

DAVID Y. IGE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the House Committee on
JUDICIARY**

**Thursday, February 13, 2020
2:05 PM
State Capitol, Conference Room 325**

**In consideration of
HOUSE BILL 2069
RELATING TO PROPERTY FORFEITURE**

House Bill 2069 proposes to: 1) Prohibit civil asset forfeiture unless the covered offense is a felony for which the property owner has been convicted, 2) Exclude forfeiture proceedings for an animal pending criminal charges, and 3) require the Attorney General to deposit the net proceeds of the forfeited property to the credit of the State General Fund. **The Department of Land and Natural Resources (Department) opposes this measure.**

Asset forfeiture is an essential enforcement tool that has been used by the Department to effectively deter and halt criminal activity. The majority of rules that the Department's Division of Conservation and Resources Enforcement (DOCARE) enforces are misdemeanor or petty misdemeanor offenses. Restricting civil asset forfeiture to felony offenses will effectually eliminate this critical tool from DOCARE's enforcement toolbox. The deterrent effect of civil forfeiture in promoting resource protection will be diminished.

Thank you for the opportunity to comment on this measure.

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
FIRST DEPUTY

M. KALEO MANUEL
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2020**

ON THE FOLLOWING MEASURE:

H.B. NO. 2069, RELATING TO PROPERTY FORFEITURE.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Thursday, February 13, 2020 **TIME:** 2:05 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Clare E. Connors, Attorney General, or
Michael S. Vincent or Gary K. Senaga, Deputy Attorneys General

Chair Lee and Members of the Committee:

The Department of the Attorney General (Department) opposes the bill. The bill proposes to require a felony conviction of the owner of property prior to the forfeiture of that property. The bill also changes the distribution of the forfeited property and money from the state and local law enforcement agencies to the state general fund.

As the legislature in Act 307, Session Laws of Hawaii 1998, noted, the forfeiture of property has proven to be a successful deterrent to criminal activity. Keeping this important tool especially in the face of recent surge of criminal activities will continue to benefit the community. The wording of the bill characterizes asset forfeiture as "government-sponsored theft," but, as the Governor mentioned in his statement of objections relating to the H.B. No. 748 last year, there are significant safeguards against abuse and the Department takes its responsibility to enforce those safeguards seriously.

In Legislative Audit Report Number 18-09, the Auditor expressed concerns that many of the transparency and accountability problems with the civil asset forfeiture program stem from the lack of administrative rules. While continuously working to improve on the problems from various aspects, the Department promulgated the new rules last year.

Additionally, one of the other concerns raised in the Auditor's report was that property held pending forfeiture may "deteriorate or fall into disrepair" due to the Department's delay of over a year and a half on average to process a petition for administrative forfeiture. The Department has taken steps, including setting definite filing deadlines in the rules, to streamline and speed up the adjudication process. However, the bill's requirement of a felony conviction will have the unwanted effect of prolonging the process and will defeat the purpose of quickly removing the proceeds of crime and other assets relied upon by individuals to perpetuate the criminal activity.

The Department also has several concerns with technical aspects of the bill. In section 2 of the bill, on page 2, lines 3 through 20, section 712A-5(2)(b)(i), Hawaii Revised Statutes, is amended to state that no property shall be forfeited unless the owner has been convicted of a felony. The next amended paragraph (b)(ii) goes on to say that, alternatively, no property shall be forfeited by any act or omission established to have been committed or omitted without the owner's consent. It is unclear how paragraph (b)(i) interacts with paragraph (b)(ii) since the former requires a felony conviction or plea, while the latter is based only on acts, omissions, and knowledge.

Furthermore, the bill's requirement of a felony conviction conflicts with other provisions in chapters 712A and 712, Hawaii Revised Statutes (HRS). For example, section 712A-11, which covers judicial forfeiture proceedings, states in subsection (6), "[a]n acquittal or dismissal in a criminal proceeding shall not preclude civil proceedings under this chapter." This inconsistency makes it unclear if we are going to have a felony conviction requirement for the administrative proceeding only but not for the judicial proceeding.

The Department is also concerned that the bill does not address what happens to the seized properties in those cases where the defendant who has been arrested and charged in an underlying criminal action then fails to appear or flees to evade prosecution, or is deceased.

Finally, the Department suggests the following amendments to the bill should it pass:

The wording on page 2, lines 11 to 14, should be replaced with the following wording to clarify what is covered under “convicted of the covered offense.”

“Owner has been convicted of the covered offense by a verdict or plea, including a no contest plea, a deferred acceptance of guilty plea or no contest plea, or a referral to a diversion program;”

The wording on page 4, lines 16 to 19, should be replaced with the following wording to clarify the scope of costs incurred:

“including any costs incurred by the department of the attorney general related to the seizure, storage, and disposition of seized property, shall be deposited to the credit of the state general fund.”

