

Department of Legislative Services
Maryland General Assembly
2015 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 528

(Senator Raskin, *et al.*)

Judicial Proceedings

Judiciary

Criminal Procedure - Seizure and Forfeiture

This bill makes several changes to statutes pertaining to seizure and forfeiture of property in connection with violations of the State's controlled dangerous substances laws.

The bill specifies that cash of \$300 or less may not be forfeited unless directly connected to the unlawful distribution of a controlled dangerous substance. The bill also alters the burden of proof in specified forfeiture proceedings by requiring that the State prove by a preponderance of the evidence that the violation of the controlled dangerous substances law was committed with the owner's actual knowledge. In addition, the bill requires law enforcement to send specified written information to the owner of seized property within 30 days of the seizure and prohibits the transfer of seized property to the federal government except under specified conditions.

Fiscal Summary

State Effect: General fund revenues decrease to the extent that the bill's changes to the seizure and forfeiture process decrease general fund revenues from forfeitures in controlled dangerous substances cases. Any potential minimal increase in State expenditures for State law enforcement agencies to comply with the bill's notice requirements is not expected to materially affect State finances.

Local Effect: Local revenues decrease to the extent that the bill's changes to the seizure and forfeiture process decrease local revenues from forfeitures in controlled dangerous substances cases. Any potential minimal increase in local expenditures for local law enforcement agencies to comply with the bill's notice requirements is not expected to materially affect local finances.

Small Business Effect: None.

Analysis

Bill Summary:

Property Subject to Forfeiture: The bill removes the following from the statutorily specified list of property and items subject to forfeiture in a controlled dangerous substances case: money of \$300 or less used or intended to be used in connection with the unlawful manufacture, distribution, dispensing, or possession of a controlled dangerous substance or controlled paraphernalia. However, the bill authorizes seizure of any amount of money that is directly connected to drug distribution.

The bill repeals the statutory provision that money or weapons that are found in close proximity to a contraband controlled dangerous substance, controlled paraphernalia, or forfeitable records of the importation, manufacture, or distribution of controlled dangerous substances are contraband and presumed to be forfeitable. The bill also removes the burden on the claimant of seized money or weapons to rebut this presumption.

Forfeiture Procedures: The State must prove, by a preponderance of the evidence, that the violation of the controlled dangerous substance law was committed *with* the owner's actual knowledge before the following property or an interest in the following property can be forfeited: (1) conveyances used or intended to be used to transport controlled dangerous substances or specified activity related to controlled dangerous substance violations; (2) real property; and (3) everything of value furnished or intended to be furnished in exchange for a controlled dangerous substance in violation of the controlled dangerous substance law, all proceeds traceable to the exchange, and all negotiable instruments and securities used, or intended to be used to facilitate any violation of the controlled dangerous substance law.

Under current law, this property is subject to forfeiture unless the owner proves, by a preponderance of the evidence, that the violation was committed without the owner's actual knowledge.

The direct or indirect transfer of seized property to a federal law enforcement authority or agency is prohibited unless a criminal case related to the seizure is prosecuted in the federal court system under federal law or the property owner consents to the forfeiture.

The bill establishes that a claimant's property is subject to forfeiture if the State establishes, by clear and convincing evidence, that the claimant violated specified provisions of the controlled dangerous substance law or attempted or conspired to violate the controlled dangerous substance law. Accordingly, the bill repeals the rebuttable presumption and the claimant's burden of proof to rebut that presumption.

Notification Requirements: Within 30 days after the seizure of property, a seizing authority must send written information via first-class mail to the owner of seized property, if known, providing (1) the location and description of the seized property and (2) the name and contact information of an individual or office within the seizing authority that can provide further information concerning the seized property, including information on how the property may be returned to the owner. The written information must contain a disclaimer that the document does not constitute legal advice, as specified in the bill.

Current Law: While several provisions of State law may provide for the seizure and forfeiture of property under certain circumstances, one primary example of property that is subject to forfeiture is property seized in connection with a violation of the controlled dangerous substances law. Seizures and forfeitures are subject to extensive procedural requirements, as specified in statute.

Property Subject to Seizure: A Schedule I substance must be seized and summarily forfeited to the State if the substance is (1) possessed, transferred, sold, or offered for sale in violation of the law or (2) possessed by the State and its owner is not known. A plant may be seized and summarily forfeited if it is one from which a Schedule I or Schedule II substance may be derived and it (1) has been planted or cultivated in violation of the law; (2) has an unknown owner or cultivator; or (3) is a wild growth.

