoin a wrongful failure to return a seized firearm where the prosecutor refuses to return the weapon after receiving a written request to do so and notice of the owner's intent to bring a civil action pursuant to this section. Failure of the prosecutor to comply with the provisions of this act shall entitle the prevailing party in the civil suit to reasonable costs, including attorney's fees, provided that the court finds that the prosecutor failed to act in good faith in retaining the seized weapon.

(5) No law enforcement officer or agency shall be held liable in any civil action brought by any person for failing to learn of, locate or seize a weapon pursuant to this act, or for returning a seized weapon to its owner.

Part V - Return or forfeiture of weapons in non-DV cases - NJSA 2C:64-3.

a.) Prima facie contraband weapons are forfeit to the state. NJSA 2C:64-2

Except as provided in [N.J.S. 2C:35-21](#), prima facie contraband shall be retained by the State until entry of judgment or dismissal of the criminal proceeding, if any, arising out of the seizure. Thereafter, prima facie contraband shall be forfeited to the entity funding the prosecuting agency involved, subject to the rights of owners and others holding interests pursuant to [section 2C:64-5](#). Otherwise, they will likely be destroyed pursuant to NJSA 2C:64-6.



b.) Procedure for other weapons - *In rem* civil action NJSA 2c:64-2

Forfeiture procedures. a. Whenever any property other than prima facie contraband is subject to forfeiture under this chapter, such forfeiture may be enforced by a civil action, instituted within 90 days of the seizure and commenced by the State and against the property sought to be forfeited.

b. The complaint shall be verified on oath or affirmation. It shall describe with reasonable particularity the property that is the subject matter of the action and shall contain allegations setting forth the reason or reasons the article sought to be or which has been seized is contraband.

c. Notice of the action shall be given to any person known to have a property interest in the article. In addition, the notice requirements of the Rules of Court for an in rem action shall be followed.

d. The claimant of the property that is the subject of an action under this chapter shall file and serve his claim in the form of an answer in accordance with the Rules of Court. The answer shall be verified on oath or affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made in behalf of the person entitled to possession by an agent, bailee or attorney, it shall state that he is duly authorized to make the claim.

e. If no answer is filed and served within the applicable time, the property seized shall be disposed of pursuant to [N.J.S.2C:64-6](#).

f. If an answer is filed, the Superior or county district court shall set the matter down for a summary hearing as soon as practicable. Upon application of the State or claimant, if he be a defendant in a criminal proceeding arising out of the seizure, the Superior or county district court may stay proceedings in the forfeiture action until the criminal proceedings have been concluded by an entry of final judgment.

g. Any person with a property interest in the seized property, other than a defendant who is being prosecuted in connection with the seizure of property may secure its release pending the forfeiture action unless the article is dangerous to the public health, safety and welfare or the State can demonstrate that the property will probably be lost or destroyed if released or employed in subsequent criminal activity. Any person with such a property interest other than a defendant who is being prosecuted, prior to the release of said property shall post a bond with the court in the amount of the market value of the seized item.



h. The prosecuting agency with approval of the entity funding such agency, or any other entity, with the approval of the prosecuting agency, where the other entity's law enforcement agency participated in the surveillance, investigation or arrest which is the subject of the forfeiture action, may apply to the Superior Court for an order permitting use of seized property, pending the disposition of the forfeiture action provided, however, that such property shall be used solely for law enforcement purposes. Approval shall be liberally granted but shall be conditioned upon the filing of a bond in an amount equal to the market value of the item seized or a written guarantee of payment for property which may be subject to return, replacement or compensation as to reasonable value in the event that the forfeiture is refused or only partial extinguishment of property rights is ordered by the court.

i. If the property is of such nature that substantial difficulty may result in preserving its value during the pendency of the forfeiture action, the Superior or county district court may appoint a trustee to protect the interests of all parties involved in the action.

j. Evidence of a conviction of a criminal offense in which seized property was either used or provided an integral part of the State's proofs in the prosecution shall be considered in the forfeiture proceeding as creating a rebuttable presumption that the property was utilized in furtherance of an unlawful a



c.) Affirmative defenses in a firearms' forfeiture case. 2C:64-5

Seized Property; Rights of Owners and Others Holding Interests. a. No forfeiture under this chapter shall affect the rights of any lessor in the ordinary course of business or any person holding a perfected security interest in property subject to seizure unless it shall appear that such person had knowledge of or consented to any act or omission upon which the right of forfeiture is based. Such rights are only to the extent of interest in the seized property and at the option of the entity funding the prosecuting agency involved may be extinguished by appropriate payment.

b. Property seized under this chapter shall not be subject to forfeiture if the owner of the property establishes by a preponderance of the evidence that the owner was not involved in or aware of the unlawful activity and that the owner had done all that could reasonably be expected to prevent the proscribed use of the property by an agent. A person who uses or possesses property with the consent or knowledge of the owner is deemed to be the agent of the owner for purposes of this chapter.

c. Property seized under this chapter shall not be subject to forfeiture if the property is seized while entrusted to a person by the owner or the agent of the owner when the property has been entrusted to the person for repairs, restoration or other services to be performed on the property, and that person, without the owner's knowledge or consent, uses the property for unlawful purposes.



d.) Destruction of firearms subject to forfeiture - 2C:64-6.

Disposal of Forfeited Property. a. Property which has been forfeited shall be destroyed if it can serve no lawful purpose or it presents a danger to the public health, safety or welfare. All other forfeited property or any proceeds resulting from the forfeiture and all money seized pursuant to this chapter shall become the property of the entity funding the prosecuting agency involved and shall be disposed of, distributed, appropriated and used in accordance with the provisions of this chapter.



Garden State CLE presents:

Give me back my guns:
Procedures for the forfeiture or return
of seized firearms.



Lesson Plan