Thank you for the opportunity to testify.

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

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

February 13, 2020

H.B. No. 2069: RELATING TO PROPERTY FORFEITURE

Chair Lee, Vice Chair San Buenaventura, and Members of the Committee:

The Office of the Public Defender respectfully supports H.B. No. 2609, which seeks to prohibit civil asset forfeiture unless the covered offense is a felony for which the property owner has been convicted.

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 he/she is innocent and that the seized property therefore should not be forfeited. In other words, the owner must prove (1) that he/she were not involved in criminal activity and (2) that he/she either had no knowledge that the property was being used to facilitate the commission of a crime or that he/she 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, find 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. Cash-Poor property owners simply cannot afford to challenge the forfeiture.

What is appalling 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 order words, no criminal charges were filed in one-fourth of the property forfeiture cases. SECTION 1 of this measure aptly described the process: “This amounts to government-sponsored theft.”

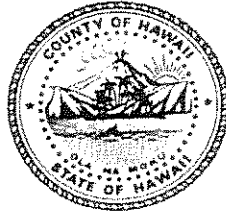
Prosecuting agencies may assert that this measure would create a time-consuming, expensive and difficult process. However, the process should be difficult when the government is attempting to deprive personal property from its citizens.

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>.

Thank you for the opportunity to comment on H.B. No. 1636.

MITCHELL D. ROTH
PROSECUTING ATTORNEY

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FIRST DEPUTY
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OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN OPPOSITION TO HOUSE BILL 2069

A BILL FOR AN ACT RELATING TO PROPERTY FOREITURE

COMMITTEE ON JUDICIARY

Rep. Chris Lee, Chair

Rep. Joy A. San Buenaventura, Vice Chair

Thursday, February 13, 2020, 9:30 a.m.
State Capitol, Conference Room 325

Honorable Chair Lee, Honorable Vice Chair San Buenaventura, and Members of the Committee on Judiciary, the Office of the Prosecuting Attorney, County of Hawai'i submits the following testimony in **STRONG OPPOSITION** to House Bill 2069.

This measure prohibits civil asset forfeiture unless the covered offense is a felony for which the property owner has been convicted and requires the Attorney General to deposit the net proceeds of the forfeited property to the credit of the state general fund.

This bill follows national pushback in reaction to some mainland states and certain communities where asset forfeiture has been shown to be used in a discriminatory manner. Here in Hawai'i, drug addiction is at an all-time high and one of the most prevalent challenges our county faces. Statistically, in Hawai'i County, narcotics trafficking constitutes the vast majority of the covered offenses that trigger asset forfeiture, and any property is seized pursuant to the strict rules and guidelines as set forth by the Attorney General.

Criminal enterprises generate a profit from the sale of their "product" or "services" through criminal activity. Asset forfeiture can immediately remove the tools, equipment, cash flow, profit, and the product itself from the criminals and criminal organization, rendering them powerless to continue to operate. This bill will effectively eliminate immediate asset forfeiture in these cases, one of the most successful tools law enforcement has to destabilize the economic structure of drug traffickers

Currently, the proceeds from asset forfeiture is directed toward programs which aim to prevent abuse of illegal drugs through education, prevention and rehabilitation. Any re-allocation of the proceeds to the state general fund would ultimately undercut those deterrent efforts, defund program costs, salaries, as well as the portion of the fund used for effective law enforcement equipment and training.

The Office of the Prosecuting Attorney, County of Hawai'i, believes that the current asset forfeiture program is not being abused and we remain 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.

For the foregoing reasons, the Office of the Prosecuting Attorney, County of Hawai'i, **STRONGLY OPPOSES** the passage of House Bill No. 2069. Thank you for the opportunity to testify on this matter.

Justin F. Kollar
Prosecuting Attorney

Jennifer S. Winn
First Deputy



Rebecca A. Vogt Like
Second Deputy

Diana Gausepohl-White
Victim/Witness Program Director

OFFICE OF THE PROSECUTING ATTORNEY

County of Kaua'i, State of Hawai'i

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**THE HONORABLE CHRIS LEE, CHAIR
THE HONORABLE JOY A. SAN BUENAVENTURA, VICE CHAIR
HOUSE COMMITTEE ON JUDICIARY**

**Thirtieth State Legislature
Regular Session of 2020
State of Hawai'i**

February 13, 2020

RE: HB 2069: RELATING TO PROPERTY FORFEITURE

Chair Lee, Vice Chair San Buenaventura, and members of the House Committee on Judiciary, The Office of the Prosecuting Attorney, County of Kaua'i, opposes this measure.