Property Subject to Forfeiture: The following are subject to forfeiture:

- (1) controlled dangerous substances manufactured, distributed, dispensed, acquired, or possessed in violation of the controlled dangerous substances law;
- (2) raw materials, products, and equipment used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting a controlled dangerous substance in violation of the controlled dangerous substances law;
- (3) property used or intended for use as a container for property described above;
- (4) conveyances, including aircraft, vehicles, or vessels used or intended to be used to transport, or facilitate the transportation, sale, receipt, possession, or concealment of property described items (1) or (2);
- (5) books, records, and research, including formulas, microfilm, tapes, and data used or intended for use in violation of the controlled dangerous substances law;
- (6) money or weapons used or intended to be used in connection with the unlawful manufacture, distribution, dispensing, or possession of a controlled dangerous substance or controlled paraphernalia;
- (7) drug paraphernalia;
- (8) controlled paraphernalia;
- (9) the remaining balance of the proceeds of a sale by a holder of an installment sale agreement of goods seized;
- (10) real property; and

- (11) everything of value furnished, or intended to be furnished, in exchange for a controlled dangerous substance in violation of the controlled dangerous substances law, all proceeds traceable to the exchange, and all negotiable instruments and securities used, or intended to be used, to facilitate any violation of the controlled dangerous substances law.

Money or weapons that are found in close proximity to a contraband controlled dangerous substance, controlled paraphernalia, or forfeitable records of the importation, manufacture, or distribution of controlled dangerous substances are contraband and presumed to be forfeitable. A claimant of money or weapons has the burden to rebut this presumption.

Conditions Excluding Property from Forfeiture: Property or an interest in conveyances, real property, everything of value furnished or intended to be furnished in exchange for a controlled dangerous substance, all proceeds traceable to the exchange, and all applicable negotiable instruments and securities used or intended to be used to facilitate a controlled dangerous substances violation may not be forfeited if the owner establishes by a preponderance of the evidence that the violation of the controlled dangerous substances law was committed without the owner's actual knowledge. Additional exclusions apply to conveyances used as a common carrier or vehicle for hire, conveyances forfeited when a person other than the owner illegally possessed the conveyance, real property associated with specified controlled dangerous substance violations, and property used as the principal family residence.

Forfeiture of Ownership Interest in Property: There is a rebuttable presumption that property or part of a property in which a person has an ownership interest is subject to forfeiture as proceeds, if the State establishes by clear and convincing evidence that:

- the person has violated specified statutory provisions pertaining to controlled dangerous substances or has attempted or conspired to violate State controlled dangerous substances laws;
- the property was acquired by the person during the violation or within a reasonable time after the violation; and
- there was no other likely source for the property.

A claimant of the property has the burden of proof to rebut the presumption. Real property used as the principal family residence may not be forfeited unless an owner of the real property (1) was convicted of one of a list of specified crimes or (2) was not convicted, but failed to appear for a required court appearance and failed to surrender to the jurisdiction of the court within 180 days after the required court appearance.

Background: Asset forfeiture programs exist nationwide at the federal, State, and local levels. Forfeitures typically fall into two categories – criminal forfeiture and civil forfeiture.

Criminal forfeiture actions are brought against a criminal defendant. In criminal forfeiture, the government must prove beyond a reasonable doubt that the property in question was used for or derived from the underlying crime. Criminal forfeitures occur after an individual has been convicted; an action is then brought against the individual, to which civil liberty protections apply.

Civil forfeiture actions are brought against property, not people. In fact, under civil forfeiture, criminal charges do not need to be brought against the owner of the property, and the government can pursue property even if the property owner was not involved in the underlying crime. Civil forfeitures occur irrespective of a conviction; an action is brought against an individual's property, to which civil liberty protections do not apply. The standard of proof for civil forfeiture is considerably lower than the criminal standard, in that the government must only prove by a preponderance of the evidence, rather than beyond a reasonable doubt, that the property in question was used or obtained illegally.

Forfeiture programs, particularly civil forfeiture, have received increased scrutiny in recent years, with news reports of individuals facing the loss of a home or property without ever being charged with a crime, while fighting to keep their property in a system they claim is stacked against them. Challenging civil forfeiture can be costly and time consuming, which can discourage citizens from initiating the process to retrieve their property.

Proponents of forfeiture programs claim asset forfeiture is an important law enforcement tool that assists in dismantling criminal organizations and offsets the cost of criminal investigations. Opponents of these programs argue that they lead to potential corruption, improper usage, and civil liberty violations. Critics of forfeiture programs claim the programs create financial incentives for officers to seize assets, which cause “policing for profit.” Law enforcement agencies that participate in a forfeiture are directly rewarded for their involvement, which creates concerns that officers will focus more on crimes that result in seized assets than on any other activity. With many law enforcement agencies facing shrinking budgets, there is also concern that departments become dependent on forfeiture money, which in turn creates pressure on officers to seize assets. Critics also claim that these programs have resulted in fishing expeditions for cash and specific valuables during traffic stops and warrantless searches of vehicles.

