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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

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**Bill No:** SB 443                      **Hearing Date:** April 21, 2015  
**Author:** Mitchell  
**Version:** April 6, 2015  
**Urgency:** No                              **Fiscal:** Yes  
**Consultant:** JM

**Subject:** *Forfeiture: Controlled Substances*

## HISTORY

**Source:** Drug Policy Alliance; American Civil Liberties Union; Institute for Justice

**Prior Legislation:** AB 639 (Norby) - 2012, Died in Senate Appropriations  
SB 1866 (Vasconcellos) - 2000, Vetoed  
SB 1255 (Hughes) - Ch. 1022, Stats. 1994  
AB 114 (Burton) - Ch. 664, Stats. 1994

**Support:** Unknown

**Opposition:** California District Attorneys Association

## PURPOSE

*The purpose of this bill is to 1) require a criminal conviction for forfeiture of alleged cash drug proceeds and assets in excess of \$25,000; 2) reduce the percentage of forfeiture proceeds distributed to prosecutors, law enforcement and the General Fund; 3) distribute 5% of forfeiture proceeds to each of the courts and public defense; 4) require that California standards be met before federal forfeiture proceeds can be distributed to a state of local law enforcement agency through equitable sharing; 5) grant a right to counsel for indigent defendants in civil drug forfeiture matters; 6) authorize attorneys' fees and costs for prevailing defendants in forfeiture cases; 7) prohibit adoption by federal authorities of a state forfeiture matter; and 8) require the California Department of Justice's annual asset forfeiture report to include data on forfeitures initiated under California law, federal adoptions, forfeiture case that were prosecuted under federal law, the number of suspects charged with drug crimes, the number of criminal charges brought under each of state and federal law and the disposition of these cases.*

*Existing law* establishes an asset-forfeiture procedure for drug-related cases. (Health & Saf. Code §§ 11469-11495.)

*Existing law* provides that the principal objective of forfeiture is law enforcement and that forfeiture shall be conducted with due process. (Health & Saf. Code § 11469, subd. (a).)

*Existing law* sets out detailed procedures for a drug forfeiture action, including: the filing of a petition for forfeiture within one year of seizure, notice of seizure, publication of notice, the right to a jury trial, and a motion for return of property. (Health & Saf. Code § 11488.4.)

*Existing law* requires a conviction in an underlying criminal case and provides that the burden of proof in the (civil) judicial forfeiture action shall be beyond a reasonable doubt. (Health & Saf. Code § 11488.4, subd. (i)(3).)

*Existing law* does not require a conviction on an underlying drug offense where the property sought to be forfeited is cash or negotiable securities over \$25,000, and allows forfeiture upon a burden of proof of “clear and convincing evidence” under these circumstances. (Health & Saf. Code § 11488.4, subd. (i)(4).)

*Existing law* allows for administrative (nonjudicial) forfeiture for cases involving personal property worth \$25,000 or less. A full hearing is required if a claim as to the property is filed, as specified. (Health & Saf. Code § 11488.4, subd. (j).)

*Existing law* provides a scheme for the distribution of fund from forfeitures and seizures. Specifically, after distribution to any bona fide innocent owners and reimbursement of expenses, 65% of proceeds go to participating law enforcement agencies, 10% to the prosecutorial agency, and 24% to the General Fund. (Health & Saf. Code § 11489.)

*Existing law* requires the Department of Justice (DOJ) to publish an annual report detailing specified information on forfeiture actions. (Health & Saf. Code § 11495, subd. (c).)

*This bill* requires a conviction for cultivation or manufacture of a controlled substance before judgment of forfeiture is entered.

*This bill* provides that a conviction is required before judgment is entered in a forfeiture matter involving cash or negotiable instruments of a value in of at least \$25,000.

*This bill* provides that the prosecutor shall prove beyond a reasonable doubt that cash or negotiable instruments with a value of at least \$25,000 meet the requirement for forfeiture.

*This bill* provides that if a defendant in the criminal case associated with the forfeiture action is represented by appointed counsel, counsel shall be appointed in the forfeiture action.

*This bill* provides that a defendant who prevails in a forfeiture action shall be entitled to litigation costs and attorneys’ fees.

*This bill* prohibits a state or local law enforcement agency from transferring property seized under state law for adoption by a federal agency.

*This bill* provides that any forfeited property received by state or local law enforcement agencies pursuant to federal equitable sharing or adoption laws and rules shall be deposited and distributed according to state law.

*This bill* provides that a conviction is required before forfeiture can be ordered if the defendant fails to appear in the underlying criminal action.