This bill will make the disposition of seized property completely dependent on the criminal process, eliminating the ability of the property owner and the State of Hawai'i to reach an expeditious out-of-court settlement. Commonly, when civil asset forfeiture cases are initiated, the State of Hawaii and the property owner negotiate a settlement, and the case does not proceed to formal adjudication. For example, if during a search of a vehicle for drugs, drugs and cash are found, and the cash is believed to be drug proceeds, the State would seize the cash and vehicle for forfeiture. The parties could negotiate a fairly quick settlement, whereby the State agrees to return the vehicle to the owner, in exchange for the owner's consent to the forfeiture of the cash. This routinely occurs while a criminal case is still pending against the owner. This bill will eliminate the ability of the State to enter into these expeditious settlements, as the State will be unable to forfeit ANY property seized as a result of that criminal incident, until the defendant-owner enters a guilty or no contest plea to a felony covered offense.

This bill is flawed in that it does not even address the impact of a defendant's appeal of his or her criminal conviction. In Hawai'i, a person has a right to a free appeal – appellate review of his or her criminal conviction. The

appellate process typically takes 2-4 years after entry of the conviction. This bill does not even address the very common situation in which a person is convicted of a felony covered offense, and then appeals the conviction.

This bill ignores a common practice in the prosecution of criminal cases: persons charged with a felony end up pleading guilty or no contest to a misdemeanor, via plea bargain with the State of Hawai'i. In that case, a person commits a felony "covered offense" with the use of property, such as vehicle, and then simply because he or she ends up entering a guilty or no contest plea to a reduced offense that is a misdemeanor, the property used to commit the offense is no longer subject to forfeiture.

Poor communities and families are impacted most when drug organizations are allowed to survive. They live next to the drug houses (with drug patrons arriving at all hours of the night) and have to suffer the negative impacts of those drug houses.

Finally, we should consider that the national sentiment pushback against asset forfeiture is largely arising in reaction to mainland states and communities where asset forfeiture is used in a discriminatory manner – minorities being targeted for asset forfeiture investigations in much greater proportion than their population proportion to the community at large. This has not been shown to be a problem here in Hawai'i.

Thank you for this opportunity to comment on this bill.

LATE

HB-2069

Submitted on: 2/12/2020 2:53:12 PM
Testimony for JUD on 2/13/2020 2:05:00 PM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| REVELYN CABAYA | HPD | Oppose | Yes |

Comments:

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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LYNN B.K. COSTALES
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LATE

**THE HONORABLE CHRIS LEE, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Thirtieth State Legislature
Regular Session of 2020
State of Hawai`i**

February 13, 2020

RE: H.B. 2069; RELATING TO PROPERTY FORFEITURE.

Chair Lee, Vice Chair San Buenaventura, and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in opposition to H.B. 2069.

The purpose of this bill is to prohibit civil asset forfeiture unless the State proves various matters “beyond a reasonable doubt” (a standard of proof often used in criminal law). While the bill appears to have good intentions, it also appears to be based upon the premise that “everyone is innocent until proven guilty,” which is certainly a true statement, but misses the point of civil asset forfeiture. At its core, civil asset forfeiture is primarily about the “innocence” of the property itself, not the guilt or innocence of its owner. The only time a property owner’s “innocence” is relevant, is to assess the owner’s knowledge and (express or implied) consent to the act or omission (that their property was connected to). For example, if a father allows his drug-dealing daughter to use his car, knowing that the daughter occasionally delivers drugs using his car, then the father’s car could be subject to forfeiture under certain circumstances, even if the father is never charged with a crime.

As clearly stated by our Hawaii Supreme Court in State v. Tuipuapua, “[a] statutory forfeiture ‘is a proceeding *in rem*.’ *It is not a proceeding against any person.*”¹ It has nothing to do with whether a property owner is the one criminally charged with the commission of a crime. Thus, it makes sense that our civil asset forfeiture statutes go into great detail about what property is subject to forfeiture (see HRS §712A-5), based on the property’s connection to an offense, with absolutely no requirement that the property be connected to any particular individual (such as a defendant in a criminal case).²

¹ State v. Tuipuapua, 925 P.2d 311, 83 Haw 141 (1996), citing U.S. v. Baird, 63 F.3d 1213, 1219; U.S. v. Arreola-Ramos, 60 F.3d 192-93 (emphasis in original).

