

Senate Bill No. 443

Passed the Senate August 24, 2016

Secretary of the Senate

Passed the Assembly August 15, 2016

Chief Clerk of the Assembly

This bill was received by the Governor this _____ day
of _____, 2016, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Sections 11470.1, 11488.4, 11488.5, and 11495 of, and to add Section 11471.2 to, the Health and Safety Code, relating to forfeiture.

LEGISLATIVE COUNSEL'S DIGEST

SB 443, Mitchell. Forfeiture: assets: controlled substances.

Existing law subjects certain property to forfeiture, such as controlled substances and equipment used to process controlled substances. Existing law allows peace officers, under specified circumstances, to seize property that is subject to forfeiture. Existing law authorizes specified public agencies to bring an action to recover expenses of seizing, eradicating, destroying, or taking remedial action with respect to any controlled substance. In a forfeiture action with regards to cash or negotiable instruments of a value of not less than \$25,000, existing law requires the state or local agency to prove by clear and convincing evidence that the property is subject to forfeiture. Existing law requires seized property or the proceeds from the sale of that property to be distributed among specified entities. Existing law requires the Attorney General to publish an annual report on forfeiture within the state.

This bill would require a prosecuting agency to seek or obtain a criminal conviction for the unlawful manufacture or cultivation of any controlled substance or its precursors prior to an entry of judgment for recovery of expenses of seizing, eradicating, destroying, or taking remedial action with respect to any controlled substance. The bill would prohibit maintaining an action for recovery of expenses against a person who has been acquitted of the underlying criminal charges.

The bill would prohibit state or local law enforcement agencies from transferring seized property to a federal agency seeking adoption by the federal agency of the seized property. The bill would further prohibit state or local agencies from receiving an equitable share from a federal agency of specified seized property if a conviction for the underlying offenses is not obtained, except as specified. The bill would require notices of a forfeiture action

to contain additional details, such as the rights of an interested party at a forfeiture hearing.

The bill would change the burden of proof that a state or local law enforcement agency must meet to succeed in a forfeiture action with regards to cash or negotiable instruments of a value not less than \$25,000, but not more than \$40,000, from a clear and convincing standard to beyond a reasonable doubt. The bill would require the Legislative Analyst's Office, on or before December 31, 2019, to submit a report to the Legislature on the economic impact of this change, and the above-described prohibition on receiving an equitable share from a federal agency, on state and local law enforcement budgets. The bill would make other related changes to court forfeiture proceedings. The bill would also require the Attorney General to include additional information on forfeiture actions in the annual report.

The people of the State of California do enact as follows:

SECTION 1. Section 11470.1 of the Health and Safety Code is amended to read:

11470.1. (a) The expenses of seizing, eradicating, destroying, or taking remedial action with respect to, any controlled substance or its precursors shall be recoverable from:

(1) Any person who manufactures or cultivates a controlled substance or its precursors in violation of this division.

(2) Any person who aids and abets or who knowingly profits in any manner from the manufacture or cultivation of a controlled substance or its precursors on property owned, leased, or possessed by the defendant, in violation of this division.

(b) The expenses of taking remedial action with respect to any controlled substance or its precursors shall also be recoverable from any person liable for the costs of that remedial action under Chapter 6.8 (commencing with Section 25300) of Division 20 of the Health and Safety Code.

(c) It shall be necessary to seek or obtain a criminal conviction for the unlawful manufacture or cultivation of any controlled substance or its precursors prior to the entry of judgment for the recovery of expenses. If criminal charges are pending against the defendant for the unlawful manufacture or cultivation of any controlled substance or its precursors, an action brought pursuant

to this section shall, upon a defendant's request, be continued while the criminal charges are pending.

(d) The action may be brought by the district attorney, county counsel, city attorney, the State Department of Health Care Services, or Attorney General. All expenses recovered pursuant to this section shall be remitted to the law enforcement agency which incurred them.