*This bill* provides that 60% of forfeiture proceeds shall be distributed to each state or local agency that participated in a forfeiture action, in proportion to the contribution of the agency.

*This bill* provides that 5% of forfeiture proceeds shall be distributed to the prosecuting agency that processed the forfeiture.

*This bill* provides that 10% of forfeiture proceeds shall be disbursed to the court where the forfeiture action occurred. These funds shall be deposited to the newly created “Judicial Asset Forfeiture Fund in the State Treasury and, upon legislative appropriation, expended for court administration in the county of forfeiture.

*This bill* provides that 5% of forfeiture proceeds shall be disbursed to the public defender’s office or provider of indigent defense services in the jurisdiction of the forfeiture action.

*This bill* strikes the provision in existing law under which 1% of forfeiture proceeds are paid to a nonprofit organization of prosecutors for use in training prosecutors and law enforcement agencies in forfeiture laws and ethics.

*This bill* provides that 20% of forfeiture proceeds shall be deposited into the General Fund.

*This bill* requires the Attorney General to annually report on the following additional matters:

- The number of forfeiture cases initiated under state law;
- The number of cases adopted by the federal government;
- The number of cases initiated in joint federal-state actions that were prosecuted under federal law;
- The number of suspects charged with a controlled substance violation; and
- The disposition of cases.

## COMMENTS

### 1. Need for This Bill

The author’s background information includes a summary of the provisions in the bill. The summary provides:

*Conviction Requirement for Seizure of Cash in Excess of \$25,000:* Under California’s existing forfeiture statute, the state can forfeit a person’s cash or other negotiable instruments in excess of \$25,000 without first convicting the person of an underlying or related criminal offense. In contrast, a conviction is required prior to forfeiture of cash less than \$25,000, real property, boats, cars, airplanes, and other personal property. This leaves California’s civil asset forfeiture law ripe for abuse by law enforcement, and permits innocent Californians to have their property taken by the government without due process. SB 443 would require a conviction as a precondition to cash forfeitures both over and under \$25,000. The bill would create uniformity in California’s drug-related asset forfeiture law and ensure a more concrete connection between the forfeited property and criminal activity.

*Right to Counsel in the Civil Asset Forfeiture Proceeding:* Property owners have the right to challenge civil asset forfeiture actions, but indigent defendants have no right to appointed counsel. Forfeiture actions are complicated and costly to challenge, and typically require an experienced attorney. Innocent property owners who can neither afford counsel nor adequately represent themselves are often forced to give up their property simply because they cannot contend against the government. To remedy this problem, SB 443 would require the court to appoint counsel for indigent property owners in forfeiture proceedings.

*Attorneys' Fees:* Current law does not provide for the recovery of attorneys' fees for successful asset forfeiture claimants. SB 443 would allow them claimants to recover reasonable costs and attorneys' fees.

*Expanded Reporting Requirements:* The Attorney General must publish an annual asset forfeiture report. To provide greater transparency and help prevent abusive practices, SB 443 would require that the report include information about the number of forfeiture actions initiated by state or local agencies under California law, the number of cases adopted by the federal government, the number of cases initiated by a joint federal-state action that were prosecuted under federal law, the number of suspects charged with a controlled substance violation, the number of alleged criminal offenses that were prosecuted under federal or state law, and the disposition of cases.

*Distribution of Forfeiture Proceeds:* Under existing law, 65% of asset forfeiture proceeds are distributed to law enforcement, 10% to the prosecuting agency, 24% to the general fund and 1% for training of prosecutors on asset forfeiture. (According the annual Attorney General's Report, most counties give this money to California District Attorneys Association). Because this bill could require more resources for courts and indigent defense in forfeiture actions, this bill would reallocate some forfeitures proceeds for these purposes. Specifically, the bill would reduce proceeds to law enforcement and prosecutors to 60% and 5% respectively, reduce the General Fund allocation to 20%, eliminate the 1% to a nonprofit association of prosecuting attorneys, and allocate 10% to the courts and 5% to the public defender's office in the jurisdiction where the forfeitures occur.