² HRS §712A-5 states in relevant part: (1) The following is subject to forfeiture:
(a) Property described in a statute authorizing forfeiture;

While our statutes do not require that the property be connected to a person, they do require that the property be connected to a violation of law, or “covered offense.” Indeed, in State v. Ten Thousand Four Hundred Forty-Seven Dollars in U.S. Currency (\$10,447.00), the Hawaii Supreme Court ordered that a certain portion of monies recovered in connection with an illegal gambling operation be returned to its owner, as “the State must prove the existence of a substantial connection [a.k.a. sufficient nexus] between the currency being forfeited and the illegal activity.”³ As stated by the Court, “[g]iven that this is an *in rem*...forfeiture proceeding, the State must prove that the defendant—the subject currency, not [the currency’s owner]—was connected to illegal activity.”⁴

Naturally, our courts and statutes recognize that property generally belongs to someone (a person or entity), and thus our statutes also state that property, which would otherwise be subject to forfeiture, cannot actually be forfeited (to the extent of an owner’s property interest) “by reason of any act...committed...without the knowledge and consent of that owner.”⁵ To this end, our civil asset forfeiture laws contain extensive procedural mandates, standards and safeguards, to ensure that that everyone—including the father in the hypothetical example mentioned previously—is given due process, every step of the way. This includes statutes prohibiting “excessive forfeiture”⁶; consideration of “extenuating circumstances”—such as a language or cultural barrier, or physical or mental abnormalities⁷—and even mechanisms to return all or part of the property (or property value) in question, despite the owner’s knowledge and consent to the act or omission.

As previously stated, we believe that H.B. 2069, has good intentions, but is based on a misunderstanding of the nature and intent of civil asset forfeiture. Current forfeiture laws are used to immediately and effectively disrupt the infrastructure of criminal activity and protect the community, by removing the property used in the commission of such activity, and/or proceeds gained from such activity. As civil proceedings deal only with the potential loss of property, and not a potential loss of liberty (i.e. incarceration), civil asset forfeiture is intentionally designed to

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- (b) Property used or intended for use in the commission of, attempt to commit, or conspiracy to commit a covered offense, or which facilitated or assisted such activity;
 - (c) Any firearm which is subject to forfeiture under any other subsection of this section or which is carried during, visible, or used in furtherance of the commission, attempt to commit, or conspiracy to commit a covered offense, or any firearm found in proximity to contraband or to instrumentalities of an offense;
 - (d) Contraband or untaxed cigarettes in violation of chapter 245, shall be seized and summarily forfeited to the State without regard to the procedures set forth in this chapter;
 - (e) Any proceeds or other property acquired, maintained, or produced by means of or as a result of the commission of the covered offense;
 - (f) Any property derived from any proceeds which were obtained directly or indirectly from the commission of a covered offense;
 - (g) Any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which has been established, participated in, operated, controlled, or conducted in order to commit a covered offense;
 - (h) All books, records, bank statements, accounting records, microfilms, tapes, computer data, or other data which are used, intended for use, or which facilitated or assisted in the commission of a covered offense, or which document the use of the proceeds of a covered offense.

³ State v. Ten Thousand Four Hundred Forty-Seven Dollars in U.S. Currency (\$10,447.00), 104 Haw 323, 337, 89 P.3d 823, 837 (2004) (regarding money properly seized pursuant to search warrant, but ultimately not subject to forfeiture).

⁴ *Id.*, at 336, 836.

⁵ See Section 712A-5(2)(b), Hawaii Revised Statutes (“HRS”).

⁶ See HRS §712A-5.5. Additionally, we note that the issue of excessive forfeiture was recently discussed in a U.S. Supreme Court case, Timbs v. Indiana, 139 S.Ct 682 (February 20, 2019)—originating from a state that does not have a statute like HRS §712A-5.5—where the Court held that civil asset forfeiture judgements cannot be excessive.

⁷ See HRS §712A-10(6).

function independently from any criminal proceedings, using civil standards of proof, in much the same way that a crime victim is permitted to file a lawsuit against their perpetrator—and the perpetrator may be held civilly liable—regardless of whether the perpetrator is ever convicted or even charged in a criminal case.

While civil asset forfeiture inherently involves the forfeiture of property, which most likely belongs to someone, this is completely separate and apart from any criminal proceedings; there is no requirement that the property owner committed a crime for the property to be forfeited, and forfeiture is not a criminal punishment.⁸ Indeed, the Court in Tuipupua noted that civil asset forfeiture “serves important nonpunitive goals...[such as encouraging] property owners ‘to take care in managing their property’ and tends to ensure ‘that they will not permit that property to be used for illegal purposes.’”⁹

To the extent the Legislature is concerned that civil asset forfeiture is being abused by the administering agencies, as a means of generating inappropriate revenue, the Department can only speak for itself in stating that it has never viewed civil asset forfeiture in such a light, has never gotten the impression that any other administering agencies in Hawaii view it in such a light. The Department greatly appreciates the valuable training that its deputies have received for drug-related cases, as provided by the civil asset forfeiture fund, but understands that it is within the purview of the Legislature to establish where and how the proceeds of this or any other state-mandated program are utilized. We do note, however, that it makes sense for the proceeds from civil asset forfeiture to at least cover the full administrative costs of the program, before it is distributed elsewhere.