Another criticism of these programs is that the money is used to purchase items that are unnecessary, wasteful, or contribute to the militarization of police forces. Although replacing bullet-proof vests for officers may seem to be a reasonable purchase, others

question the merits of small-town police forces owning Humvees, automatic weapons, or gas grenades purchased with forfeiture proceeds.

While the laws in some jurisdictions allow a seizing agency to retain the proceeds from forfeited property, Maryland law requires that the proceeds from forfeitures processed under State law be deposited into the general fund of the State or the appropriate local government.

Federal Asset Forfeiture Program: The U.S. Department of Justice (DOJ) Asset Forfeiture Program (AFP) was established by the Comprehensive Crime Control Act of 1984. The program's objective is the seizure and forfeiture of assets that represent the proceeds of, or were used to facilitate, federal crimes. The U.S. Marshals Service, under DOJ, is responsible for the management and disposal of forfeited property. Other components of DOJ involved in the AFP include the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); the Drug Enforcement Administration (DEA); the Federal Bureau of Investigation (FBI); and the U.S. Attorneys' Offices. Participating components outside of DOJ include the U.S. Department of Agriculture (Office of Inspector General), U.S. Department of Defense (Criminal Investigative Service), U.S. Department of State (Bureau of Diplomatic Security), U.S. Food and Drug Administration (Office of Criminal Investigations), and the U.S. Postal Inspection Service (USPIS).

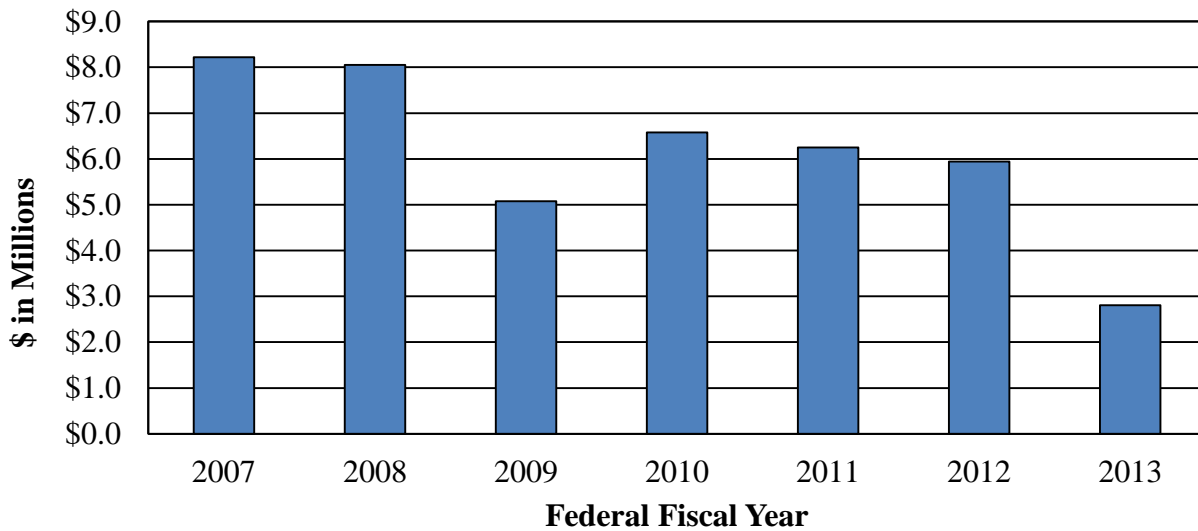
Under the federal Equitable Sharing Program, the net proceeds from sales of forfeited assets are shared with the state and local law enforcement agencies that participated in the seizure. There are two options for state and local forfeitures: joint investigative and adoptive. Joint investigative forfeitures occur when federal law enforcement agencies cooperate with state or local law enforcement agencies to seize assets; adoptive forfeitures occur when state and local law enforcement agencies forfeit assets from state crimes to be processed at the federal level. DOJ advises that adoption cases represent a small percentage of the Equitable Sharing Program; joint task forces and joint investigations represent the majority of the program. The FBI, DEA, ATF, and USPIS are the only agencies participating in the DOJ Asset Forfeiture Program that directly adopt seizures by state and local law enforcement agencies.

According to DOJ, with respect to joint investigations and adoptions, the percentage of funds shared is based on the level of participation/effort of each agency and is determined on a case-by-case basis. Joint task forces often determine sharing percentages based on prearranged written sharing agreements. In adoption cases, the federal government retains at least 20% of the net proceeds from the sale of an adopted asset. This 20% minimum typically applies to cases in which the state/local law enforcement agency performed all of the preseizure activity and the federal government merely processed the forfeiture.

In October 2014, the Department of State Police (DSP) advised that it processes all of its forfeitures through the AFP.

