

Staff Memorandum 2024-12
Crime Prevention, Intervention, and Disruption and Related Matters
Updates on Preliminary Proposals

At its July 2024 meeting, the Committee considered crime prevention, intervention, and disruption, with an emphasis on gun violence. This memorandum presents staff proposals for further discussion on those topics.

Preliminary Staff Proposals

1. Establish prosecutor-led diversion for gun possession offenses.

Summary Staff Proposal

Explicitly allow prosecutors to offer evidence-based diversion programs to individuals charged with illegal gun possession.

Current Law

The Penal Code authorizes judge-initiated diversion for most misdemeanor offenses including gun possession. However, this program is not available for felony charges and prosecutors are not given explicit authority to offer diversion in either misdemeanor or gun possession cases.

Background

Arrests and prosecutions for gun possession offenses are common and often result in jail or prison sentences. However, research suggests that incarceration for these offenses can exacerbate underlying conditions that contribute to violence, such as poverty, poor access to education, untreated trauma, and lack of affordable housing.¹

People in communities with high levels of violence often carry firearms out of fear for personal safety without any intent to commit another crime.² While the number of people in a community who possess or carry firearms illegally may be large, research indicates that a much smaller group within a community is typically responsible for committing violent crimes.³ For example, analysis of gun possession arrests in Philadelphia found that only 1% of people arrested for gun possession are arrested for committing a shooting within 2 years of their initial arrest or conviction.⁴

¹ Daniel Kim, *Social Determinants of Health in Relation to Firearm-Related Homicides in the United States: A Nationwide Multilevel Cross-Sectional Study*, PLOS Medicine 16, no. 12, December 17, 2019.

² See Melissa Barragan, et al., “*Damned if You Do, Damned if You Don’t*”: Perceptions of Guns, Safety, and Legitimacy Among Detained Gun Offenders, *Criminal Justice and Behavior*, 43(1) 140–155 (October 2015).

³ Stephen Lurie, et al., *The Less Than 1%: Groups and the Extreme Concentration of Urban Violence*, National Network for Safe Communities (November 2018).

⁴ Philadelphia City Council, *100 Shooting Review Committee Report*, 41, Appendix 7: DAO 15. Gun Possession Arrests and Re-arrests for a Future Shooting (January 2022).

An alternative strategy for responding to gun possession arrests considers such arrests as an opportunity to address untreated trauma related to community violence and offer interventions that help prevent future violence. Nationally, a few prosecutor's offices have partnered with community-based organizations to develop and implement diversion programs that take this approach.⁵

As Mike McLively, Policy Director at the Giffords Center for Violence Intervention explained to the Committee at its July meeting, while few in number, these programs have shown promising results. For example, a University of Chicago study of a gun diversion program in Minneapolis found that graduates of the program had significantly lower odds of a violent or weapons-related offense compared to the comparison group.⁶ Only 13% of program graduates were convicted of a new offense within two years compared to 40% of the comparison group.⁷ The program, developed through collaboration between the local prosecutor and a trusted community-based organization, offers life skills classes, mentoring, and other support services to people charged with misdemeanor gun possession offenses as an alternative to conviction and incarceration.⁸ Over 6 to 9 months, trained counselors use a mix of cognitive behavioral and group therapy to address trauma, faulty thinking, and the ability to regulate one's emotions.⁹

While California's Penal Code does not explicitly prohibit diversion for unlawful gun possession offenses and allows judges to grant diversion for misdemeanor gun possession cases over the objection of prosecutors,¹⁰ judges and prosecutors may be reluctant to offer diversion due to public safety concerns.¹¹ The novelty of these programs also means that many prosecutors may be unaware of effective community-based programs that address gun violence. Additionally, some communities have yet to develop community-based programs tailored to addressing unlawful gun possession.

Staff Proposal

The Committee should consider recommending a Penal Code provision that expressly permits prosecutors to offer diversion for gun possession offenses including but not limited to carrying a concealed firearm, carrying an unloaded

⁵ Giffords Law Center, *A Second Chance: The Case for Gun Diversion Programs* (Dec. 7, 2021); See also University of Chicago Smart Decarceration Project, *Principles of Prosecutor-Led Gun Diversion Programming: The National Landscape and Current Trends* (2021).

⁶ Epperson, et al., *An Examination of Recidivism Outcomes for a Novel Prosecutor-Led Gun Diversion Program*, *Journal of Criminal Justice*, Vol. 92 (May–June 2024).

⁷ *Id.* at 4.

⁸ *Id.* Committee staff also spoke to the director of the Minneapolis program, Priscilla Brown.

⁹ Staff interview of Pathways to New Beginnings Director Priscilla Brown.

¹⁰ Penal Code § 1001.95.

¹¹ See, e.g., San Luis Obispo Superior Court, *Court Misdemeanor Diversion Guidelines*.

firearm, and carrying a loaded firearm in public or in a vehicle.¹² The law should specify eligibility for diversion when unlawful gun possession is the sole charge, regardless of misdemeanor or felony classification.

2. Modernize civil asset forfeiture.

Summary Staff Proposal

Exempt amounts below \$10,000 from civil forfeiture and allow forfeiture proceeds to support crime victims.

Current Law

Under current law, there is no minimum threshold that prosecutors must meet before civilly forfeiting cash that they suspect is related to a drug crime. (Asset forfeiture in other types of cases requires a criminal conviction.) Forfeiture proceeds are distributed according to a statutory formula, but the formula does not allow proceeds to support crime victims.

