

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,
State of Hawai‘i to the Senate Committee on Judiciary**

February 2, 2023

S.B. No. 400: RELATING TO PROPERTY FORFEITURE

Chair Rhoads, Vice Chair Gabbard, and Members of the Committee:

The Office of the Public Defender supports the S.B. No. 400, which seeks to restrict civil asset forfeiture to cases involving the commission of a felony offense where the property owner has been convicted of an underlying felony offense and would direct any and all forfeiture proceeds to the State general fund.

Property (or asset) forfeiture may have originally been intended to cripple drug trafficking organizations and organized crime; however, in practice, this is hardly the case. Rather, ordinary people, many with little or no connection to criminal activity, are frequently the targets of asset seizures. Most seizures involve small dollar amounts, not huge sums of cash seized from drug traffickers.

In property forfeiture proceedings, the property is presumed to be guilty until the owner proves that they are innocent and that the seized property therefore should not be forfeited. In other words, the owner must prove (1) that they were not involved in criminal activity and (2) that they either had no knowledge that the property was being used to facilitate the commission of a crime or that they took every reasonable step under the circumstances to terminate such use. Moreover, the proceedings are not before a neutral judge or arbitrator; forfeiture of personal property worth less than \$100,000, or forfeiture of any vehicle or conveyance, regardless of value is administratively processed. Finally, most forfeitures are unchallenged. Pragmatic property owners, however innocent, may reason that it is simply too cost prohibitive to challenge the seizure (primarily, due to the high cost of hiring an attorney) or that the cost far surpasses the value of the property.

Jurisdiction

Currently, Hawai‘i’s civil forfeiture law allows law enforcement agencies to seize and keep property based on suspicion that the property is connected to criminal activity. Property can be taken without the property owner having been convicted of a crime or even being formally accused of one.

A more just process is to restrict civil asset forfeiture *to cases involving the commission of a felony offense where the property owner has been convicted of an underlying felony offense*. What is troubling is that, according to the State Auditor report on civil forfeiture published in June 2018, in **26%** of the asset forfeiture cases, the property was forfeited without a corresponding criminal charge. *See* State of Hawai‘i, Office of the Auditor, Audit of the Department of the Attorney General’s Asset Forfeiture Program, Report No. 18-09 (June 2018). In other words, no criminal charges were filed in more than one-fourth of the property forfeiture cases.

It should be noted that sixteen (16) states now require a conviction in criminal court to forfeit most or all types of property in civil court.¹ Moreover, four states – North Carolina (1985), New Mexico (2015), Nebraska (2016), and Maine (2021) – have abolished civil forfeiture entirely and only use criminal law to forfeit property.²

Distribution of proceeds of forfeited property

Put simply, civil forfeiture laws present law enforcement with significant incentives to seize property for financial gain. Currently,

One quarter shall be distributed to the unit or units of state or local government whose officers or employees conducted the investigation and caused the arrest of the person whose property was forfeited or seizure of the property for forfeiture; and

One quarter shall be distributed to the prosecuting attorney who instituted the action producing the forfeiture; and

One half shall be distributed into the criminal forfeiture fund.

Moreover, all property and money distributed to units of state and local government must be used for law enforcement purposes.

¹ The sixteen jurisdictions that require a conviction in criminal court are California, Oregon, Arizona, Montana, North Dakota, Minnesota, Iowa, Missouri, Arkansas, Wisconsin, Michigan, Virginia, New Jersey, Connecticut, New Hampshire, Vermont. Institute for Civil Justice, “Civil Forfeiture Reforms on the State Level,” *see* <https://ij.org/legislative-advocacy/civil-forfeiture-legislative-highlights/> (last visited, February 26, 2022).

² Institute for Civil Justice, “Civil Forfeiture Reforms on the State Level,” *see* <https://ij.org/legislative-advocacy/civil-forfeiture-legislative-highlights/> (last visited, February 26, 2022).

True reform of the asset forfeiture law would direct any and all forfeiture proceeds to the State general fund. The Institute for Justice, a nonprofit civil liberties law firm, recommends the elimination of financial incentives for law enforcement to seize and keep forfeited property and, instead, directs any proceeds to either a general revenue fund or other neutral fund. Eight jurisdictions now prohibit law enforcement from keeping proceeds from forfeited property.³ It is unconscionable that a policing agency and a prosecuting agency directly profits from the taking of property. Law enforcement's only incentive to initiate asset forfeiture proceedings should be for public safety or justice; allowing law enforcement a financial stake in seizures and directing even a portion of the proceeds to law enforcement creates a perverse secondary incentive to seize property – revenue generation.

Conclusion

Prosecuting agencies may assert that this measure would create a time-consuming, expensive, and difficult process. However, the process should be difficult when the government is attempting to deprive personal property from its citizens.

Finally, the absurdity of the current state of our asset forfeiture laws in this country, including Hawai'i's law, is brilliantly lampooned in a segment on HBO's Last Week Tonight with John Oliver, which originally aired on October 5, 2014, and which can be viewed at <https://m.youtube.com/watch?v=3kEpZWGgJks> (viewer discretion advised).

Thank you for the opportunity to comment on this measure.

³ As of 2015, the eight jurisdictions that block law enforcement access to forfeiture proceeds are New Mexico, Missouri, Indiana, North Carolina, Maine, Wisconsin, Delaware, and District of Columbia. Dick M. Carpenter II, et al., "[Policing for Profit: The Abuse of Civil Asset Forfeiture, 2nd Edition](#)," Institute for Justice, November 2015.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

ALII PLACE
1060 RICHARDS STREET • HONOLULU, HAWAII 96813
PHONE: (808) 768-7400 • FAX: (808) 768-7515

STEVEN S. ALM
PROSECUTING ATTORNEY

THOMAS J. BRADY
FIRST DEPUTY
PROSECUTING ATTORNEY



THE HONORABLE KARL RHOADS, CHAIR
SENATE COMMITTEE ON JUDICIARY
Thirty-Second State Legislature
Regular Session of 2023
State of Hawai'i

February 2, 2023

RE: S.B. 400; RELATING TO PROPERTY FORFEITURE.