In federal fiscal year 2013, State and local law enforcement agencies in Maryland received \$2.8 million in Equitable Sharing payments from the DOJ Asset Forfeiture Fund (AFF). Local law enforcement agencies received \$2.25 million, or 80.3% of this amount. **Exhibit 1** shows the amount Maryland received from the AFF from federal fiscal 2007 to 2013. According to the Equitable Sharing Program, AFF money may only be used for specific law enforcement purposes, such as investigative support, training, equipment, facility upgrades, and educational programs. Funding is usually used for one-time purposes and is meant to supplement, not supplant, law enforcement agencies' budgets.

Exhibit 1
U.S. Department of Justice Assets Forfeiture Fund
Amount Shared with Maryland Law Enforcement Agencies
Federal Fiscal Years 2007-2013



Source: U.S. Department of Justice and National Conference of State Legislatures

On January 16, 2015, U.S. Attorney General Eric Holder issued an order, effective immediately, prohibiting federal agencies from “adopting” assets seized by state and local law enforcement agencies. However, the order contains an exception for property that directly relates to public safety concerns (*e.g.*, firearms, ammunition, explosives, and property associated with child pornography). Examples of property subject to the order include vehicles, valuables, cash, and other monetary instruments.

The U.S. Department of the Treasury issued a similar policy for its forfeiture programs.

State Fiscal Effect: General fund revenues decrease to the extent that the bill's changes to the seizure and forfeiture process under State law decreases the amount of property seized by and forfeited to State law enforcement agencies. Any potential minimal increase in State expenditures for State law enforcement agencies to comply with the bill's notice requirements is not expected to materially affect State finances.

As previously mentioned, proceeds from property forfeited and processed under Maryland law must be deposited into the State's general fund or the general fund of the applicable local government. Under the federal Equitable Sharing Program, State and local law enforcement agencies can seize property under State law and request that a federal agency take the seized asset and forfeit it under federal law. The bill prohibits a seizing authority or prosecuting authority from directly or indirectly transferring seized property to a federal law enforcement authority unless a criminal case related to the seizure is prosecuted in the federal court system under federal law or the owner of the property consents to the forfeiture. The U.S. Attorney General's recent order produces a similar effect. This estimate assumes that property forfeited due to the efforts of federal/State joint task forces and investigations is connected to federal criminal cases.

As previously mentioned, DSP advised in October 2014 that it processes seized assets exclusively through the federal Asset Forfeiture Program. The Natural Resources Police (NRP) within the Department of Natural Resources (DNR) advises that it participates in the federal Equitable Sharing Program as a member of federal task forces. Other than this information, it is unclear to what extent local law enforcement agencies in the State participate in the federal program, the frequency with which they participate or plan to participate in the federal program following the Attorney General's January 2015 order, and to what extent they would seize and forfeit assets under State law given the changing landscape of forfeitures after the Attorney General's order and the provisions of the bill.

Regardless, to the extent that law enforcement agencies seize and forfeit assets under State law, the bill's restrictions on the types of property that may be seized and the mandatory return of seized property when charges have not been brought against the owner of the seized property reduce State general fund revenues from forfeiture proceeds. The bill's changes to the "rebuttable presumption" in forfeiture proceedings may also result in reduced State general fund revenues. The magnitude of any such decrease cannot be reliably determined at this time because data is not readily available on the frequency with which the property prohibited from seizure/forfeiture under the bill is seized by local authorities and the frequency with which charges are not brought against the owner of the property within 90 days of the seizure.

This analysis assumes that agencies are in compliance with the bill's requirements when they seize property as part of a federal task force.

Local Revenues: Local revenues decrease to the extent that the bill's alteration of seizure/forfeiture eligibility and procedures reduces the amount of property seized by and forfeited to local law enforcement agencies. Any potential minimal increase in local expenditures for local law enforcement agencies to comply with the bill's notice requirements is not expected to materially affect local finances.

The Montgomery County Police Department (MCPD) advises that the bill has the potential to reduce the amount of revenue available to the department (which is used to support the department's needs related to drug enforcement) by restricting items subject to seizure and mandating the return of seized property in certain circumstances. MCPD advises that it is impossible to quantify the fiscal impact because the department cannot predict the scope of future investigations and the corresponding impact of the bill's proposed changes to seizures and forfeitures. MCPD also advises that many drug investigations involve multiple agencies as part of local, State, or federal task forces, and in those cases, forfeited assets are divided between the participating agencies.

Additional Information

Prior Introductions: None.

Cross File: HB 360 (Delegate Vallario, *et al.*) - Judiciary.

Information Source(s): Montgomery County, Town of Leonardtown, Governor's Office of Crime Control and Prevention, Department of Natural Resources, Judiciary (Administrative Office of the Courts), Department of State Police, Department of Public Safety and Correctional Services, State's Attorneys' Association, Maryland Department of Transportation, U.S. Department of Justice, U.S. Department of the Treasury, Department of Legislative Services

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