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# Money for Nothing: California's Outdated Illegal Gambling Forfeiture Laws Provide Criminals Low Risk and High Rewards

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**MONEY FOR NOTHING: CALIFORNIA’S OUTDATED  
ILLEGAL GAMBLING FORFEITURE LAWS PROVIDE  
CRIMINALS LOW RISK AND HIGH REWARDS**

**Mattia Murawski Corsiglia, Esq.\* and Daniel Trager\*\***

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\* The views stated herein are those of the author not the government agency with which he is associated. Mattia Murawski Corsiglia, Esq. is a Deputy District Attorney for Santa Clara County where he currently prosecutes Major Fraud cases. Prior to joining the District Attorney’s Office, Mr. Corsiglia was a Senior Associate at a Global AmLaw top 10 firm.

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## INTRODUCTION

Illegal slot machine operations continue to flourish in California despite law enforcement's best efforts. These locations, often referred to as "sweepstakes cafes" or "internet cafes," act as magnets and incubators for other crimes including drug sales, violent felonies, government corruption, illegal sales of firearms, and human trafficking.<sup>1</sup>

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1. In addition to the public news articles listed herein, this publication relies on the author's multiple years of prosecutorial experience working on over 30 illegal slot machine investigations and prosecutions, including countless discussions with judges, fellow county, state and federal prosecutors, defense counsel, expert and lay witnesses, and peace officers on the topic of illegal gambling in Santa Clara County and the State of California; *see also* Don Thompson, *California Cracks Down on 'Sweepstakes Cafes,'* USA TODAY (June 28, 2014, 4:15 PM), <https://www.usatoday.com/story/money/business/2014/06/28/california-cracks-down-on-sweepstakes-cafes/11630543/> ("This is a prolific problem that we're seeing in our neighborhoods up and down the state, where we're seeing these illegal gaming sweepstakes cafes opening with a myriad of problems and issues . . . of drugs, of prostitution, impacts to local legitimate businesses in these strip malls where these things are occurring, said Assemblyman Rudy Salas, D-Bakersfield."); Press Release, Att'y Gen., Xavier Becerra, Cal. Dep't. of Justice, Attorney General Kamala D. Harris Announces \$700,000 Settlement with