*Prohibits "Adoptive Forfeitures":* Pursuant to so-called "equitable sharing" of assets transferred to federal control, local and state law enforcement may circumvent California's more stringent asset forfeiture laws, take advantage of more lenient federal law, and receive up to 80% of the proceeds from the forfeiture action. Through this procedure, local law enforcement officers who seize property pursuant to an alleged state law violation apply to a federal agency to "adopt" the property and initiate federal forfeiture proceedings. This bill would prohibit local and state law enforcement from seeking federal adoption of seized property for federal forfeiture. It would neither affect the ability of the federal government to take possession of property or California law enforcement to engage in truly joint operations with federal agencies/

*Limits Equitable Sharing in Joint Investigations:* This bill provides that local and state law enforcement can only receive forfeiture proceeds pursuant to joint

federal- state investigations where there is a conviction in an underlying or related criminal action for an offense that authorizes forfeiture under California law. SB 443 requires that any forfeiture proceeds paid to local and state law enforcement pursuant to joint investigations with federal agencies be distributed according to state law. SB 443 further states that, to the extent that federal law does not permit such a distribution, state and local law enforcement agencies are prohibited from receiving such funds.

## 2. The Major Differences Between California and Federal Forfeiture Law

Federal forfeiture law is less burdensome for law enforcement and gives law enforcement more benefits than state law. Some ways in which California and federal provisions differ are:

- Conviction:
  - California: Conviction generally required, except where the property seized was cash in excess of \$25,000. (Health & Saf. Code §11488.4, subd. (i)(3))
  - Federal: No conviction required. (18 U.S.C. § 981.)
- Burden of proof:
  - California: Beyond a reasonable doubt for most cases. The burden is clear and convincing evidence (with no underlying conviction) in cases involving at least \$25,000 in cash. (Health & Saf. Code §11488.4, subd. (i)(4).)
  - Federal: Preponderance of the evidence. (18 U.S.C. § 983 (c)(1).)
- Administrative forfeiture (limited or no court hearings):
  - California: Only available for cases involving personal property worth \$25,000 or less. (Health & Saf. Code §11488.4, subd. (i)(4).)
  - Federal: Available for any amount of currency and personal property valued at \$500,000 or less, including cars, guns, and boats. (19 U.S.C. § 1607 (a).)
- Use of forfeited assets:
  - California: No direct use of seized assets, such as vehicles or planes. (Health & Saf. Code § 11489.)
  - Federal: Seizing agency can use the asset or transfer it to a state or local agency that participated in the proceedings. (18 U.S.C. § 881 (e)(1)(A).)
- Disbursement of Forfeited Assets:
  - California: 65% to law enforcement agency, 10% to prosecuting agency, 24% to general fund, 1% to law enforcement training. (Health & Saf. Code § 11489, subd. (b).)

- Federal: 80% (maximum) of seized proceeds to the agency or agencies involved in the seizure of the assets. (21 U.S.C. § 881 (e); U.S. DOJ, Guide to Equitable Sharing, p. 12.)
- Exemptions for Family Property, other Limitations:
  - California: No forfeiture of family residence partly owned by innocent party and no forfeiture of vehicle necessary for family transportation. (Health & Saf. Code §11470, subds. (e) and (g).
  - Federal: No family exemption
  - California: If property subject to seizure is a boat, vehicle or other conveyance, the drugs associated with the vehicle must be of a specified weight or volume. (Health & Saf. Code §1147, subd. (e).
  - Federal law: No weight or volume limits apply under federal law. (21 U.S.C. § 881 (a)(4).)

### **3. “Equitable Sharing” by State and Local Law Enforcement of Federal Forfeiture Proceeds, including Adoption of State Forfeitures by Federal Authorities**

Because there is overlapping jurisdiction in drug-related crimes, California law enforcement agencies can avoid relatively stringent state forfeiture laws by participating in joint federal-state investigations or by transferring assets seized pursuant to state law to federal authorities. This entire process is referred to as “equitable sharing.” Equitable sharing includes “adoption,” through which the U.S. Attorney essentially processes a state forfeiture under federal law.

To participate in equitable sharing, a California law enforcement agency must execute an agreement with U.S. DOJ. DOJ has promulgated guidelines for forfeiture adoption, including that the district attorney must consent to the transfer. Procedurally, the local or state agency files a request to federal authorities to adopt a state seizure. Minimum value amounts apply and vary by federal court district. The amount of money and property disbursed to local or state law enforcement is based on “the degree of direct law enforcement effort” by the state or local agency. (21 U.S.C. §881 (e)(3).) State and local and agencies can receive up to 80% of the proceeds of an adopted forfeiture case.

As explained in Comment # 4, United States Attorney General Holder has recently issued an order that prohibits adoption of local and state forfeitures, except in a case where US DOJ specifically approves the adoption. The order is administration policy and does not have the force of law. Because adoption cases involve a small percentage of equitable sharing, the new policy will have limited effects. Further, agencies may seek to make more seizures under the umbrella of joint federal-state task forces so that equitable sharing rule, not state law, applies. Given the much stricter standards for California forfeiture, it can be argued that state and local agencies have substantial incentives to avoid California law and work with federal agencies instead.

