

AMENDED IN SENATE MAY 16, 2000

AMENDED IN SENATE MAY 2, 2000

**SENATE BILL**

**No. 2106**

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**Introduced by Senator Lewis**

February 25, 2000

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An act to add Sections 11492.5 and 11492.6 to the Health and Safety Code, and to amend Sections 502.01 and 653v of, and to add Sections 186.65 and 186.85 to, the Penal Code, relating to asset forfeiture.

LEGISLATIVE COUNSEL'S DIGEST

SB 2106, as amended, Lewis. Criminal profiteering: asset forfeiture.

(1) Existing law includes various statutory schemes that authorize the forfeiture of assets used in connection with the commission of specified offenses. The California Control of Profits of Organized Crime Act provides for the forfeiture of assets of any person convicted of engaging in a pattern of criminal profiteering activity as defined. Other provisions authorize the seizure and forfeiture of property that is illegal telecommunications equipment or other computer-related systems, software or data, if used to violate specified provisions of law prohibiting forgery, fraud, and theft; or property used in connection with the commission of the theft or misappropriation of sound recordings; or property used or intended to be used in violation of the Uniform Controlled Substances Act. With the exception of the provisions relating to the theft or misappropriation of sound recordings, under

the other schemes, property owned by innocent owners, as defined, is exempt from forfeiture. Innocent owners are given notice and a hearing to prove the validity of their claim of ownership in the property.

This bill would provide for the immediate release of seized property, except contraband, if continued possession by the government would cause substantial hardship to a claimant and that hardship would outweigh the risk that the property would be adversely affected, except as specified. However, this remedy would not be available to a person who is charged with the underlying criminal offense for which the property is subject to forfeiture.

In addition, the bill would impose liability on the agency responsible for the seizure of the property, for damages caused to seized property while in the possession of a law enforcement officer if that property was seized for purposes of forfeiture. This liability would not extend to property that is contraband and this remedy would not be available to a person who is charged with the underlying criminal offense for which the property is subject to forfeiture.

(2) Under existing asset forfeiture law relating to telecommunications and computer crimes, if a minor commits a computer crime with a computer located in his or her parent's primary residence, the computer is subject to forfeiture. However, if the parent makes full restitution to the victim or signs a statement indicating that the minor will not have access to the home computer for 2 years, the computer is not subject to forfeiture unless the minor commits a subsequent computer-related offense within the following 2 years.

This bill would provide that if the minor *who is convicted in an adult prosecution or is adjudicated to be a person to come within the jurisdiction of the juvenile court for a specified offense*, commits a subsequent computer offense within the 2 years following the commission of the first offense, the computer used to commit the first offense would still not be subject to forfeiture if the parent made restitution to the victim and the computer used to commit the 2nd offense was not located in the parent's primary residence.



Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

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

1 SECTION 1. Section 11492.5 is added to the Health  
2 and Safety Code, to read:

3 11492.5. (a) A claimant of the seized property  
4 alleged in the complaint for forfeiture may move the  
5 court for immediate release of that property. The motion  
6 shall be in writing and shall be served on the agency that  
7 seized the property. The court shall grant the motion  
8 after making all of the following findings:

9 (1) The claimant has a valid possessory interest in the  
10 property.

11 (2) Continued possession by the government will  
12 cause substantial hardship to the claimant.

13 (3) The hardship to the claimant outweighs the risk  
14 that the property will be destroyed, damaged, lost,  
15 concealed, or transferred if it is returned to the claimant  
16 during the pendency of the forfeiture proceedings.

17 (b) Subdivision (a) shall not apply to property that is  
18 contraband or is property that is owned by a person  
19 charged with the underlying criminal offense for which  
20 the property is subject to forfeiture.