(e) (1) The burden of proof as to liability shall be on the plaintiff and shall be by a preponderance of the evidence in an action alleging that the defendant is liable for expenses pursuant to paragraph (1) of subdivision (a). The burden of proof as to liability shall be on the plaintiff and shall be by clear and convincing evidence in an action alleging that the defendant is liable for expenses pursuant to paragraph (2) of subdivision (a). The burden of proof as to the amount of expenses recoverable shall be on the plaintiff and shall be by a preponderance of the evidence in any action brought pursuant to subdivision (a).

(2) Notwithstanding paragraph (1), for any person convicted of a criminal charge of the manufacture or cultivation of a controlled substance or its precursors there shall be a presumption affecting the burden of proof that the person is liable.

(f) Only expenses which meet the following requirements shall be recoverable under this section:

(1) The expenses were incurred in seizing, eradicating, or destroying the controlled substance or its precursors or in taking remedial action with respect to a hazardous substance. These expenses may not include any costs incurred in use of the herbicide paraquat.

(2) The expenses were incurred as a proximate result of the defendant's manufacture or cultivation of a controlled substance in violation of this division.

(3) The expenses were reasonably incurred.

(g) For purposes of this section, "remedial action" shall have the meaning set forth in Section 25322.

(h) For the purpose of discharge in bankruptcy, a judgment for recovery of expenses under this section shall be deemed to be a debt for willful and malicious injury by the defendant to another entity or to the property of another entity.

(i) Notwithstanding Section 526 of the Code of Civil Procedure, the plaintiff may be granted a temporary restraining order or a

preliminary injunction, pending or during trial, to restrain the defendant from transferring, encumbering, hypothecating, or otherwise disposing of any assets specified by the court, if it appears by the complaint that the plaintiff is entitled to the relief demanded and it appears that the defendant may dispose of those assets to thwart enforcement of the judgment.

(j) The Legislature finds and declares that civil penalties for the recovery of expenses incurred in enforcing the provisions of this division shall not supplant criminal prosecution for violation of those provisions, but shall be a supplemental remedy to criminal enforcement.

(k) Any testimony, admission, or any other statement made by the defendant in any proceeding brought pursuant to this section, or any evidence derived from the testimony, admission, or other statement, shall not be admitted or otherwise used in any criminal proceeding arising out of the same conduct.

(l) No action shall be brought or maintained pursuant to this section against a person who has been acquitted of criminal charges for conduct that is the basis for an action under this section.

SEC. 2. Section 11471.2 is added to the Health and Safety Code, to read:

11471.2. (a) State or local law enforcement authorities shall not refer or otherwise transfer property seized under state law authorizing the seizure of property to a federal agency seeking the adoption of the seized property by the federal agency for proceeding with federal forfeiture under the federal Controlled Substances Act. Nothing in this section shall be construed to prohibit the federal government, or any of its agencies, from seizing property, seeking forfeiture under federal law, or sharing federally forfeited property with state or local law enforcement agencies when those state or local agencies work with federal agencies in joint investigations arising out of federal law or federal joint task forces comprised of federal and state or local agencies. Nothing in this section shall be construed to prohibit state or local law enforcement agencies from participating in a joint law enforcement operation with federal agencies.

(b) Except as provided in this subdivision and in subdivision (c), a state or local law enforcement agency participating in a joint investigation with a federal agency shall not receive an equitable share from the federal agency of all or a portion of the forfeited

property or proceeds from the sale of property forfeited pursuant to the federal Controlled Substances Act unless a defendant is convicted in an underlying or related criminal action of an offense for which property is subject to forfeiture as specified in Section 11470 or Section 11488, or an offense under the federal Controlled Substances Act that includes all of the elements of an offense for which property is subject to forfeiture as specified in Sections 11470 and 11488. In any case in which the forfeited property is cash or negotiable instruments of a value of not less than forty thousand dollars (\$40,000) there shall be no requirement of a criminal conviction as a prerequisite to receipt by state or local law enforcement agencies of an equitable share from federal authorities.

(c) If the defendant has been arrested and charged in an underlying or related criminal action or proceeding for an offense described in subdivision (b) and willfully fails to appear as required, intentionally flees to evade prosecution, or is deceased, there shall be no requirement of a criminal conviction as a prerequisite to receipt by state or local law enforcement agencies of an equitable share from federal authorities.