To the extent that the Legislature is alarmed by complaints that a certain amount of property is never returned to owners—even when criminal charges are never brought against the owner—the Department would reiterate its earlier example of the father who continues to allow his drug-dealing daughter to borrow his car, but is never prosecuted criminally. Moreover, please keep in mind that any “illegal” items seized by law enforcement—such as illicit drugs, illicit drug-manufacturing equipment, gambling devices, and so forth—are never be returned to people, as a matter of public policy, so retention of such items may also skew “statistics” in a confusing manner.

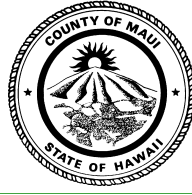
Rather than forcing such a far-reaching and premature overhaul of Hawaii’s well-conceived program, the Department urges the Legislature to consider the State Auditor’s recommendations, published in June 2018 (available at files.hawaii.gov/auditor/Reports/2018/18-09.pdf), which are already in the process of being implemented. If the Legislature truly believes that change are needed to this program, further discussion and review should take place, at a minimum, to study its impact on law enforcement and the safety of the public. In 2016, the Legislature considered a bill (S.B. 2149) to require that the Department of the Attorney General establish a working group to review and discuss Hawaii's forfeiture laws and make recommendations to improve these laws, including identifying any areas of concern or abuse. While we firmly believe that Hawaii’s asset forfeiture program is generally well-conceived and well-operated, we understand that “nothing is perfect,” and are open to being part of a process to evaluate all areas of the program.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes the passage of H.B. 2069. Thank for you the opportunity to testify on this matter.

⁸ Tuipupua at 323, 153.

⁹ *Id.*

MICHAEL P. VICTORINO
Mayor



DON S. GUZMAN
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TESTIMONY
ON
H.B. 2069 - RELATING TO
PROPERTY FORFEITURE



February 13, 2020

The Honorable Chris Lee
Chair
The Honorable Joy A. San Buenaventura
Vice Chair
and Members of the Committee on Judiciary

Chair Lee, Vice Chair San Buenaventura, and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui respectfully submits the following comments concerning H.B. 2069, Relating to Property Forfeiture. Specifically, we would like to express our strong opposition to H.B. 2069 in its current form, which redirects sale proceeds of forfeited property to the state general fund and prohibits civil asset forfeiture pursuant to H.R.S. Chapter 712A unless the covered offense is chargeable as a felony and the owner of the property has been convicted of the covered offense.

We have a number of concerns relating to this bill. Our first concern is that there does not appear to be facts supporting the claim that civil asset forfeiture in Hawaii “frequently leaves innocent citizens deprived of personal property without having ever been charged or convicted of any crime.” The forfeiture statutes have specific provisions under H.R.S. Chapter 712A that create a process by which innocent citizens are allowed to contest the forfeiture action, including notice of the action, an opportunity to contest it, and an appeals process for an adverse decision.

Our second concern is the proposed requirement of a felony conviction before the civil asset forfeiture process can begin. Although the proposed bill contains language that attempts to address common scenarios such as no contest pleas and deferred pleas, the bill’s plain language still requires a conviction. In scenarios involving deferred pleas, Drug Court-related dismissals and other such dispositions, no actual conviction occurs because all charges are dismissed once the requisite conditions are met. Thus, there will be no conviction in that scenario that would allow for civil asset forfeiture to occur. Furthermore, in the common scenario where a defendant appeals their conviction, the appellate process can take months to years to complete and there is

a possibility that a conviction for a covered offense is reversed and remanded for a new trial after a forfeiture has occurred, while this bill does not address that scenario. There are also scenarios where the owner of property subject to forfeiture is completely unknown, and thus a criminal felony conviction is impossible to obtain.

Our third concern involves the complete exclusion of misdemeanor offenses from the forfeiture process. There are scenarios where cash and other property are seized as the result of misdemeanor offenses such as prostitution or gambling, and the possibility of forfeiture proceedings has a deterrent effect that should not be eliminated.

Our fourth concern involves the redirection of forfeiture funds solely to the general fund, with a cost reimbursement allowed only for department of the attorney general relating to seizure and storage of the property. Our Department would still be responsible for administering the program, but without any reimbursement for costs incurred. Furthermore, the law enforcement agencies involved would not be reimbursed for their costs either.

For these reasons, the Department of the Prosecuting Attorney, County of Maui strongly opposes the passage of H.B. 2069 in its current form. Please feel free to contact our office at (808) 270-7777 if you have any questions or inquiries.

Thank you very much for the opportunity to provide testimony on this bill.



Hawai'i

Committee: Committee on Judiciary
Hearing Date/Time: Thursday, February 13, 2020, 2:05 p.m.
Place: Conference Room 325
Re: Testimony of the ACLU of Hawai'i in Support of H.B. 2069, Relating to Property Forfeiture

Dear Chair Lee, Vice Chair San Buenaventura, and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawai'i ("ACLU of Hawai'i") writes in support of H.B. 2069, which would reform Hawai'i's civil asset forfeiture law by prohibiting forfeiture except in cases where the property owner has been convicted of a covered felony offense, and by reducing the profit incentive to seize property by directing net forfeiture proceeds to the general fund.