21 SEC. 2. Section 11492.6 is added to the Health and  
22 Safety Code, to read:

23 11492.6. (a) A law enforcement agency shall be liable  
24 for the actual damages caused by the destruction, injury,  
25 or loss of goods, merchandise, or other property, while in  
26 the possession of a law enforcement officer employed by  
27 that agency, if that property was seized for the purpose  
28 of forfeiture under this chapter.

29 (b) A law enforcement agency shall not be liable  
30 under subdivision (a) to a person who is convicted of the  
31 underlying criminal offense for which the property was  
32 subject to forfeiture under this chapter.

33 SEC. 3. Section 186.65 is added to the Penal Code, to  
34 read:



1 186.65. (a) A claimant of seized property may move  
2 the court for immediate release of the property. The  
3 motion shall be in writing and shall be served upon the  
4 agency that seized the property. The court shall grant the  
5 motion after making all of the following findings:

6 (1) The claimant has a valid possessory interest in the  
7 property.

8 (2) Continued possession by the government will  
9 cause substantial hardship to the claimant.

10 (3) The hardship to the claimant outweighs the risk  
11 that the property will be destroyed, damaged, lost,  
12 concealed, or transferred if it is returned to the claimant  
13 during the pendency of the forfeiture proceedings.

14 (b) Subdivision (a) shall not apply to property that is  
15 contraband or to property that is owned by a person  
16 charged with the underlying criminal offense for which  
17 the property is subject to forfeiture.

18 SEC. 4. Section 186.85 is added to the Penal Code, to  
19 read:

20 186.85. (a) A law enforcement agency shall be liable  
21 for the actual damages caused by the destruction, injury,  
22 or loss of goods, merchandise, or other property, while in  
23 the possession of a law enforcement officer employed by  
24 that agency, if that property was seized for the purpose  
25 of forfeiture under this chapter.

26 (b) A law enforcement agency shall not be liable  
27 under subdivision (a) to a person who is convicted of the  
28 underlying criminal offense for which the property was  
29 subject to forfeiture under this chapter.

30 SEC. 5. Section 502.01 of the Penal Code is amended  
31 to read:

32 502.01. (a) As used in this section:

33 (1) "Property subject to forfeiture" means any  
34 property of the defendant that is illegal  
35 telecommunications equipment as defined in subdivision  
36 (g) of Section 502.8, or a computer, computer system, or  
37 computer network, and any software or data residing  
38 thereon, if the telecommunications device, computer,  
39 computer system, or computer network was used in  
40 committing a violation of Section 470, 470a, 472, 476, 480,



1 or subdivision (b) of Section 484e, subdivision (d) of  
2 Section 484e, subdivision (a) of Section 484f, subdivision  
3 (b) of Section 484i, subdivision (c) of Section 502, or  
4 Section 502.7, 502.8, 529, 529a, or 530.5, or was used as a  
5 repository for the storage of software or data obtained in  
6 violation of those provisions. Forfeiture shall not be  
7 available for any property used solely in the commission  
8 of an infraction. If the defendant is a minor, it also  
9 includes property of the parent or guardian of the  
10 defendant.

11 (2) “Sentencing court” means the court sentencing a  
12 person found guilty of violating Section 470, 470a, 472, 476,  
13 480, or subdivision (b) of Section 484e, subdivision (d) of  
14 Section 484e, subdivision (a) of Section 484f, subdivision  
15 (b) of Section 484i, subdivision (c) of Section 502, or  
16 Section 502.7, 502.8, 529, 529a, or 530.5, or, in the case of  
17 a minor, found to be a person described in Section 602 of  
18 the Welfare and Institutions Code because of a violation  
19 of those provisions, the juvenile court.

20 (3) “Interest” means any property interest in the  
21 property subject to forfeiture.

22 (4) “Security interest” means an interest that is a lien,  
23 mortgage, security interest, or interest under a  
24 conditional sales contract.

25 (5) “Value” has the following meanings:

26 (A) When counterfeit items of computer software are  
27 manufactured or possessed for sale, the “value” of those  
28 items shall be equivalent to the retail price or fair market  
29 price of the true items that are counterfeited.