Chair Rhoads, Vice Chair Gabbard, and members of the Senate Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in **opposition** to S.B. 400.

The Department is deeply concerned that S.B. 400 is a "solution in search of a problem," which would confuse the difference between civil and criminal proceedings, by making civil asset forfeiture proceedings reliant upon criminal convictions. Indeed, criminal proceedings and civil proceedings are separate for a reason, and they have different standards of proof for a reason. If the Legislature ever required that other civil proceedings be held to a standard of "beyond a reasonable doubt" (the standard for criminal convictions), there would likely be an uproar among civil law practitioners (including those in private practice, non-profit legal organizations, or government entities like Corporation Counsel). There is currently no civil proceeding in the State that turns on a criminal standard of proof.

If the Committee feels strongly that civil asset forfeiture must be held to a higher standard, the Department would suggest that the state of mind be increased to "clear and convincing evidence"—which we believe is the highest standard of proof used in civil law—from the current standard of "preponderance of the evidence." That said, the Department would note that "preponderance of the evidence" is actually the standard of proof used in most civil and administrative legal proceedings throughout Hawaii. While it may not be widely known, "preponderance of the evidence" is already used every day to decide matters that affect people's assets, property and livelihood. For example, the standard used by the Department of Commerce and Consumer Affairs, Commissioner of Securities, Insurance Commissioner, Commissioner of Financial Institutions, and any board or commission attached for administrative purposes to the Department of Commerce and Consumer Affairs with rulemaking, decision making, or

adjudicatory powers, is preponderance of the evidence.¹ Also, all adjudication hearings held before the Honolulu Liquor Commission,² Land Use Commission,³ the Hawaiian Homes Commission,⁴ or any other State body or agency governed by HRS Chapter 91, are decided based on preponderance of the evidence.⁵

While the Department has heard horror stories about a number of civil asset forfeiture programs on the Continental U.S., abusing their programs for their own benefit, Hawaii's forfeiture laws have always provided due process safeguards for the protection of property owners' rights, and ample statutory safeguards—including exemptions (HRS §712A-5) and a prohibition against excessive forfeitures (HRS §712A-5.5)—that some of those states are only now adding to their framework. Concerns about “innocent owners” being deprived of their property or “policing for profit” are unfounded—as safeguards for the protection of property owners' rights were codified long ago—and we would welcome the opportunity to look into any specific instances of concern (we would just need the case number or other identifying case information). That said, it is our understanding that the Department of the Attorney General did implement all or nearly all (they may still be in the process of implementing one) of the specific recommendations provided by the State Auditor's report in 2018 (available online at: files.hawaii.gov/auditor/Reports/2018/18-09.pdf). Since those changes were made, we are not aware of any complaints arising from a civil asset forfeiture case in Hawaii.

By design, Hawaii's civil asset forfeiture proceedings protect unknowing property owners and operate independently from any related criminal case, just as other civil proceedings operate independently from any related criminal case. Taking the drastic leap of tying our civil

¹ See the definition of “Authority,” under Section 16-201-2, Hawaii Administrative Rules (“HAR”). See also HAR §16-201-21(d), which states:

(d) Except as otherwise provided by law, the burden of proof, including the burden of producing the evidence and the burden of persuasion, shall be upon the party initiating the proceeding. Proof of a matter shall be by a preponderance of the evidence.

Available online at https://files.hawaii.gov/dcca/oah/forms/oah/oah_hearings_rules.pdf; last accessed February 1, 2021.

² See Section 3-85-91.5(d), Rules of the Liquor Commission, which states:

(d) Except as otherwise provided by law, the burden of proof, including the burden of producing the evidence and the burden of persuasion, shall be upon the party initiating the proceeding. Proof of a matter shall be by a preponderance of the evidence.

Available online at honolulu.gov/rep/site/bfsliq/rules/LIQ_Rules_Website_Version_032717.pdf; last accessed February 1, 2021.

³ See HRS §205-4(h) and (i), which state that all land use boundary decisions by the commission, and upon judicial review, shall be found “upon the clear preponderance of the evidence.” Available online at www.hawaii.gov/hrcurrent/Vol04_Ch201-0257/HRS0205/HRS_0205-0004.htm; last accessed February 1, 2021.

⁴ See *Lui-Dyball v. Hawaiian Homes Commission*, Memorandum Opinion issued May 29, 2015, at page 7, which states in relevant part, “The degree or quantum of proof Section 91-10, HRS, establishes that the burden of proof in matters such as this is ‘by a preponderance of the evidence.’...not ‘beyond a reasonable doubt.’” Available online at www.courts.state.hi.us/docs/opin_ord/ica/2015/May/CAAP-12-0000572mopada.pdf; last accessed February 1, 2021.

⁵ See HRS §91-10(5), which states:

(d) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing the evidence as well as the burden of persuasion. The degree or quantum of proof shall be by a preponderance of the evidence.

Available online at www.capitol.hawaii.gov/hrcurrent/Vol01_Ch0046-0115/HRS009/HRS_0091-0010.htm; last accessed February 1, 2021.

and criminal proceedings together would not only be unprecedented and unnecessary, but would frustrate and impede the very purpose of civil asset forfeiture. Under Hawaii's existing laws, civil asset forfeiture is used to immediately and effectively disrupt the infrastructure of criminal activity and protect the community from the effects of that criminal activity; on Oahu, nearly all of our asset forfeiture cases involve illegal gambling establishments.