SEC. 3. Section 11488.4 of the Health and Safety Code is amended to read:

11488.4. (a) (1) Except as provided in subdivision (j), if the Department of Justice or the local governmental entity determines that the factual circumstances do warrant that the moneys, negotiable instruments, securities, or other things of value seized or subject to forfeiture come within the provisions of subdivisions (a) to (g), inclusive, of Section 11470, and are not automatically made forfeitable or subject to court order of forfeiture or destruction by another provision of this chapter, the Attorney General or district attorney shall file a petition of forfeiture with the superior court of the county in which the defendant has been charged with the underlying criminal offense or in which the property subject to forfeiture has been seized or, if no seizure has occurred, in the county in which the property subject to forfeiture is located. If the petition alleges that real property is forfeitable, the prosecuting attorney shall cause a lis pendens to be recorded in the office of the county recorder of each county in which the real property is located.

(2) A petition of forfeiture under this subdivision shall be filed as soon as practicable, but in any case within one year of the seizure of the property which is subject to forfeiture, or as soon as practicable, but in any case within one year of the filing by the Attorney General or district attorney of a lis pendens or other process against the property, whichever is earlier.

(b) Physical seizure of assets shall not be necessary in order to have that particular asset alleged to be forfeitable in a petition under this section. The prosecuting attorney may seek protective orders for any asset pursuant to Section 11492.

(c) The Attorney General or district attorney shall make service of process regarding this petition upon every individual designated in a receipt issued for the property seized. In addition, the Attorney General or district attorney shall cause a notice of the seizure, if any, and of the intended forfeiture proceeding, as well as a notice stating that any interested party may file a verified claim with the superior court of the county in which the property was seized or if the property was not seized, a notice of the initiation of forfeiture proceedings with respect to any interest in the property seized or subject to forfeiture, to be served by personal delivery or by registered mail upon any person who has an interest in the seized property or property subject to forfeiture other than persons designated in a receipt issued for the property seized. Whenever a notice is delivered pursuant to this section, it shall be accompanied by a claim form as described in Section 11488.5 and directions for the filing and service of a claim.

(d) An investigation shall be made by the law enforcement agency as to any claimant to a vehicle, boat, or airplane whose right, title, interest, or lien is of record in the Department of Motor Vehicles or appropriate federal agency. If the law enforcement agency finds that any person, other than the registered owner, is the legal owner thereof, and that ownership did not arise subsequent to the date and time of arrest or notification of the forfeiture proceedings or seizure of the vehicle, boat, or airplane, it shall forthwith send a notice to the legal owner at his or her address appearing on the records of the Department of Motor Vehicles or appropriate federal agency.

(e) When a forfeiture action is filed, the notices shall be published once a week for three successive weeks in a newspaper

of general circulation in the county where the seizure was made or where the property subject to forfeiture is located.

(f) All notices shall set forth the time within which a claim of interest in the property seized or subject to forfeiture is required to be filed pursuant to Section 11488.5. The notices shall explain, in plain language, what an interested party must do and the time in which the person must act to contest the forfeiture in a hearing. The notices shall state what rights the interested party has at a hearing. The notices shall also state the legal consequences for failing to respond to the forfeiture notice.

(g) Nothing contained in this chapter shall preclude a person, other than a defendant, claiming an interest in property actually seized from moving for a return of property if that person can show standing by proving an interest in the property not assigned subsequent to the seizure or filing of the forfeiture petition.

(h) (1) If there is an underlying or related criminal action, a defendant may move for the return of the property on the grounds that there is not probable cause to believe that the property is forfeitable pursuant to subdivisions (a) to (g), inclusive, of Section 11470 and is not automatically made forfeitable or subject to court order of forfeiture or destruction by another provision of this chapter. The motion may be made prior to, during, or subsequent to the preliminary examination. If made subsequent to the preliminary examination, the Attorney General or district attorney may submit the record of the preliminary hearing as evidence that probable cause exists to believe that the underlying or related criminal violations have occurred.