30 (B) When counterfeited but unassembled  
31 components of computer software packages are  
32 recovered, including, but not limited to, counterfeited  
33 computer diskettes, instruction manuals, or licensing  
34 envelopes, the “value” of those components of computer  
35 software packages shall be equivalent to the retail price  
36 or fair market price of the number of completed  
37 computer software packages that could have been made  
38 from those components.

39 (b) The sentencing court shall, upon petition by the  
40 prosecuting attorney, at any time following sentencing,



1 or by agreement of all parties, at the time of sentencing,  
2 conduct a hearing to determine whether any property or  
3 property interest is subject to forfeiture under this  
4 section. At the forfeiture hearing, the prosecuting  
5 attorney shall have the burden of establishing, by a  
6 preponderance of the evidence, that the property or  
7 property interests are subject to forfeiture. The  
8 prosecuting attorney may retain seized property that  
9 may be subject to forfeiture until the sentencing hearing.

10 (c) Prior to the commencement of a forfeiture  
11 proceeding, the law enforcement agency seizing the  
12 property subject to forfeiture shall make an investigation  
13 as to any person other than the defendant who may have  
14 an interest in it. At least 30 days before the hearing to  
15 determine whether the property should be forfeited, the  
16 prosecuting agency shall send notice of the hearing to any  
17 person who may have an interest in the property that  
18 arose before the seizure.

19 A person claiming an interest in the property shall file  
20 a motion for the redemption of that interest at least 10  
21 days before the hearing on forfeiture, and shall send a  
22 copy of the motion to the prosecuting agency and to the  
23 probation department.

24 If a motion to redeem an interest has been filed, the  
25 sentencing court shall hold a hearing to identify all  
26 persons who possess valid interests in the property. No  
27 person shall hold a valid interest in the property if, by a  
28 preponderance of the evidence, the prosecuting agency  
29 shows that the person knew or should have known that  
30 the property was being used in violation of Section 470,  
31 470a, 472, 476, 480, or subdivision (b) of Section 484e,  
32 subdivision (d) of Section 484e, subdivision (a) of Section  
33 484f, subdivision (b) of Section 484i, subdivision (c) of  
34 Section 502, or Section 502.7, 502.8, 529, 529a, or 530.5, and  
35 that the person did not take reasonable steps to prevent  
36 that use, or if the interest is a security interest, the person  
37 knew or should have known at the time that the security  
38 interest was created that the property would be used for  
39 a violation.



1 (d) If the sentencing court finds that a person holds a  
2 valid interest in the property, the following provisions  
3 shall apply:

4 (1) The court shall determine the value of the  
5 property.

6 (2) The court shall determine the value of each valid  
7 interest in the property.

8 (3) If the value of the property is greater than the  
9 value of the interest, the holder of the interest shall be  
10 entitled to ownership of the property upon paying the  
11 court the difference between the value of the property  
12 and the value of the valid interest.

13 If the holder of the interest declines to pay the amount  
14 determined under paragraph (2), the court may order  
15 the property sold and designate the prosecutor or any  
16 other agency to sell the property. The designated agency  
17 shall be entitled to seize the property and the holder of  
18 the interest shall forward any documentation underlying  
19 the interest, including any ownership certificates for that  
20 property, to the designated agency. The designated  
21 agency shall sell the property and pay the owner of the  
22 interest the proceeds, up to the value of that interest.

23 (4) If the value of the property is less than the value of  
24 the interest, the designated agency shall sell the property  
25 and pay the owner of the interest the proceeds, up to the  
26 value of that interest.

27 (e) If the defendant was a minor at the time of the  
28 offense, this subdivision shall apply to property subject to  
29 forfeiture that is the property of the parent or guardian  
30 of the minor.

31 (1) The prosecuting agency shall notify the parent or  
32 guardian of the forfeiture hearing at least 30 days before  
33 the date set for the hearing.