If the concern is that the civil asset forfeiture process should be more simple, transparent or accessible for the public, or those impacted by its proceedings, that can and should be addressed in other ways, and the Department is absolutely willing to participate in stakeholder meetings that could make the system more user-friendly.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes S.B. 400, and asks that the measure be deferred. Thank for you the opportunity to testify on this matter.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

801 SOUTH BERETANIA STREET · HONOLULU, HAWAII 96813
TELEPHONE: (808) 529-3111 · INTERNET: www.honoluluupd.org



RICK BLANGIARDI
MAYOR

ARTHUR J. LOGAN
CHIEF

KEITH K. HORIKAWA
RADE K. VANIC
DEPUTY CHIEFS

OUR REFERENCE PO-HR

February 2, 2023

The Honorable Karl Rhoads, Chair
and Members
Committee on Judiciary
State Senate
Hawaii State Capitol
415 South Beretania Street, Room 016
Honolulu, Hawaii 96813

Dear Chair Rhoads and Members:

SUBJECT: Senate Bill No. 400, Relating to Property Forfeiture.

I am Paul Okamoto, Acting Major of the Narcotics/Vice Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD opposes Senate Bill No. 400, Relating to Property Forfeiture.

Asset forfeiture is an essential enforcement tool used by the HPD to take the profit out of crime, deter criminality, and protect the community. The restrictions created by this bill will greatly diminish the criminal deterrent of civil asset forfeiture. In addition, while waiting for adjudication of a criminal case, this bill causes undue delays for the public, law enforcement agencies, and as well as the criminal defendant. Lastly, a tremendous amount of resources are utilized by law enforcement for these investigations. Delaying or eliminating the local investigating law enforcement agency from the proceeds of property forfeited from illegal activities will have a direct impact on the services that the HPD provides to the community.

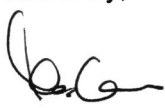
The HPD urges you to oppose Senate Bill No. 400, Relating Property Forfeiture.

Thank you for the opportunity to testify.

APPROVED:


Arthur J. Logan
Chief of Police

Sincerely,


Paul Okamoto, Acting Major
Narcotics/Vice Division

Mitchell D. Roth
Mayor



Benjamin T. Moszkowicz
Police Chief

County of Hawai'i

POLICE DEPARTMENT

349 Kapi'olani Street • Hilo, Hawai'i 96720-3998
(808) 935-3311 • Fax (808) 961-2389

February 1, 2023

Senator Karl Rhoads
Chairperson and Committee Members
Committee on Judiciary
415 South Beretania Street
Honolulu, Hawai'i 96813

RE: SENATE BILL 400, RELATING TO PROPERTY FORFEITURE
HEARING DATE: FEBRUARY 2, 2023
TIME: 10:00 A.M.

Dear Senator Rhoads:

The Hawai'i Police Department **opposes** Senate Bill 400, with its purpose to restrict civil asset forfeiture to cases involving the commission of a felony offense where the property owner has been convicted of an underlying felony offense.

The forfeiture laws are used to ensure those items used to further criminal activity and/or the ill-gotten gains of such activity become items for seizure in accordance with prescribed civil procedures. These prescribed civil procedures are accompanied by attendant ownership rights of appeal.

The changes as proposed by this legislation would significantly compromise law enforcement's ability to combat those who profit from illegal activity through victimization of the community at large. Many of our forfeiture cases are the result of felony drug offenses that cater to those individuals who are involved in fatal traffic collisions, drug overdose deaths, as well as thefts, burglaries, robberies and other crimes in order to afford purchase of illicit narcotics.

Asset forfeiture helps law enforcement take the profit out of crime. The restrictions in this bill will reduce the criminal deterrent of civil asset forfeiture. The bill would cause undue delays for law enforcement as well as criminal defendants. Delaying or eliminating local law enforcement agencies from the proceeds of property forfeited from illegal activities will have an impact on our ability to serve the community.

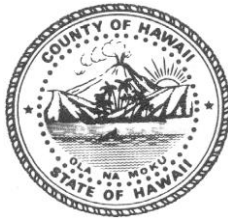
It is for these reasons, we urge this committee **to not support** this legislation. Thank you for allowing the Hawai'i Police Department to provide comments relating to Senate Bill 400.

Sincerely,


BENJAMIN T. MOSZKOWICZ
POLICE CHIEF

KELDEN B.A. WALTJEN
PROSECUTING ATTORNEY

STEPHEN L. FRYE
FIRST DEPUTY
PROSECUTING ATTORNEY



LATE

PH: (808) 322-2552
FAX: (808) 322-6584

64-1067 MAMALAHOA HIGHWAY, C-3
KAMUELA, HAWAII 96743
PH: (808) 887-3017
FAX: (808) 887-3016

OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN OPPOSITION TO SENATE BILL NO. 400

**A BILL FOR AN ACT
RELATING TO PROPERTY FOREITURE**

COMMITTEE ON JUDICIARY
Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair

Friday, February 2, 2023 at 10:00 a.m.
Via Videoconference
State Capitol Conference Room 016
415 South Beretania Street

Honorable Chair Rhoads, Vice-Chair Gabbard, and Members of the Committee on Judiciary. The County of Hawai'i, Office of the Prosecuting Attorney submits the following testimony in opposition to Senate Bill No. 400.

This bill was drafted with the intention to prohibit civil asset forfeiture unless the covered offense is a felony for which the property owner has been convicted, contemplates implementation of a higher standard of proof, such as "beyond a reasonable doubt," and directs proceeds to the general fund.

In Hawai'i County, violent crime trends continue to rise as a result of the influx of illegal narcotics. Thus, narcotics addiction is at an all-time high and one of the most prevalent challenges our community faces. Statistically, narcotics distribution and possession of illegal and prohibited firearms offenses constitutes the overwhelming majority of the offenses which trigger asset forfeiture in Hawai'i County, and all property is seized pursuant to the strict rules and guidelines as set forth by the Attorney General.