Capital Sweepstakes For Illegal Gambling (Jul. 31, 2015) (“These illegal [gambling] operations often are magnets for other crime at the local level and generally target a vulnerable low-income clientele.”) [hereinafter Settlement with Capital Sweepstakes], <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-700000-settlement-capital-sweepstakes>; Sam Stanton, *Illegal Slots, Cocaine and Fast Cars. Now It’s Payback Time for ‘Dino the Casino,’* THE SACRAMENTO BEE (Sept. 15, 8:06 AM) (Operator operated 70-100 slot machines and sold cocaine earning himself \$500,000 profit in six months), <http://www.sacbee.com/news/local/crime/article173347431.html>; Brock Keeling, *City Attorney To Close Illegal Gambling Cafes In Excelsior*, SFIST (Nov. 7, 2013, 10:17 AM) (“Gambling is strictly regulated in California for a reason, and Net Stop’s owner should know better than to think he can get away with flouting state and local law,” The City Attorney fumed in a press release. “When one spot in the City sees a hundred-fold increase in police calls in a single next year, the City will move aggressively to protect the neighborhood and send a message to other would-be scofflaws that similar schemes won’t be tolerated. This is criminal activity creating more criminal activity, and we’re asking the court to put a stop to it and impose the maximum penalties under the law.” San Francisco Supervisor John Avalos . . . [said], “Net Stop’s blatant violation of the law is doing real damage to quality of life in the area . . . It has put a terrible strain on the neighborhood, but today we’ve taken a big step toward shutting it down.” A local resident vented on Yelp, “The people who frequent this business are up to no good! Gambling, prostitution, smoking on the street right next to our bus stop, graffiti, break-ins, and general sketchy behavior. Not an appropriate business for our neighborhood.”), [http://sfist.com/2013/11/07/city\\_attorney\\_to\\_close\\_illegal\\_gamb.php](http://sfist.com/2013/11/07/city_attorney_to_close_illegal_gamb.php); Theo Douglas, *Kern Playing an Active Role in State Internet Cafe Task Force*, BAKERSFIELD.COM (Aug. 7, 2015) (On July 31, Attorney General Kamala D. Harris announced Capital Sweepstakes Systems Inc., a sweepstakes gambling software provider, had agreed to pay \$700,000 in civil penalties and admit to violating state gambling laws, in a case brought by the task force. The settlement resolved allegations Capital Sweepstakes violated state law governing illegal gambling and unfair competition. According to the terms of the agreement, Capital Sweepstakes is also barred from conducting any sweepstakes operations in California for a decade. “Capital Sweepstakes profited by targeting low-income communities, misrepresenting their slot-machine style operations as legal enterprises and creating magnets for crime,” Harris said in a statement. “Our supreme court decision we obtained is a key basis on which that task force is operating. That gives us the green light, really, to go forward now and hold some of these large companies accountable,” said Deputy District Attorney Gregory Pulskamp, who successfully argued against the Internet cafe owners’ appeal to the California Supreme Court.), [http://www.bakersfield.com/news/kern-playing-an-active-role-in-state-internet-cafe-task/article\\_e752f5b6-f1fe-549c-9155-40bdfea3f7db.html](http://www.bakersfield.com/news/kern-playing-an-active-role-in-state-internet-cafe-task/article_e752f5b6-f1fe-549c-9155-40bdfea3f7db.html); Jack Morse, *Police Crack Down (Again) On Cocaine-Fueled Excelsior Gambling Clubs*, SFIST (Oct. 16, 2015, 1:05 PM) (“Sweepstakes cafés, which have operated under a legal loophole in California state law, were accused of drawing unsavory elements to the neighborhood. But with those cafes now gone, it appears those looking to make a quick buck have simply gone the old-school route of launching illegal gambling clubs. These “gambling shacks,” dilapidated storefronts that stay open well past the last call of 2:00 a.m. and frequently house illegal gambling rings, have not gone unnoticed by police or Excelsior residents. According to KQED News, one spot in particular—running out of a closed women’s clothing shop called “The Pink Spot”—has already been the subject of an ABC investigation and police raid. After an undercover ABC agent entered the club and confirmed there were unlicensed alcohol sales, he let in the ABC agents and police to execute a warrant. Forty patrons left as the authorities detained and cited the operators.” Agents at the scene seized five bottles of distilled spirits, over 1,000 containers of beer and over \$800 in cash,” ABC spokesman John Carr said. “The bartender later admitted that the club normally stayed open until 6 a.m.” And as KQED News notes, it seems booze wasn’t the only thing fueling

They are often operated by either: (1) citizens with very little criminal history, but high hopes for easy untaxed and unregulated money;<sup>2</sup> or (2)

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the late-night party. The SFPD arrested a man on narcotics charges who allegedly tried to stash in an ice bucket “eleven packets of cocaine packaged for sale,” according to a police report. “A search of the suspect’s clothing revealed packets of small denominations of currency totaling more than \$1,000.” Supervisor John Avalos, who represents the Excelsior, called a public hearing yesterday to both inform residents of police efforts to shut down the spots and to reassure his constituents that he is paying attention to their complaints. The Examiner reports that Ingleside Police Captain Joseph McFadden attended the hearing, and spoke to his efforts to follow the money behind the operations. “You’re looking for the bigger kingpins in it, the people that are handling the money,” McFadden said of the illegal operations. “You want to catch the main guys. That’s the toughest part, getting the nexus and the evidence to identify that particular person. They are very intricate in stopping that.” Madden continued that the police are moving much faster than they used to. “We are knocking them down sooner rather than later. When I first came in, there were some places that took upwards from four to eight years to close down. We are doing it in a matter of months.” But moving quickly may not be enough. The high number of empty storefronts plays a significant contributing role in the neighborhood’s draw to organizers of late-night gambling joints, and means that operators can move from one location to another. Again, from KQED News: This diverse, working-class neighborhood in the southern part of the city includes discount shops, liquor stores, fast-food outlets, and mom-and-pop grocery stores, as well as numerous empty storefronts. [. . .] The Excelsior Action Group, a government-funded nonprofit dedicated to enhancing the neighborhood’s commercial corridor, recently performed its quarterly storefront survey and found 38 empty, non-performing or for-sale spaces, up two from the previous survey, on the 1.4-mile stretch of Mission Street it works on. That one 1.4-mile strip has thirty-eight potential options for would-be illegal gamblers, which means the police have their work cut out for them. Unless yesterday’s hearing leads to major changes in the way these clubs are dealt with, our money is on the gamblers.), [http://sfist.com/2015/10/16/the\\_excelsior\\_experiences\\_a\\_boom\\_in.php](http://sfist.com/2015/10/16/the_excelsior_experiences_a_boom_in.php); *States Scramble to Stop Illegal Gambling at Internet Sweepstakes Cafes*, THE MERCURY NEWS, (Aug. 12, 2016, 10:17 AM) (“More than \$10 billion in revenue a year is the incentive to stay in business for these storefronts, numbering in the thousands.”), <http://www.mercurynews.com/2014/03/24/states-scramble-to-stop-illegal-gambling-at-internet-sweepstakes-cafes/>; Katie Nelson, *Santa Clara: Police Warrant Served on Gambling Ring Nets 27 Arrests*, THE MERCURY NEWS (Feb. 25, 2015, 12:34 PM) (“Police said 27 people were arrested after a six-month investigation linked the suspects to an illegal gambling ring that spanned from San Jose to Modesto. Of the 27 people arrested, 10 were suspects in the gambling investigation, according to Santa Clara police. An additional 17 individuals arrested face unrelated charges, including drug possession and child endangerment. Police said they also seized four firearms, \$70,000 in cash, five illegal gambling machines and half an ounce of methamphetamine. Those involved in the gambling ring referenced by Santa Clara police were linked to a series of search warrants served Tuesday by San Jose police to dismantle an alleged gambling network operating out of a home and a corner market. Those warrants marked the second time police have tried to break up the operation, after a November raid of the home turned up video gaming machines and other contraband. But investigators say it *re-emerged even larger*, leading to Tuesday’s busts.”) (emphasis added), <https://www.mercurynews.com/2015/02/25/santa-clara-police-warrant-served-on-gambling-ring-nets-27-arrests/>; Rick Hurd, *Illegal Slots, Poker at East Bay Garage Casino Uncovered, 14 Arrested*, THE MERCURY NEWS (Aug. 11, 2016, 10:45 AM), <http://www.mercurynews.com/2016/06/27/illegal-slots-poker-at-east-bay-garage-casino-uncovered-14-arrested/>.