Background

California's asset forfeiture laws, like most states and the federal government, allow police and prosecutors to permanently keep cash, cars, homes, and other property that is involved in a crime. Asset forfeitures can happen as part of resolving criminal charges, but in many drug cases a conviction is not required and can instead occur as "civil" asset forfeiture. The practice has long been criticized as allowing arbitrary exercises of government power without any evidence that the practice disrupts criminal activity or reduces drug use.¹³

Minimum seizure amounts

In California, there are no minimum requirements on the value of property that can be seized — meaning that very small amounts of money can be taken, which may be difficult for a low-income person to challenge or not worth the cost to challenge in court. Compounding this problem, amounts less than \$25,000 in drug cases can be seized without any judicial oversight if no one objects to the forfeiture.¹⁴

For example, in 2023, more than \$41 million across approximately 1,600 drug cases was seized in California under state law.¹⁵ The smallest amount seized was \$4.20 and the largest was \$5,442,850. 10% of forfeitures were for less than \$1,000,

¹² See Penal Code §§ 25400 (concealed), 25850 (loaded in public), 26100 (loaded in a vehicle), 26350 (unloaded).

¹³ Brian D. Kelly, *Does Forfeiture Work? Evidence from the States*, Institute for Justice, 5 (February 2021).

¹⁴ Health and Safety Code § 11488.4(j)(5)(B).

¹⁵ California Department of Justice, *Asset Forfeiture Report: Calendar Year 2023*, Table 3. This total excludes amounts seized under federal law and received by state and local law enforcement agencies.

20% were for less than \$1,500, 34% were for less than \$2,500 and 70% were for less than \$10,000.¹⁶

But the total amount of funds represented by these lesser seizures is quite small: the money seized in amounts under \$10,000 (\$3.8 million) was less than 10% of the total amount seized in 2023. In other words, requiring a minimum amount before civil forfeiture can occur in drug cases would help protect due process and reduce court and law enforcement costs with likely little bottom-line impact in the amount of money received.

Additionally, setting a minimum threshold for civil forfeiture in California would not prohibit a prosecutor from seizing amounts under \$10,000 altogether: prosecutors could still do so with a criminal conviction.¹⁷ Of all seizures completed in 2023 that were for \$10,000 or less, at least 48% were completed with a guilty plea in a criminal case.¹⁸ The criminal conviction requirement triggers other protections for the property — namely, access to counsel and increased due process.

Other states have taken similar steps. In 2021, Minnesota passed legislation that prohibits prosecutors from administratively seizing cash less than \$1,500.¹⁹ The State Auditor, which is responsible for tracking forfeiture in Minnesota, explained that forfeitures of small-dollar assets are not a large part of public safety budgets, but the amounts seized can be significant to individuals.²⁰ And four other states have eliminated civil forfeiture and only allow criminal forfeiture.²¹

Expand forfeiture funds to crime victims

After assets are forfeited in drug cases — which make up the large majority of forfeiture cases — California law directs the majority of proceeds (65%) to the

¹⁶ Forfeiture data used in this memo comes from the California Department of Justice, *Asset Forfeiture Report: Calendar Year 2023*, Table 3. Staff thanks the Department of Justice for providing the information in that report in a machine-readable format for easier analysis. Analysis is preliminary and may change; please contact Committee staff before relying on this analysis.

¹⁷ Under current law, if a person does not contest the forfeiture, a prosecutor may administratively seize (i.e. without judicial oversight) any amount of money less than \$25,000. Health and Safety Code § 11488.4(j)(5)(B).

¹⁸ Another 39% of the seizures did not indicate how they were obtained. Only 12% of seizures were done with no charges or dropped charges.

¹⁹ Minn. Stat. § 609.5314(1).

²⁰ Eric Rasmussen, *Auditor: Police Use of Controversial Forfeiture Law Declining in Minnesota*, KSTP TV, September 28, 2023.

²¹ Lisa Knepper et al, Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, 3d Edition, 5, 39 (December 2020), 39; Maine Rev. Stat. Ann. tit. 15 § 5821; N.C. Gen. Stat. § 75D-5 (civil forfeiture is still available in racketeering cases).

law enforcement agencies that participated in the seizure.²² And 15% of that 65% must be set aside in a special local fund for programs to “combat drug abuse and divert gang activity.”²³ This set-aside — which amounted to approximately \$4 million in 2023 — could be modernized to also allow support for crime victims.

Staff Proposal

The Committee should consider recommending (1) that only cash amounts totaling \$10,000 or more are subject to civil or administrative forfeiture and (2) that the forfeiture distribution formula be updated to allow support for crime victims.²⁴

Conclusion

Staff looks forward to discussing the proposals presented in this memorandum with the Committee.

Respectfully submitted,

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²² Health and Safety Code § 11489(b)(2)(D). The funds are distributed as follows: 65% to the law enforcement agencies that participated in the seizure, 15% of this must be deposited in a special local fund for programs “designed to combat drug abuse and divert gang activity”; 10% to the prosecutorial agency that processes forfeiture action; 24% to the state General Fund, of which up to \$10 million shall be made available for school safety and security; and 1% to the Environmental Enforcement and Training Account.

²³ Health & Safety Code § 11489(b)(2)(A)(i).

²⁴ In addition to the proposals here, staff explored expanding the California Control of Profits of Organized Crime Act to include organized retail theft and illegal sales of firearms, which would allow asset forfeiture for those offenses. Despite efforts, Committee staff were unable to obtain more information and data from prosecutors on the impact that this expansion would have. Staff will continue researching this issue and update the Committee as appropriate.