34 (2) The computer or telecommunications device shall  
35 not be subject to forfeiture if the parent or guardian files  
36 a signed statement with the court at least 10 days before  
37 the date set for the hearing that the minor shall not have  
38 access to any computer or telecommunications device  
39 owned by the parent or guardian for two years after the  
40 date on which the minor is sentenced.



1 (3) If the minor is convicted *in an adult prosecution or*  
2 *is adjudicated to be a person to come within the*  
3 *jurisdiction of the juvenile court for the commission of a*  
4 violation of Section 470, 470a, 472, 476, 480, or subdivision  
5 (b) of Section 484e, subdivision (d) of Section 484e,  
6 subdivision (a) of Section 484f, subdivision (b) of Section  
7 484i, subdivision (c) of Section 502, or Section 502.7, 502.8,  
8 529, 529a, or 530.5, within two years after the date on  
9 which the minor ~~is sentenced~~ *was subject to the*  
10 *disposition of the juvenile court*, and the violation  
11 involves a computer or telecommunications device  
12 owned by the parent or guardian, the original property  
13 subject to forfeiture, and the property involved in the  
14 new offense, shall be subject to forfeiture  
15 notwithstanding paragraph (2).

16 (4) Notwithstanding paragraph (3), if the minor is  
17 convicted *in an adult prosecution or is adjudicated to be*  
18 *a person to come within the jurisdiction of the juvenile*  
19 *court for the commission of a violation of this section or*  
20 Section 470, 470a, 472, 476, 480, or subdivision (b) of  
21 Section 484e, subdivision (d) of Section 484e, subdivision  
22 (a) of Section 484f, subdivision (b) of Section 484i,  
23 subdivision (c) of Section 502, or Section 502.7, 502.8, 529,  
24 529a, or 530.5, within two years after the date on which the  
25 minor was ~~sentenced for a prior conviction~~ *was subject*  
26 *to the disposition of the juvenile court for an offense*  
27 under this section, ~~and~~ the property involved in the prior  
28 offense shall not be subject to forfeiture if the parent  
29 made restitution to the victim of the first offense and the  
30 second offense was not committed with a  
31 telecommunications device or computer located in the  
32 parent's primary residence.

33 (5) Notwithstanding paragraph (1), (2), or (3), or any  
34 other provision of this chapter, if a minor's parent or  
35 guardian makes full restitution to the victim of a crime  
36 enumerated in this chapter in an amount or manner  
37 determined by the court, the forfeiture provisions of this  
38 chapter do not apply to the property of that parent or  
39 guardian if the property was located in the family's  
40 primary residence during the commission of the crime.



1 (f) Notwithstanding any other provision of this  
2 chapter, the court may exercise its discretion to deny  
3 forfeiture where the court finds that the convicted  
4 defendant, or minor adjudicated to come within the  
5 jurisdiction of the juvenile court, is not likely to use the  
6 property otherwise subject to forfeiture for future illegal  
7 acts.

8 (g) If the defendant is found to have the only valid  
9 interest in the property subject to forfeiture, it shall be  
10 distributed as follows:

11 (1) First, to the victim, if the victim elects to take the  
12 property as full or partial restitution for injury, victim  
13 expenditures, or compensatory damages, as defined in  
14 paragraph (1) of subdivision (e) of Section 502. If the  
15 victim elects to receive the property under this  
16 paragraph, the value of the property shall be determined  
17 by the court and that amount shall be credited against the  
18 restitution owed by the defendant. The victim shall not  
19 be penalized for electing not to accept the forfeited  
20 property in lieu of full or partial restitution.

21 (2) Second, at the discretion of the court, to one or  
22 more of the following agencies or entities:

23 (A) The prosecuting agency.

24 (B) The public entity of which the prosecuting agency  
25 is a part.

26 (C) The public entity whose officers or employees  
27 conducted the investigation resulting in forfeiture.