2. Senate Rules Committee, Bill Analysis of AB 1753 (2010) [hereinafter Bill Analysis

criminal street gangs who seek to fund their other illicit activities.<sup>3</sup>

These locations operate for one reason—they earn millions of dollars in illegal profits with almost no risk. Depending on the programming of the machines, each can bring in \$2,500-\$5,000 a week or more.<sup>4</sup> The method of play often never involves placing money into the machines itself.<sup>5</sup> Instead, money is often collected by a cashier.<sup>6</sup> A typical operation runs anywhere from 1-10 to upwards of 40 machines at a time.<sup>7</sup> Indeed, the California Attorney General states that illegal slot machines “are a nationwide problem and are estimated to earn over \$10 billion a year.”<sup>8</sup> The video slot machines are generally placed in establishments located in lower income communities.<sup>9</sup> The profits from these machines are split between the operator and the group that provides the software and terminals.<sup>10</sup> The money is unreported and untaxed.<sup>11</sup>

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of AB 1753], [ftp://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_1751-1800/ab\\_1753\\_cfa\\_20100803\\_100240\\_sen\\_floor.html](ftp://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1751-1800/ab_1753_cfa_20100803_100240_sen_floor.html).

3. Robert Salonga, *San Jose: Crackdown on Vietnamese Gang Leads to Cop's Arrest, Guns, Drugs, Alligator*, THE MERCURY NEWS (Sep. 22, 2016, 11:38 AM), <https://www.mercurynews.com/2016/08/24/san-jose-crackdown-on-vietnamese-gang-leads-to-cops-arrest-guns-drugs-alligator/>; Joseph Serna, *'Gang of Thrones' Sweep Nets Cache of Ecstasy, Molly, Xanax . . . and a Baby Alligator*, L.A. TIMES (Aug. 25, 2016, 11:35 AM), <http://www.latimes.com/local/lanow/la-me-ln-san-jose-gang-of-thrones-sweep-officer-arrest-drug-ring-20160825-snap-story.html>.