Hawai'i's current civil asset forfeiture law is based on the legal fiction that property can be guilty. Civil asset forfeiture is a civil action initiated by the government against a piece of property on the basis that the property was used in the commission of a covered criminal offense. Due to the way that the current law is written, government can seize (and profit from) property without obtaining a criminal conviction in connection with the property. Although this practice is often justified as a way to incapacitate large-scale criminal operations, it has been used to create revenue for law enforcement with little restriction or accountability. Critics often call this practice "policing for profit," because, under Hawai'i's law, the seizing agency (usually a county police department) keeps 25 percent of the profits from forfeited property; the prosecuting attorney's office keeps another 25 percent, and the remaining 50 percent goes into the criminal forfeiture fund, which finances the asset forfeiture division within the Department of the Attorney General, the agency charged with adjudicating the vast majority of forfeiture cases (rather than the courts). At every step of the process, there exists a clear profit motive to a) seize property, and b) ensure that seized property is successfully forfeited and auctioned by the state.

Hawai'i's law enforcement is abusing the current system. The Hawai'i State Auditor conducted a study of civil asset forfeiture in Hawai'i, which was published in June 2018.¹ The report found that in fiscal year 2015, "**property was forfeited without a corresponding criminal charge in 26 percent of the asset forfeiture cases.**" This means that during this period, in over one quarter of all

¹ 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).

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www.acluHawai'i.org

civil property forfeiture cases, not only was there no conviction, but *there were not even criminal charges filed*.²

It comes as no surprise that Hawaii's civil asset forfeiture law is regarded among the worst in the nation, receiving a grade of D- by the Institute for Justice.³ A low standard of proof and a lack of administrative rules governing forfeitures means that property can be seized when it has only a tenuous connection to the alleged underlying offense, and property may be forfeited even when there have been **no criminal charges filed. This is often a substantial burden on the property owner**, who may lose their job or home because the state seized their means of transportation or money needed to pay rent. While the law contains a provision intended to protect innocent property owners, this provision is inadequate and the burden placed on property owners seeking to challenge a forfeiture makes it nearly impossible in most cases for innocent people to recover their property.

This legislation is necessary to rectify the harms caused by our current system and to prevent its continued abuse. **This bill still allows property to be seized — but not forfeited — prior to conviction, which achieves the purported objective of stopping criminal operations.**

For the above reasons, we urge the Committee to support this measure. Thank you for the opportunity to testify.

Sincerely,

Mandy Fernandes
Policy Director
ACLU of Hawai'i

The mission of the ACLU of Hawai'i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai'i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai'i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai'i has been serving Hawai'i for over 50 years.

² This creates a possible scenario in which the prosecutor's office petitions the Department of the Attorney General to forfeit property on the basis that the property was used in the commission of a criminal offense *without ever even alleging* that an actual person committed the offense that is at the center of the forfeiture.

³ Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, 2nd Edition (November 2015) available at <https://ij.org/report/policing-for-profit>.

TESTIMONY IN SUPPORT OF HB 2069

TO: Chair Lee, Vice-Chair San Buenaventura, and Members of the House Judiciary Committee

FROM: Nikos Leverenz
Grants, Development & Policy Manager

DATE: February 13, 2020 (2:05 PM)

Hawai'i Health & Harm Reduction Center (HHRC) supports HB 2069, which would reform this state's asset forfeiture laws to protect the rights of innocent property owners against undue and often unsubstantiated executive actions against them. Requiring a conviction before property is permanently seized and forfeited and channeling proceeds to the General Fund represent a significant improvement over existing law and practices in Hawai'i.

In 2018 [the Hawai'i State Auditor found serious shortcomings in the practice of asset forfeiture over the past three decades](#) up to the present day, including the absence of administrative rules from the state Attorney General describing procedures and practice requirements. As such, "the program cannot fully account for the property it has obtained by forfeiture, is unable to adequately manage its funds, and cannot review or reconcile its forfeiture case data to ensure accurate reporting of information to the Legislature and the general public." The rules promulgated by the Attorney General earlier this year are a pro forma declaration of administrative procedures and are not responsive to the auditor's findings or last year's legislative deliberations.

HHRC works 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 misuse and underlying mental health conditions. Current law governing asset forfeiture harms innocent property owners who do not have the economic means to post bond or hire an attorney to secure their property; they are effectively left without legal recourse. *Those with little or no economic means should have adequate access to equal justice under law.* This measure helps to ensure that due process of law, undermined by current asset forfeiture practices, is provided to those who would not otherwise be afforded such when their property is seized and permanently forfeited.