28 (D) Other state and local public entities, including  
29 school districts.

30 (E) Nonprofit charitable organizations.

31 (h) If the property is to be sold, the court may  
32 designate the prosecuting agency or any other agency to  
33 sell the property at auction. The proceeds of the sale shall  
34 be distributed by the court as follows:

35 (1) To the bona fide or innocent purchaser or  
36 encumbrancer, conditional sales vendor, or mortgagee of  
37 the property up to the amount of his or her interest in the  
38 property, if the court orders a distribution to that person.



1 (2) The balance, if any, to be retained by the court,  
2 subject to the provisions for distribution under  
3 subdivision (g).

4 (i) (1) A claimant of seized property alleged in the  
5 complaint of forfeiture may move the court for  
6 immediate release of the property. The motion shall be  
7 in writing and shall be served upon the agency that seized  
8 the property. The court shall grant the motion after  
9 making all of the following findings:

10 (A) The claimant has a valid possessory interest in the  
11 property.

12 (B) Continued possession by the government will  
13 cause substantial hardship to the claimant.

14 (C) The hardship to the claimant outweighs the risk  
15 that the property will be destroyed, damaged, lost,  
16 concealed, or transferred if it is returned to the claimant  
17 during the pendency of the forfeiture proceedings.

18 (2) Paragraph (1) shall not apply to property that is  
19 owned by a person charged with the underlying criminal  
20 offense for which the property is subject to forfeiture.

21 (j) (1) A law enforcement agency shall be liable for  
22 the real damages caused by the destruction, injury, or loss  
23 of goods, merchandise, or other property, while in the  
24 possession of a law enforcement officer employed by that  
25 agency, if that property was seized for the purpose of  
26 forfeiture under this section.

27 (2) A law enforcement agency shall not be liable  
28 under paragraph (1) to a person who is convicted of the  
29 underlying criminal offense for which the property was  
30 subject to forfeiture under this section.

31 SEC. 6. Section 653v of the Penal Code is amended to  
32 read:

33 653v. (a) Whenever any person is convicted of any  
34 violation of Section 653h, 653s, 653u, or 653w the court, in  
35 its judgment of conviction, shall, in addition to the  
36 penalty therein prescribed, order the forfeiture and  
37 destruction or other disposition of all articles, including,  
38 but not limited to, phonograph records, discs, wires,  
39 tapes, films, or any other article upon which sounds or  
40 images can be recorded or stored, and any and all



1 electronic, mechanical, or other devices for  
2 manufacturing, reproducing or assembling these articles,  
3 which were used in connection with, or which were part  
4 of, any violation of Section 653h, 653s, 653u, or 653w.

5 (b) (1) If property is seized pursuant to this section,  
6 a claimant may move the court for immediate release of  
7 that property. The motion shall be in writing and shall be  
8 served on the agency that seized the property. The court  
9 shall grant the motion after making all of the following  
10 findings:

11 (A) The claimant has a valid possessory interest in the  
12 property.

13 (B) Continued possession by the government will  
14 cause substantial hardship to the claimant.

15 (C) The hardship to the claimant outweighs the risk  
16 that the property will be destroyed, damaged, lost,  
17 concealed, or transferred if it is returned to the claimant  
18 during the pendency of the forfeiture proceedings.

19 (2) Paragraph (1) shall not apply to property that is  
20 contraband or is property that is owned by a person  
21 charged with the underlying criminal offense for which  
22 the property is subject to forfeiture.

23 (b) (1) A law enforcement agency shall be liable for  
24 the actual damages caused by the destruction, injury, or  
25 loss of goods, merchandise, or other property, while in the  
26 possession of a law enforcement officer employed by that  
27 agency, if the property was seized for the purpose of  
28 forfeiture under this section.

29 (2) A law enforcement agency shall not be liable  
30 under paragraph (1) to a person who is convicted of the  
31 underlying criminal offense for which the property was  
32 subject to forfeiture under this section.