(2) Within 15 days after a defendant's motion is granted, the people may file a petition for a writ of mandate or prohibition seeking appellate review of the ruling.

(i) (1) With respect to property described in subdivisions (e) and (g) of Section 11470 for which forfeiture is sought and as to which forfeiture is contested, the state or local governmental entity shall have the burden of proving beyond a reasonable doubt that the property for which forfeiture is sought was used, or intended to be used, to facilitate a violation of one of the offenses enumerated in subdivision (f) or (g) of Section 11470.

(2) In the case of property described in subdivision (f) of Section 11470, except cash, negotiable instruments, or other cash equivalents of a value of not less than forty thousand dollars

(\$40,000), for which forfeiture is sought and as to which forfeiture is contested, the state or local governmental entity shall have the burden of proving beyond a reasonable doubt that the property for which forfeiture is sought meets the criteria for forfeiture described in subdivision (f) of Section 11470.

(3) In the case of property described in paragraphs (1) and (2), where forfeiture is contested, a judgment of forfeiture requires as a condition precedent thereto, that a defendant be convicted in an underlying or related criminal action of an offense specified in subdivision (f) or (g) of Section 11470 which offense occurred within five years of the seizure of the property subject to forfeiture or within five years of the notification of intention to seek forfeiture. If the defendant is found guilty of the underlying or related criminal offense, the issue of forfeiture shall be tried before the same jury, if the trial was by jury, or tried before the same court, if trial was by court, unless waived by all parties. The issue of forfeiture shall be bifurcated from the criminal trial and tried after conviction unless waived by all the parties.

(4) In the case of property described in subdivision (f) of Section 11470 that is cash or negotiable instruments of a value of not less than forty thousand dollars (\$40,000), the state or local governmental entity shall have the burden of proving by clear and convincing evidence that the property for which forfeiture is sought is such as is described in subdivision (f) of Section 11470. There is no requirement for forfeiture thereof that a criminal conviction be obtained in an underlying or related criminal offense.

(5) If there is an underlying or related criminal action, and a criminal conviction is required before a judgment of forfeiture may be entered, the issue of forfeiture shall be tried in conjunction therewith. In such a case, the issue of forfeiture shall be bifurcated from the criminal trial and tried after conviction unless waived by the parties. Trial shall be by jury unless waived by all parties. If there is no underlying or related criminal action, the presiding judge of the superior court shall assign the action brought pursuant to this chapter for trial.

(j) The Attorney General or the district attorney of the county in which property is subject to forfeiture under Section 11470 may, pursuant to this subdivision, order forfeiture of personal property not exceeding twenty-five thousand dollars (\$25,000) in value. The Attorney General or district attorney shall provide notice of

proceedings under this subdivision pursuant to subdivisions (c), (d), (e), and (f), including:

- (1) A description of the property.
- (2) The appraised value of the property.
- (3) The date and place of seizure or location of any property not seized but subject to forfeiture.
- (4) The violation of law alleged with respect to forfeiture of the property.

(5) (A) The instructions for filing and serving a claim with the Attorney General or the district attorney pursuant to Section 11488.5 and time limits for filing a claim and claim form.

(B) If no claims are timely filed, the Attorney General or the district attorney shall prepare a written declaration of forfeiture of the subject property to the state and dispose of the property in accordance with Section 11489. A written declaration of forfeiture signed by the Attorney General or district attorney under this subdivision shall be deemed to provide good and sufficient title to the forfeited property. The prosecuting agency ordering forfeiture pursuant to this subdivision shall provide a copy of the declaration of forfeiture to any person listed in the receipt given at the time of seizure and to any person personally served notice of the forfeiture proceedings.

(C) If a claim is timely filed, then the Attorney General or district attorney shall file a petition of forfeiture pursuant to this section within 30 days of the receipt of the claim. The petition of forfeiture shall then proceed pursuant to other provisions of this chapter, except that no additional notice need be given and no additional claim need be filed.