As exhibited in the Preamble, the estimated value of property seized by Hawai'i State law enforcement has been in a steep decline over the last few years. Law enforcement agencies seized \$1,050,463 in fiscal year 2018-2019, \$963,055 in fiscal year 2019-2020, and only \$483,506 in fiscal year 2020-2021. As a result, a legislative amendment does not seem to be necessary at this time and any notion of "policing for profit" or a profit incentive appears misguided and misplaced.

Criminal enterprises generate a profit from the sale of their "product" or "services" through criminal activity. Asset forfeiture can remove the tools, equipment, cash flow, profit, and the product itself from the criminals and criminal organization. Currently, some of the

proceeds from asset forfeiture are directed toward programs which aim to prevent abuse of illegal narcotics through education, prevention and rehabilitation. Any re-allocation of the proceeds to the state general fund would ultimately undercut those deterrent efforts, defund program and prevention efforts, as well as the portion of the funds used directly for the purpose of providing training to community stakeholders and law enforcement.

The Office of the Prosecuting Attorney, County of Hawai‘i remains committed to the cause of ensuring that any property forfeited is within the interest of justice and pursuant to the strict rules, timeframes, and guidelines as set forth by the Attorney General. Nevertheless, our Office is more than willing to participate in discussions to address any concerns related to our current civil asset forfeiture process.

For the foregoing reasons, the Office of the Prosecuting Attorney, County of Hawai‘i, opposes Senate Bill No. 400. Thank you for the opportunity to testify on this matter.

Rebecca V. Like
Prosecuting Attorney



Keola Siu
First Deputy
Prosecuting Attorney

OFFICE OF THE PROSECUTING ATTORNEY

County of Kaua'i, State of Hawai'i

3990 Ka'ana Street, Suite 210, Lihue, Hawai'i 96766
808-241-1888 ~ FAX 808-241-1758
Victim/Witness Program 808-241-1898 or 800-668-5734

February 1, 2023

RE: S.B. 400; RELATING TO CIVIL ASSET FORFEITURE

Chair Rhoads, Vice-Chair Gabbard and members of the Senate Judiciary Committee, the Office of the Prosecuting Attorney for the County of Kaua'i submits the following testimony in **opposition** to S.B. 400.

Civil asset forfeiture is an important law enforcement tool that immediately disrupts a criminal enterprise. This tool benefits communities burdened with criminal enterprises. Concerns have been raised about perceived abuses of HRS Chapter 712A, "Forfeiture," as it authorizes law enforcement to forfeit property before a person is charged with or convicted of a crime.

Our Office opposes the proposed requirement of a felony conviction before property is forfeited to the State. This bill does not address the situation in which a person appeals a felony conviction. When a person is convicted of a crime, he or she has a right to an appeal; and appeals generally take 2-5 years before they are disposed of by our appellate courts. Thus, requiring a felony conviction will delay disposition of civil asset forfeiture cases. As an alternative, this Committee might consider conditioning forfeiture of property on the filing of a felony charge (which requires a judge or grand jury to find the existence of probable cause).

We do not take a position on the proposal that seizing agencies will not retain any proceeds of forfeited property. If this amendment passes, we anticipate that the overall volume of civil asset forfeiture cases in the State will decline. Relatedly, as police departments and prosecutors' offices throughout the nation struggle to maintain full staffing, it is likely that they will reduce the amount of time dedicated to civil asset forfeiture cases, choosing to prioritize time spent on criminal cases.

The Office of the Prosecuting Attorney for the County of Kaua'i respectfully submits the above comments opposing the passage of S.B. 400. Thank you for the opportunity to testify on this matter.

An Equal Opportunity Employer



AMERICANS FOR DEMOCRATIC ACTION

OFFICERS	DIRECTORS		MAILING ADDRESS	
John Bickel, President	Melodie Aduja	Jan Lubin	Bill South	P.O. Box 23404
Alan Burdick, Vice President	Keola Akana	Shannon Matson	Michael Vernon	Honolulu
Doug Pyle, Secretary	Juliet Begley	Jenny Nomura		Hawaii 96823
	Stephanie Fitzpatrick	Stephen O'Harrow		

January 31, 2023

TO: Chair Rhoads and Members of the Judiciary Committee

RE: SB 400 Relating to Property Forfeiture

Support for a hearing on Feb. 3

Americans for Democratic Action is an organization founded in the 1950s by leading supporters of the New Deal and led by Patsy Mink in the 1970s. We are devoted to the promotion of progressive public policies.

We support SB 400 as it would restrict civil asset forfeiture to cases involving the commission of a felony offense where the property owner has been convicted of an underlying felony offense. Seizing assets before a conviction is a violation of basic civil liberties. We would like to see the bill amended to end civil forfeiture.

Thank you for your consideration.

Sincerely,

John Bickel, President

COMMUNITY ALLIANCE ON PRISONS

P.O. Box 37158, Honolulu, HI 96837-0158

Phone/E-Mail: (808) 927-1214 / kat.caphi@gmail.com



COMMITTEE ON JUDICIARY

Senator Karl Rhoads, Chair

Senator Mike Gabbard, Vice Chair

Thursday, February 2, 2023

10:00 AM

SUPPORT FOR SB 400 - ASSET FORFEITURE REFORM

Aloha Chair Rhoads, Vice Chair Gabbard and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies in Hawai'i for more than two decades. This testimony is respectfully offered on behalf of the 4,058 Hawai'i individuals living behind bars¹ and under the "care and custody" of the Department of Public Safety/Corrections and Rehabilitation on any given day. We are always mindful that 965 of Hawai'i's imprisoned people are serving their sentences abroad - thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Kanaka Maoli, far, far from their ancestral lands.

Community Alliance on Prisons appreciates this opportunity to testify and share our research on asset forfeiture. SB 400 restricts forfeiture to cases involving the commission of a felony offense where the property owner has been convicted of an underlying felony offense and promotes transparency.