Thank you for the opportunity to provide testimony on this important measure.



February 13, 2020

2:05 p.m.

Hawaii State Capitol

Conference Room 325

To: House Committee on Judiciary

Rep. Chris Lee, Chair

Rep. Joy A. San Buenaventura, Vice Chair

From: Grassroot Institute of Hawaii

Joe Kent, Executive Vice President

Re: HB2069 — RELATING TO PROPERTY FORFEITURE

Comments Only

Dear Chair and Committee Members:

The Grassroot Institute of Hawaii would like to offer its comments on House Bill 2069, which would prohibit civil asset forfeiture unless the covered offense is a felony for which the property owner has been convicted.

The state of civil asset forfeiture in Hawaii has been the subject of criticism and concern. Thus, we commend the legislature for continuing to address these problems and pressing for much needed reforms.

In a recent survey of civil asset forfeiture nationwide by the Institute of Justice,¹ Hawaii earned a D-minus and the dubious distinction of having some of the worst forfeiture laws in the country. Singled out for criticism was the low standard of proof required for the government to show the property is tied to a crime. In addition, the burden is placed on innocent owners to prove they weren't tied to the crime resulting in the forfeiture.

The result of these laws is a state forfeiture program open to abuse.

¹ Dick M. Carpenter II, et al. "Policing for Profit: The Abuse of Civil Asset Forfeiture, 2nd Edition," Institute for Justice, November 2015. <https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf>

As the Hawaii state auditor wrote in a June 2018 report on the asset forfeiture program,² the program lacks clear rules and procedures, inadequately manages funds and is badly in need of greater transparency. More important, it is reasonable to believe that the current system preys on innocent property owners.

The audit found that in 26% of asset forfeiture cases closed during fiscal year 2015, property was forfeited without a corresponding criminal charge. In another 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 may not know petition is an option because of the lack of transparency surrounding the forfeiture program.

By introducing a higher standard for forfeiture, this bill takes an important step in addressing many of the concerns raised in the audit. It is shocking that citizens can lose their property without being convicted — or even charged with a crime.

This bill also deserves praise for eliminating incentives that can arise from the practice of asset forfeiture. By directing the proceeds from the forfeiture program to the general fund, this bill prevents any agency or group to have a financial interest in asset forfeiture.

Finally, there is one more reform that could improve the state asset forfeiture program. In order to maintain the transparency of the program and boost public confidence, we suggest that the bill include language that would require more detailed reporting on the forfeiture program, especially regarding financial management and case data for specific property dispositions.

Thank you for the opportunity to submit our testimony.

Sincerely,

Joe Kent
Executive Vice President
Grassroot Institute of Hawaii

² “Audit of the Department of the Attorney General’s Asset Forfeiture Program,” Office of the Auditor, State of Hawaii, June 2018, <http://files.hawaii.gov/auditor/Reports/2018/18-09.pdf>.



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TESTIMONY IN SUPPORT OF HB 2069

LATE

TO: Chair Lee, Vice Chair San Buenaventura & Members of the House Judiciary Committee

FROM: Nikos Leverenz
DPFH Board President

DATE: February 13, 2020 (2:05 PM)

Drug Policy Forum of Hawai'i (DPFH) **strongly supports** HB 2069, which would reform Hawai'i's civil asset forfeiture law to require a conviction before property is permanently forfeited.

As evinced by legislative efforts and significant media coverage of this issue last year, the need for reform is clear to most everyone but those executive agencies who have effectively operated without meaningful legislative oversight, clear operational parameters, or any 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, 34 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.

Hawai'i should join them.

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

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

Rep. Chris Lee, Chair

Rep. Joy San Buenaventura, Vice Chair

Thursday, February 13, 2020

2:05 pm – Room 325

LATE

STRONG SUPPORT for HB 2069 – ASSET FORFEITURE

Aloha Chair Lee, Vice Chair San Buenaventura 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 families of **JAMES BORLING SALAS, ASHLEY GREY, DAISY KASITATI, JOEY O`MALLEY, JESSICA FORTSON AND ALL THE PEOPLE WHO HAVE DIED UNDER THE “CARE AND CUSTODY” OF THE STATE**, including the eleven (11) people that we know of, who have died in the last six (6) months. We also remind the committee of the approximately 5,200 Hawai`i individuals living behind bars or under the “care and custody” of the Department of Public Safety on any given day, and we are always mindful that more than 1,200 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.

In the interest of justice, Community Alliance on Prisons supports HB 2069!

On February 20, 2019, in an opinion delivered by Justice Ruth Bader Ginsberg, the US Supreme Court ruled that the Eighth Amendment’s ban on excessive fines applies to the states. The decision is a victory for an Indiana man whose luxury SUV was seized after he pleaded guilty to selling heroin. It is also a blow to state and local governments, for whom fines and forfeitures have become an important source of funds.