(k) If in any underlying or related criminal action or proceeding, in which a petition for forfeiture has been filed pursuant to this section, and a criminal conviction is required before a judgment of forfeiture may be entered, the defendant willfully fails to appear as required, there shall be no requirement of a criminal conviction as a prerequisite to the forfeiture. In these cases, forfeiture shall be ordered as against the defendant and judgment entered upon default, upon application of the state or local governmental entity. In its application for default, the state or local governmental entity shall be required to give notice to the defendant's attorney of record, if any, in the underlying or related criminal action, and to make a showing of due diligence to locate the defendant. In moving

for a default judgment pursuant to this subdivision, the state or local governmental entity shall be required to establish a prima facie case in support of its petition for forfeiture.

SEC. 4. Section 11488.5 of the Health and Safety Code is amended to read:

11488.5. (a) (1) Any person claiming an interest in the property seized pursuant to Section 11488 may, unless for good cause shown the court extends the time for filing, at any time within 30 days from the date of the last publication of the notice of seizure, if that person was not personally served or served by mail, or within 30 days after receipt of actual notice, file with the superior court of the county in which the defendant has been charged with the underlying or related criminal offense or in which the property was seized or, if there was no seizure, in which the property is located, a claim, verified in accordance with Section 446 of the Code of Civil Procedure, stating his or her interest in the property. An endorsed copy of the claim shall be served by the claimant on the Attorney General or district attorney, as appropriate, within 30 days of the filing of the claim. The Judicial Council shall develop and approve official forms for the verified claim that is to be filed pursuant to this section. The official forms shall be drafted in nontechnical language, in English and in Spanish, and shall be made available through the office of the clerk of the appropriate court.

(2) Any person who claims that the property was assigned to him or to her prior to the seizure or notification of pending forfeiture of the property under this chapter, whichever occurs last, shall file a claim with the court and prosecuting agency pursuant to Section 11488.5 declaring an interest in that property and that interest shall be adjudicated at the forfeiture hearing. The property shall remain under control of the law enforcement or prosecutorial agency until the adjudication of the forfeiture hearing. Seized property shall be protected and its value shall be preserved pending the outcome of the forfeiture proceedings.

(3) The clerk of the court shall not charge or collect a fee for the filing of a claim in any case in which the value of the respondent property as specified in the notice is five thousand dollars (\$5,000) or less. If the value of the property, as specified in the notice, is more than five thousand dollars (\$5,000), the clerk

of the court shall charge the filing fee specified in Section 70611 of the Government Code.

(4) The claim of a law enforcement agency to property seized pursuant to Section 11488 or subject to forfeiture shall have priority over a claim to the seized or forfeitable property made by the Franchise Tax Board in a notice to withhold issued pursuant to Section 18817 or 26132 of the Revenue and Taxation Code.

(b) (1) If at the end of the time set forth in subdivision (a) there is no claim on file, the court, upon motion, shall declare the property seized or subject to forfeiture pursuant to subdivisions (a) to (g), inclusive, of Section 11470 forfeited to the state. In moving for a default judgment pursuant to this subdivision, the state or local governmental entity shall be required to establish a prima facie case in support of its petition for forfeiture. There is no requirement for forfeiture thereof that a criminal conviction be obtained in an underlying or related criminal offense.

(2) The court shall order the money forfeited or the proceeds of the sale of property to be distributed as set forth in Section 11489.

(c) (1) If a verified claim is filed, the forfeiture proceeding shall be set for hearing on a day not less than 30 days therefrom, and the proceeding shall have priority over other civil cases. Notice of the hearing shall be given in the same manner as provided in Section 11488.4. Such a verified claim or a claim filed pursuant to subdivision (j) of Section 11488.4 shall not be admissible in the proceedings regarding the underlying or related criminal offense set forth in subdivision (a) of Section 11488.

(2) The hearing shall be by jury, unless waived by consent of all parties.

(3) The provisions of the Code of Civil Procedure shall apply to proceedings under this chapter unless otherwise inconsistent with the provisions or procedures set forth in this chapter. However, in proceedings under this chapter, there shall be no joinder of actions, coordination of actions, except for forfeiture proceedings, or cross-complaints, and the issues shall be limited strictly to the questions related to this chapter.