THE BACKGROUND

In the US², a form of civil asset forfeiture was passed into law by the first U.S. Congress in 1789. Until the 16th Amendment granted the power in 1913 to levy income taxes, forfeiture was used to protect the national economy and fiscal position of the U.S., which relied heavily on the imposition of tariff duties. Civil forfeiture was also a vital sanction used to protect U.S. shores from piracy.

(...)

Following the advent of income tax, civil forfeiture was little used in the U.S. until the 1970s and 1980s, although there were some interesting prohibition cases. In

¹ Department of Public Safety, Weekly Population Report, January 23, 2023.

https://dps.hawaii.gov/wp-content/uploads/2023/01/Pop-Reports-Weekly-2023-01-23_George-King.pdf

² Impact Study on Civil Forfeiture, 2013, Council of Europe, Jeffrey Simser, Perspectives on Civil Forfeiture, Hong Kong University publ. (2008), at p51.

<https://rm.coe.int/impact-study-on-civil-forfeiture-en/1680782955>

1970, Congress focused on organised crime with the passage of the well-known Racketeer Influenced Corrupt Organization Act; a lesser-known statute was passed at the same time, the Continuing Criminal Enterprise Act. However, it was not until 1984, with the passage of the Comprehensive Crime Control Act, that civil forfeiture began to be used extensively across the United States. Forfeiture attracts 8th Amendment protection, which constitutionally prohibits excessive fines; in 2000, this and a number of other issues, were addressed by the Civil Asset Forfeiture Reform Act, 2000. In the federal system alone, \$1.2 billion (USD) was recovered in 2006, \$1.6 billion in 2007 and incremental growth up to and including an estimated \$2.8 billion in 2011. Only one-third of that money will be recovered through conviction-based forfeiture. The balance will be recovered through civil asset forfeiture cases.

In the US, prosecutors found that *in rem* proceedings allowed for the seizure of property in a number of instances where it would not be possible to confiscate proceeds held by others who were not a party to the criminal proceedings, where the defendant is dead, the 'criminal' is unknown or where the interests of justice do not require a prosecution or where a prosecution is held in a foreign state but the property is located in the US.

HOW ASSET FORFEITURE HAS EVOLVED

Since the advent of the War on Drugs, law enforcement agencies have used civil asset forfeiture laws to strip Americans of billions of dollars in cash, cars, real estate, and other assets. Under these state and federal laws, officers are legally empowered to seize property they believe is connected to criminal activity – even if the owner is never charged with a crime. In most states, the agencies are entitled to keep the property or, more typically, the proceeds from its sale.

While federal forfeitures totaled \$93.7 million in 1986, this revenue grew by more than 4,600% – to \$4.5 billion a year – by 2014.³ Forfeitures handled by states have also poured millions, perhaps billions, of dollars into law enforcement agencies.⁴ As a result, there has been a massive transfer of wealth and assets from American citizens – and especially the most economically vulnerable – to police, who can largely use the funds however they see fit. Many states do not even require local agencies to track or report seized property.

Though proponents of civil asset forfeiture claim that its revenue helps to fund more effective policing, evidence shows it has little impact on efforts to stop crime. Instead, it perverts the incentives of law enforcement, encouraging agencies to pursue strategies that maximize profit rather than ensure public safety.

Civil forfeiture was also boosted under the 1984 Comprehensive Crime Control Act (CCCA). Unlike the 1970 law that had channeled revenue into the General Fund

³ Dick M. Carpenter II, Lisa Knepper, Angela C. Erickson, and Jennifer McDonald, "Policing for Profit: The Abuse of Civil Asset Forfeiture," Institute for Justice, 2nd Edition, November 2015, 5, <https://ij.org/wp-content/uploads/2015/11/policing-forprofit-2nd-edition.pdf>.

⁴ Because there are no uniform data reporting requirements, the amount of state forfeitures is unknown.

of the U.S. Treasury, the CCCA earmarked all forfeiture profits for law enforcement purposes. State civil forfeiture bills creating similar funding mechanisms followed.⁵ In effect, lawmakers created a financial incentive for policing agencies to prioritize anti-drug law enforcement.

HOW IT WORKS

Civil asset forfeiture laws allow police to seize property, money, or assets if police merely believe it is connected to criminal activity. Police do not have to file charges or even establish guilt in these cases before seizing and keeping property and there is no limit to what police can seize. In addition, these seizures often take place in instances where law enforcement have engaged in discriminatory profiling people of color and other minorities (e.g., traffic stops, airport searches, and train searches).

Federal forfeiture law provides law enforcement with a strong monetary interest in asset seizures. Under the Department of Justice's equitable sharing program, state and local law enforcement that turn over seized property to the federal government can pocket up to 80 percent of the forfeiture proceeds. Additionally, federal law does not require the collection or reporting of data on state, local, or federal seizures.

In essence, these laws amount to legalized theft and rest on a presumption of guilt that flies in the face of our longstanding principle that everyone is innocent until proven guilty.

Civil asset forfeiture laws are disproportionately harmful to lower-income communities and communities of color.

- A recent series of articles by The Washington Post chronicling the issue found that “of the 400 court cases examined by The Post where people who challenged seizures and received money back, the majority were Black, Hispanic or another minority.”⁶
- Despite making up 43 percent of the city's population, 63 percent of Philadelphia cash seizures each year involve money taken from African Americans. African Americans account for 71 percent of innocent Philadelphians who have cash seized each year.⁷

⁵ Carpenter et al., “Policing for Profit,” 10

⁶ Michael Sallah, Robert O’Harrow Jr., Steven Rich, Stop and Seize, WASHINGTON POST, September 6, 2014, <http://www.washingtonpost.com/sf/investigative/collection/stop-and-seize-2/>.

⁷ American Civil Liberties Union of Pennsylvania, Guilty Property, June 2015, http://www.aclupa.org/files/3214/3326/0426/Guilty_Property_Report_-_FINAL.pdf.