#### 4. The New Federal Policy on Adoption of State Forfeiture Actions will have Limited Effects

On January 16, 2015, United States Attorney General Holder issued a new policy order for all United States Attorney offices. The policy was widely described as effectively ending equitable sharing of federal forfeiture proceeds with local law enforcement agencies. However, the order did not limit equitable sharing in cases involving a joint federal-state task forces or investigations. The policy prohibits wholesale “adoption” of what would otherwise solely be a state or local seizure and forfeiture. Adoptions - counted as a subset of equitable sharing - account for about 3% of forfeiture deposits. Total equitable sharing amounts to about 22% of forfeiture deposits. Thus, approximately 85% of the proceeds of federal forfeiture that goes to state and local agencies is unaffected by the new policy.<sup>1</sup>

The policy provides:

Federal adoption of property seized by state or local law enforcement under state law is prohibited, except for property that directly relates to public safety concerns, including firearms. Ammunition, explosives and property associated with child pornography. To the extent that seizures of property other than these...categories are ... considered for federal adoption...such seizures [must be approved by] the Assistant Attorney General for the Criminal Division. The prohibition ... includes...seizures by state or local law enforcement of vehicles, valuable, and cash, [including currency, checks] stored value cards” and specified other categories

The policy order allows equitable sharing as follows:

This order does not apply to (1) seizures by state and local authorities working together with federal authorities in a joint task force; (2) seizures...that are the result of joint federal-state investigations or that are coordinated with federal authorities as part of ongoing federal investigations; or (3) seizures pursuant to federal search warrant, obtained from federal courts to take custody of assets originally seized under state law.

It thus appears that many seizures of property by state and local authorities are still subject to forfeiture under federal law through the equitable sharing process. It appears that joint task forces and federal-state cooperation in investigations is relatively common. Just concerning joint task force operations, the Drug Enforcement Administration website<sup>2</sup> explains:

In 2013, the *DEA State and Local Task Force Program managed 259 state and local task forces*, which included Program Funded, Provisional, HIDTA, and Tactical Diversion Squads. The difference between funded and provisional state and local task forces is that the financial support for funded task forces is provided by DEA headquarters and includes additional resources for state and local overtime. Provisional task forces are supported by the operating budgets of DEA field division offices, without resources from DEA headquarters, and do not

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<sup>1</sup> <http://www.washingtonpost.com/news/the-watch/wp/2015/01/20/how-much-civil-asset-forfeiture-will-holders-new-policy-actually-prevent/>

<sup>2</sup> <http://www.dea.gov/ops/taskforces.shtml>

include state and local overtime. *These task forces are staffed by over 2,190 DEA special agents and over 2,556 state and local officers.* Participating state and local task force officers are deputized to perform the same functions as DEA special agents. (Italics added.)

**5. Federal Asset Forfeiture Proceeds Disbursed to California Agencies**

The use of federal asset forfeiture – through adoption and equitable sharing – has increased substantially over the past 15 years, as demonstrated by the following table.

FEDERAL FORFEITURE DISBURSED	STATE FORFEITURE DISBURSED
2014 - \$77 million	Data unavailable
2013 – \$86	2013 - \$28 million
2012 - \$83	2012 - \$15
2011 - \$79	2011 - \$18
2010 - \$76	2010 - \$16 million
2009 - \$60	2009 - \$38.8
2008 - \$52.4	2008 - \$25.5
2007 - \$ 42.8	2007 - \$27.6
2006 - \$42.3	2006 - \$25.6
2005 - \$26.7	2005 - \$19.9
2004 - \$31.3	2004 - \$22.5
2003 - \$24.5	2003 - \$26.6
2002 - \$24	2002 - \$25.6
2001 - \$32.8	2001 - \$25.7
2000 - \$30	2000 - \$21

**6. Argument in Opposition**

The California District Attorneys Association argues in opposition:

One of our primary missions as an association is to provide training for prosecutors and law enforcement on the ethics and proper use of forfeiture laws. Funding for those trainings comes from Health and Safety Code Section 11489(b)(2)(D), which gives us one-percent distribution of proceeds from forfeiture actions in the state. SB 443 eliminates that distribution.

Making sure that those law enforcement officials and prosecutors who engage in the forfeiture process are well trained and ethically prepared to handle forfeiture cases is of great benefit to the public. We fail to see how getting rid of the funding mechanism for those training would be beneficial to anyone involved in forfeiture proceedings.