(d) (1) At the hearing, the state or local governmental entity shall have the burden of establishing, pursuant to subdivision (i) of Section 11488.4, that the owner of any interest in the seized property consented to the use of the property with knowledge that

it would be or was used for a purpose for which forfeiture is permitted, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4.

(2) No interest in the seized property shall be affected by a forfeiture decree under this section unless the state or local governmental entity has proven that the owner of that interest consented to the use of the property with knowledge that it would be or was used for the purpose charged. Forfeiture shall be ordered when, at the hearing, the state or local governmental entity has shown that the assets in question are subject to forfeiture pursuant to Section 11470, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4.

(e) The forfeiture hearing shall be continued upon motion of the prosecution or the defendant until after a verdict of guilty on any criminal charges specified in this chapter and pending against the defendant have been decided. The forfeiture hearing shall be conducted in accordance with Sections 190 to 222.5, inclusive, Sections 224 to 234, inclusive, Section 237, and Sections 607 to 630, inclusive, of the Code of Civil Procedure if a trial by jury, and by Sections 631 to 636, inclusive, of the Code of Civil Procedure if by the court. Unless the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, the court shall order the seized property released to the person it determines is entitled thereto.

If the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, but does not find that a person claiming an interest therein, to which the court has determined he or she is entitled, had actual knowledge that the seized property would be or was used for a purpose for which forfeiture is permitted and consented to that use, the court shall order the seized property released to the claimant.

(f) All seized property which was the subject of a contested forfeiture hearing and which was not released by the court to a claimant shall be declared by the court to be forfeited to the state, provided the burden of proof required pursuant to subdivision (i) of Section 11488.4 has been met. The court shall order the forfeited property to be distributed as set forth in Section 11489.

(g) All seized property which was the subject of the forfeiture hearing and which was not forfeited shall remain subject to any

order to withhold issued with respect to the property by the Franchise Tax Board.

SEC. 5. Section 11495 of the Health and Safety Code is amended to read:

11495. (a) The funds received by the law enforcement agencies under Section 11489 shall be deposited into an account maintained by the Controller, county auditor, or city treasurer. These funds shall be distributed to the law enforcement agencies at their request. The Controller, auditor, or treasurer shall maintain a record of these disbursements which records shall be open to public inspection, subject to the privileges contained in Sections 1040, 1041, and 1042 of the Evidence Code.

(b) Upon request of the governing body of the jurisdiction in which the distributions are made, the Controller, auditor, or treasurer shall conduct an audit of these funds and their use. In the case of the state, the governing body shall be the Legislature.

(c) Each year, the Attorney General shall publish a report which sets forth the following information for the state, each county, each city, and each city and county:

(1) The number of forfeiture actions initiated and administered by state or local agencies under California law, the number of cases adopted by the federal government, and the number of cases initiated by a joint federal-state action that were prosecuted under federal law.

(2) The number of cases and the administrative number or court docket number of each case for which forfeiture was ordered or declared.

(3) The number of suspects charged with a controlled substance violation.

(4) The number of alleged criminal offenses that were under federal or state law.

(5) The disposition of cases, including no charge, dropped charges, acquittal, plea agreement, jury conviction, or other.

(6) The value of the assets forfeited.

(7) The recipients of the forfeited assets, the amounts received, and the date of the disbursement.

(d) The Attorney General shall develop administrative guidelines for the collection and publication of the information required in subdivision (c).

(e) The Attorney General's report shall cover the calendar year and shall be made no later than March 1 of each year beginning with the year after the enactment of this law.

SEC. 6. (a) The Legislative Analyst's Office (LAO) shall provide a report to the Legislature containing data about the economic impact on state and local law enforcement budgets of subdivision (b) of Section 11471.2 of the Health and Safety Code and the changes to the burden of proof and conviction requirement in forfeiture proceedings in Section 3 of this act. The LAO shall report the findings on or before December 31, 2019.

(b) A report to be submitted pursuant to this section shall be submitted in compliance with Section 9795 of the Government Code.

(c) Pursuant to Section 10231.5 of the Government Code, this section is repealed on January 1, 2021.

Approved _____, 2016

Governor