⁸ American Civil Liberties Union, Letter to the House on the Civil Asset Forfeiture Act of 1999, June 10, 1999, <https://www.aclu.org/letter/letter-house-civil-asset-forfeiture-act-1999>.

⁹ Police Say Seizing Property Without Trial Helps Keep Crime Down. A New Study Shows They’re Wrong.

A new study reveals the median amount taken is as low as \$369 in some states.

Ian MacDougall for ProPublica, Dec. 14, 2020, 2:33 p.m. EST.

<https://www.propublica.org/article/police-say-seizing-property-without-trial-helps-keep-crime-down-a-new-study-shows-theyre-wrong>

- Asset forfeiture takes place in situations where minorities are often targeted by police because of racial profiling. According to a study by the ACLU, in “traffic stops, airport seizures, and drug arrests...minorities are the hardest hit.”⁸

THE NEWEST STUDY FROM THE INSTITUTE OF JUSTICE

The new study – the third, and most comprehensive, edition of a report titled “Policing for Profit” – is built on data acquired through hundreds of public records requests to state and federal agencies, many of which maintain only limited statistics on forfeitures. That lack of transparency can obscure abusive practices not only from the public but even from state and local officials.

The Institute for Justice found that the U.S. Justice Department spends less than a third of what it brings in from civil forfeiture on compensating victims and other third parties. Some states mandate spending on victim compensation. But in at least six of the 15 states that disclose data on how forfeiture funds are spent – including Florida, Illinois, Oregon and Utah – none of the money obtained by civil asset forfeiture went toward paying back victims of crime for what they lost. The other nine states either use negligible amounts to compensate victims or do not specify whether any money goes to victims.

Instead, law enforcement directed the money mostly toward salaries, equipment and other operational expenses. For some law enforcement agencies, forfeiture funds [have accounted for](#) as much as 20% of their budgets, and are sometimes used for seemingly nonessential purchases. A police department in Georgia, for example, once spent \$227,000 on an armored personnel carrier, and a sheriff in New Mexico splashed out \$4,600 for an awards banquet. In [one recent case](#), a suburban Atlanta sheriff spent \$70,000 in forfeiture funds on a muscle car, a Dodge Charger Hellcat, that he uses solely to drive to and from work. The U.S. Justice Department called that purchase “extravagant.”

The U.S. Supreme Court has shown an interest in civil asset forfeiture in recent years. In 2017, Justice Clarence Thomas expressed doubts about whether civil forfeiture practices “can be squared with the Due Process Clause and our Nation’s history.” The following year, in a case litigated by the Institute for Justice, the high court ruled that the prohibition on excessive fines enumerated in the Eighth Amendment to the U.S. Constitution applies to state-level civil asset forfeiture procedures.⁹

HAWAII EARNS ANOTHER D- FOR OUR FORFEITURE LAWS³

- Low bar to forfeit: Prosecutors must prove by preponderance of the evidence that property is connected to a crime.
-

- Poor protections for the innocent. Third-party owners must prove their own innocence to recover seized property.
- Large profit incentive: 100% of forfeiture proceeds go to law enforcement (up to a maximum of \$3 million per year, 25% to police, 25% to prosecutors and 50% to the attorney general for law enforcement projects).

Between 2001 and 2018, Hawai'i law enforcement agencies forfeited more than \$20 million under state law. Between 2000 and 2019, they generated an additional \$29 million from federal equitable sharing, for a total of \$49 million in forfeiture revenue. Hawai'i ranks 26th for its participation in the Department of Justice's equitable sharing program. The state does not prevent state and local agencies from using equitable sharing to circumvent state forfeiture law.

NEW MEXICO EARNS AN A FOR ITS FORFEITURE LAWS

- Highest bar to forfeit: New Mexico has only criminal forfeiture.
- Stronger protections for the innocent: The government must prove by clear and convincing evidence that a third party owner knew about the criminal use of their property.
- No profit incentive: All forfeiture proceeds, beyond some retained to cover related expenses, go to the general fund.

Recent Reforms:

- (2019) HB 312: Formally extended the abolition of civil forfeiture to cover municipalities; added new procedural protections; permitted law enforcement to keep part of the proceeds from the sale of forfeited and abandoned property to cover related expenses; strengthened transparency requirements.
- (2018) State Court Ruling in *Espinoza v City of Albuquerque*. Held that Albuquerque's vehicle forfeiture program was preempted by the state's 2015 reform.
- (2018) Federal Court Rulings in *Harjo v City of Albuquerque*: Declared Albuquerque's vehicle forfeiture program unconstitutional after concluding it violated due process by creating an unconstitutional incentive to forfeit and forcing owners to prove their innocence.

Between 2015 and 2018, New Mexico law enforcement agencies forfeited more than \$377,000 under state law. Between 2000 to 2019, they generated an additional \$50.8 million from federal equitable sharing, for a total of \$51.1 million in forfeiture revenue. New Mexico ranks 4th for its participation in the Department of Justice's equitable sharing program. The state also directs all forfeiture proceeds, to the general fund, effectively eliminating agencies' incentive to participate.

Some of the most important things are protection of the constitutional rights of the innocent; transparency in the forfeiture process, and accountability by filing publicly available reports on the web regarding assets forfeited.

Community Alliance on Prisons respectfully asks the committee to pass this important and over-due reform that incentives bad behavior.



Feb. 2, 2022

10 a.m.

Via Videoconference

Conference Room 016

To: Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair

From: Grassroot Institute of Hawaii
Ted Kefalas, Director of Strategic Campaigns

Re: SB400 — RELATING TO PROPERTY FORFEITURE

Comments Only

Dear Chair and Committee Members:

The Grassroot Institute of Hawaii would like to offer its comments on [SB400](#), which would reform the practice of civil asset forfeiture in the state.