The question presented: Is the Eighth Amendment’s Excessive Fines Clause an “incorporated” protection applicable to the States under the Fourteenth Amendment’s Due Process Clause? Like the Eighth Amendment’s proscriptions of “cruel and unusual punishment” and “[e]xcessive bail,” the protection against excessive fines guards against abuses of government’s punitive or criminal law-enforcement authority. This safeguard, we hold, is “fundamental to our scheme of ordered liberty,” with “dee[p] root[s] in [our] history

and tradition.” McDonald v. Chicago, 561 U. S. 742, 767 (2010) (internal quotation marks omitted; emphasis deleted). The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.

In 2015, the Institute of Justice graded states on their programs: **Hawaii** earns a **D-** for its civil forfeiture laws¹ because of 1) the low bar to forfeit and no conviction required; 2) the poor protections for innocent third-party property owners; and 3) the fact that 100% of forfeiture proceeds go to law enforcement. This only encourages corruption.

In 2010, Hawai`i received a grade of D- for Forfeiture Law; C for State Law and an overall grade of D²; showing that things have gotten worse. As part of the Cooperative Congressional Election Study National Survey, the Institute for Justice asked a random sample of 1,000 participants nationwide whether they agree or disagree with various features of modern civil forfeiture laws. The results show that the public overwhelmingly favors greater protections for property owners and removing financial incentives that encourage civil forfeiture.

And then the long-awaited audit of the Forfeiture program was released and it highlighted the mismanagement of the program by the Attorney General’s office.

The scathing Hawai`i auditor’s report concluded: *“Hawai`i’s asset forfeiture program is controversial, attracting criticism from lawmakers, the public, and the media. The statute gives the Attorney General 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. We found that is not the case. The department has failed to adopt administrative rules as required by statute, establish formal Report No. 18-09 / June 2018 17 management policies and procedures, and implement strong internal controls.”*

Community Alliance on Prisons urges the committee to pass this important reform.

Mahalo for this opportunity to testify.

¹ Institute for Justice <https://ij.org/pfp-state-pages/pfp-hawaii/>

² Institute for Justice, March 2010. <https://ij.org/report/policing-for-profit-first-edition/part-ii-grading-the-states/hawaii/>

HB-2069

Submitted on: 2/12/2020 12:50:09 AM

Testimony for JUD on 2/13/2020 2:05:00 PM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| Gerard Silva | Individual | Oppose | No |

Comments:

HB-2069

Submitted on: 2/12/2020 12:04:14 PM

Testimony for JUD on 2/13/2020 2:05:00 PM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|--------------|--------------|--------------------|--------------------|
| Heather Lusk | Individual | Support | No |

Comments:

Thank you for the opportunity to testify.

I strongly support SB 2069, which would reform this state’s asset forfeiture laws to protect the rights of innocent property owners against undue and often unsubstantiated executive actions against them. Requiring a conviction before property is permanently seized and forfeited and channeling the bulk of the proceeds to the General Fund represents a significant improvement over existing law and practices in Hawai‘i.

Last year, [the Hawai‘i State Auditor found serious shortcomings in the practice of asset forfeiture over the past three decades](#) up to the present day, including the absence of administrative rules from the state Attorney General describing procedures and practice requirements. As such, “the program cannot fully account for the property it has obtained by forfeiture, is unable to adequately manage its funds, and cannot review or reconcile its forfeiture case data to ensure accurate reporting of information to the Legislature and the general public.”

I 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.

Under Hawai‘i’s current law governing asset forfeiture innocent property owners who do not have the economic means to post bond and hire an attorney to secure their property are effectively left without legal recourse. Those with little or no economic means should have adequate access to equal justice under law. This measure helps to ensure that due process of law is provided to those who would not otherwise be afforded such.

LATE

HB-2069

Submitted on: 2/12/2020 10:14:30 PM

Testimony for JUD on 2/13/2020 2:05:00 PM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| Thaddeus Pham | Individual | Support | No |

Comments:

HB-2069

Submitted on: 2/13/2020 9:05:00 AM

Testimony for JUD on 2/13/2020 2:05:00 PM

LATE

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| Aashish Hemrajani | Individual | Support | No |

Comments:

I strongly support HB 2069 and encourage you to pass this vital bill that would require a conviction before taking a person's belongings. How can you possibly represent a free society and prevent gross, explicit corruption if it is perfectly legal for armed authorities to take ownership of someone's belongings solely on the basis of a criminal charge that may be invalid and has not been evaluated through the constitutional right to a fair trial? This is effectively saying that a citizen may in fact be innocent until proven guilty, but that we can take his stuff whenever we please. Please pass this bill to restore basic rights and protections to the citizens of Hawaii.