Civil asset forfeiture in Hawaii has been the subject of criticism and concern. We commend the Legislature for focusing on this issue.

In 2020, a report card of civil asset forfeiture practices nationwide by the Institute of Justice gave Hawaii a D- and the dubious distinction of having some of the worst forfeiture laws in the country.¹

Singled out for criticism was the state's low standard of proof for showing how the property is tied to a crime.

In addition, Hawaii places the burden on innocent owners to prove they weren't tied to the crime resulting in the forfeiture.

The result is a state forfeiture program open to abuse and able to prey on innocent property owners.

¹ Lisa Knepper, et al., "[Policing for Profit: The Abuse of Civil Asset Forfeiture, 3rd Edition](#)," Institute for Justice, December 2020.

As the Hawaii state auditor wrote in a June 2018 report, Hawaii’s asset-forfeiture program lacks clear rules and procedures, inadequately manages funds and is badly in need of greater transparency.²

The state audit found:

>> In 26% of asset forfeiture cases closed during fiscal 2015, property was forfeited without a corresponding criminal charge.

>> In 4% of cases, the property was forfeited even though the charge was dismissed. Of those whose property was forfeited, very few petitioned for remission or mitigation. The state auditor speculated that most people might not know petition is an option because of the lack of transparency surrounding the forfeiture program.

The Office of the Auditor’s follow-up in 2021 found that the state Department of the Attorney General had only implemented two of its recommendations, with two partially implemented and two not implemented at all.

Among those recommendations that were ignored was that the department develop policies and procedures, “to ensure that petitions for administrative forfeiture are processed timely and consistently, that forfeited property and program funds are appropriately managed, and that proceeds from the sale of forfeited property are used for purposes intended by the Legislature.”

A separate unimplemented recommendation concerned the lack of a strict accounting and valuation system for forfeited property.³

Though the Department of the Attorney General has been given adequate time to increase the transparency and accountability of the state’s forfeiture program, the situation has not improved, and Hawaii continues to be among the worst states for property forfeiture. It is clear that reform is overdue.

By introducing a higher standard for forfeiture, this bill would take an important step in addressing many of the concerns raised in the audit.

It is shocking that Hawaii residents can lose their property without being convicted of a crime. Given that many of those subject to forfeiture lack the knowledge, assets or ability to challenge the seizure, this makes the forfeiture program especially threatening to vulnerable populations.

By limiting forfeiture to those situations where the property owner has been convicted of a felony, this bill addresses the auditor’s concerns while strengthening protections for innocent third-parties who can get swept up in a forfeiture case.

² [“Audit of the Department of the Attorney General’s Asset Forfeiture Program.”](#) Office of the Auditor, State of Hawaii, June 2018.

³ [“Follow-Up on Recommendations from Report No. 18-09, Audit of the Department of the Attorney General’s Asset Forfeiture Program,”](#) Office of the Auditor, State of Hawaii, July 2021.

This bill also deserves praise for seeking to eliminate the monetary incentives that can arise from the practice of asset forfeiture. By directing the proceeds from the forfeiture program to the general fund and limiting the allowable expenses for monies in the criminal forfeiture fund, this bill would prevent any agency or group from having a financial interest in asset forfeiture.

The bill should also be praised for limiting the transfer of forfeiture property to federal agencies, a technique that has been used elsewhere to circumvent state restrictions on forfeiture.

In addition, the elimination of the language allowing liberal construction of the statute is a praiseworthy addition that further clarifies the intent of this bill.

Finally, the recording and reporting requirements included in the bill would help improve transparency and accountability within the program. This, in turn, would help improve public trust in government.

This bill, if enacted, would represent a giant leap forward in improving Hawaii's forfeiture laws. As written, its changes would help make our state a nationwide model for forfeiture reform.

Thank you for the opportunity to submit our testimony.

Sincerely,

Ted Kefalas
Director of Strategic Campaigns
Grassroot Institute of Hawaii

LATE

SB-400

Submitted on: 2/1/2023 7:00:20 PM

Testimony for JDC on 2/2/2023 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Nikos Leverenz	Testifying for Hawaii Health & Harm Reduction Center	Support	Written Testimony Only

Comments:

Chair Rhoads, Vice Chair Gabbard, & Committee Members:

Hawaii Health & Harm Reduction Center (HHHRC) strongly supports SB 400, which would provide needed reforms to our state's asset forfeiture laws.

As with much of the operation of the state's criminal legal system, asset forfeiture disproportionately impacts those from under resourced communities.

We hope that our state's laws and prosecutorial practices can better respect the dignity of those who do not have the necessary resources to contest government predation of their property.

HHHRC's mission is to reduce harm, promote health, create wellness, and fight stigma in Hawai'i and the Pacific. We work with many individuals who are impacted by poverty, housing instability, and other social determinants of health. Many have behavioral health problems, including those relating to substance use and underlying mental health conditions, and have been deeply impacted by trauma, including histories of physical, sexual, and psychological abuse.

Dedicated to safe, responsible, humane and effective drug policies since 1993

TESTIMONY IN SUPPORT OF SB 400

TO: Chair Rhoads, Vice Chair Gabbard & Judiciary Committee Members

FROM: Nikos Leverenz
DPFH Board President

DATE: February 2, 2023 (10:00 AM)

Drug Policy Forum of Hawai'i (DPFH) **strongly supports** SB 400, which would reform Hawai'i's civil asset forfeiture law to require a felony conviction before a person's property is permanently forfeited, among other safeguards.

As evinced by legislative efforts and significant media coverage of this issue in recent years, the need for reform is clear to most everyone but those executive agencies who have effectively operated without careful legislative oversight, clear operational parameters, or any meaningful public reporting requirements for over three decades.

A [2018 report by the Hawai'i State Auditor](#) noted that about 85 percent of administrative forfeiture cases went uncontested during FY2006-FY2015. Current state law erects high barriers for an innocent owner to recoup their seized property, including the requirement to post bond. The auditor further noted that transparency and accountability have been lacking:

The Attorney General [has] broad power to take personal property from individuals without judicial oversight based on a relatively low standard of proof. Given the high profile of the program and the power bestowed on the Attorney General to administer it, it is crucial that the department manage the program with the highest degree of transparency and accountability.

Beyond the lack of administrative oversight, Hawai'i law and current practices do not adequately protect the rights of innocent owners to be secure in their property. Institute for Justice (IJ), a national non-profit public interest law firm, [calls Hawai'i's civil forfeiture laws "among the nation's worst" in assigning it a grade of "D-."](#) IJ also noted the wide disparity between the standard of proof required of state actors and that required of private individuals:

State law has a low standard of proof, requiring only that the government show by a preponderance of the evidence that property is tied to a crime. Furthermore, innocent owners bear the burden of proving that they had nothing to do with the alleged crime giving rise to the forfeiture. Most troubling, law enforcement has a large financial stake in forfeiture, receiving 100 percent of civil forfeiture proceeds: 25 percent goes to police, 25 percent to prosecuting attorneys and 50 percent to the attorney general.

When I served as an advocate to help reform California's civil asset forfeiture law in 2015, it was my pleasure to facilitate meetings between Senate Republican members, IJ Staff Attorney Lee McGrath, and Brad Cates, Director of the Justice Department's Asset Forfeiture Office from 1985 to 1989. Their message and their presence were very well-received, even among those conservative Republicans who were not typically inclined to support reforms to the criminal legal system.

Cates, who spearheaded successful efforts in New Mexico to abolish civil asset forfeiture entirely with a Republican governor and Republican majorities in both houses, [wrote a penetrating opinion editorial in *The Washington Post*](#) with his immediate predecessor John Yoder calling for its national abolition. They noted the how the practice of asset forfeiture turns the law on its head:

In America, it is often said that it is better that nine guilty people go free than one innocent person be wrongly convicted. But our forfeiture laws turn our traditional concept of guilt upside down. Civil forfeiture laws presume someone's personal property to be tainted, placing the burden of proving it "innocent" on the owner. What of the Fourth Amendment requirement that a warrant to seize or search requires the showing of probable cause of a specific violation?

Defendants should be charged with the crimes they commit. Charge someone with drug dealing if it can be proved, but don't invent a second offense of "money laundering" to use as a backup or a pretext to seize cash. Valid, time-tested methods exist to allow law enforcement to seize contraband, profits and instrumentalities via legitimate criminal prosecution.

Since 2014, [37 states and the District of Columbia have reformed their civil forfeiture laws](#). 16 states require a conviction in criminal court to forfeit most or all types of property in civil court, and three states (New Mexico, Nebraska, and North Carolina) have abolished civil forfeiture entirely. 8 states and the District of Columbia have passed anti-circumvention legislation to close the equitable sharing loophole.

In short, Hawai'i should join the supermajority of states that have reformed their forfeiture laws.

Thank you for the opportunity to testify on this critical reform measure.

Will Caron
Kahalu'u, O'ahu
Jan. 30, 2023

TO: Senate Committee on Judiciary
RE: Testimony in Support of SB400

Dear Senators,

I strongly support SB400, which restricts civil asset forfeiture to cases involving a felony offense, and where the property owner has been convicted of the underlying felony offense. It also directs forfeiture proceeds to the general fund.

This bill facilitates a very important change in state statute. Under existing law, the police can seize (and the state can forfeit) property that is only tenuously connected to a *suspected* crime; and a person's property can be auctioned off by the state even if charges are never brought against anyone for any crime relating to that property. This is a violation of due process and civil rights.

Civil asset forfeiture is often called "policing for profit" because, in Hawai'i and in other jurisdictions, police and prosecutors get to keep a portion of the proceeds. This creates a perverse incentive for law enforcement to over-police communities, often those that are predominantly communities of color. There is no place for profit motive within the criminal-legal system. Allowing for a profit incentive anywhere within this system is unethical and causes further harm.

According to a recent AG report on forfeitures for Fiscal Year (FY) 2020, county police departments seized a total of \$535,641. That doesn't include the value of other seized property. The total value of seized property, including currency, vehicles, misc. property and real property for this reporting period was \$963,055—almost a million dollars. Of this amount, the vast majority of both cash and property (valued at \$828,609) was ordered forfeited.

Directing proceeds into the general fund is a critical reform to mitigate the profit incentive that police have to seize property, even where there is not a clear connection to any underlying crime. The requirement of conviction, meanwhile, protects due process and constitutional rights.

If law enforcement hopes to rebuild trust among the community, it must undergo extensive reforms to transform itself from a predatory force within society to instead be a genuine public service. This is a good step in that direction.

Mahalo for the opportunity to testify,

Will Caron

SB-400

Submitted on: 1/30/2023 4:16:43 PM

Testimony for JDC on 2/2/2023 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Gerard Silva	Individual	Oppose	Written Testimony Only

Comments:

Violates the Constitutional Rights of the Person!!!

SB-400

Submitted on: 1/31/2023 10:00:14 AM

Testimony for JDC on 2/2/2023 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
lynne matusow	Individual	Support	Written Testimony Only

Comments:

This is long over due. Please pass.

SB-400

Submitted on: 2/1/2023 11:49:07 AM

Testimony for JDC on 2/2/2023 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Andy Kagemoto	Individual	Support	Written Testimony Only

Comments:

Thank you Chair San Buenaventura for hearing SB400. I am in strong support. Mahalo for the opportunity to offer testimony!

SB-400

Submitted on: 2/1/2023 12:10:21 PM

Testimony for JDC on 2/2/2023 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Shannon Rudolph	Individual	Support	Written Testimony Only

Comments:

Support