4. See *supra* notes 1–3; see also *infra* Part II.A. and II.B.

5. See *infra* Part II.B.

6. See *supra* notes 1–3.

7. See generally *supra* notes 1–3; see also *infra* Part III.C.

8. Settlement with Capital Sweepstakes, *supra* note 1. (“Sweepstakes gambling enterprises are a nationwide problem and are estimated to earn over \$10 billion a year. Attorney General Harris recently filed an amicus brief in the California Supreme Court in support of several cases that the Kern County District Attorney’s Office brought against sweepstakes gambling operations. The Supreme Court ruled unanimously that these sweepstakes gambling operations are illegal. Attorney General Harris continues to take the lead in the battle against these illegal gambling operations, having been involved in seizures of illegal sweepstakes gambling equipment and funds across the state and pioneering the use of the Unfair Competition Law to provide stronger monetary remedies against them. The Sweepstakes Gambling Task Force was formed to bring an end to illegal sweepstakes gambling operations in California and includes the California Attorney General’s Office, Contra Costa County District Attorney Mark A. Peterson, Fresno County District Attorney Lisa A. Smittcamp, Kern County District Attorney Lisa S. Green, Merced County District Attorney Larry Morse II, Riverside County District Attorney Michael A. Hestrin, San Diego County District Attorney Bonnie M. Dumanis, Sonoma County District Attorney Jill R. Ravitch, Tulare County District Attorney Timothy Ward, and Los Angeles City Attorney Michael N. Feuer.”).

9. Bill Analysis of AB 1753, *supra* note 2. It has been this author’s experience that the operators generally license the software from a third-party vendor—usually out of state—who shares the profits 75%-25%. Often, they reserve 5% as future “litigation expenses.”

10. *Id.* at 5.

11. *Id.* at 4.

The machines are unregulated and have high retention rates, which provide operators with the ability to take advantage of lower income individuals.<sup>12</sup> Yet, operating these machines in California is merely a misdemeanor.<sup>13</sup>

For criminal street gangs, the machines are so profitable they have become territorial.<sup>14</sup> There have been multiple reports of armed confrontations between different gangs regarding control over machines.<sup>15</sup> As a result, homicides have been linked to illegal gambling operations.<sup>16</sup> Oftentimes gangs approach legitimate business owners and demand the gang's machines go into service.<sup>17</sup> Owners are afraid of these gangs and acquiesce to their demands.<sup>18</sup>

Local law enforcement agencies have expended a significant amount of energy and resources to combat illegal slot machines throughout the State.<sup>19</sup> Yet, an operation is frequently reopened a few short weeks after law enforcement shuts it down—often in the same location and under the same ownership.<sup>20</sup> A significant tool that law enforcement uses to prevent operators from being able to quickly reopen in a new location is depriving them of their ill-gotten gains. Forfeiture ensures that criminals do not profit from their illegal acts. Depriving the operators of profits strips gangs of their economic base, and abates nuisances in the community.<sup>21</sup> A major reason that this deterrence is ultimately ineffective is that the current forfeiture laws are difficult to interpret for courts, which results in no seizure of assets found in these illegal casinos being made, or the courts returning money to the illegal operators.<sup>22</sup>

Specifically, courts, prosecutors, and defendants do not have a clear understanding of the requirements needed to seize profits held in bank accounts and not just money within the slot machine itself.<sup>23</sup> As

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12. *Id.*

13. CAL. PEN. CODE § 330.

14. *See* Salonga, *supra* note 3.

15. *Id.*

16. *Id.*

17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. *See* U.S. v. Ursery, 518 U.S. 267, 278, 290–91 (1996); U.S. v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); *People v. Superior Court (Clements)*, 200 Cal. App. 3d 491 (1988).

22. *See infra* Part II.B.

23. *See infra* Part II.C.

technology advances, this is a significant issue for all parties.<sup>24</sup> In addition, as currently drafted, illegal slot machine laws allow law enforcement to seize and destroy illegal slot machines and forfeit any funds without a clear judicial process. This lack of clarity is a significant issue for all parties.

This article explores recent litigation in California and evaluates various options as a matter of public policy moving forward.<sup>25</sup> It begins with a discussion of legislative attempts at prohibiting illegal slot machines.<sup>26</sup> This discussion is followed by a brief history of “cafes.”<sup>27</sup> The article then turns to a recent California case *People ex rel. Green v. Grewal*, which clarified the illegality of such cafes.<sup>28</sup> Next, the article analyzes existing frameworks of forfeiture law.<sup>29</sup> The article then explains how the current law works and how courts can and should seize ill-gotten illegal gambling gains.<sup>30</sup> Finally, the article proposes a solution by either passing AB1395, amending Penal Code section 286.2, or adopting a proposed amendment to section 335a, the California statute governing slot machines, harmonizing it with established money laundering forfeiture laws.<sup>31</sup>

## BACKGROUND

### *A. The Applicable Law and the Current Situation*

#### *1. Penal Code Section 330b*

California’s broad Penal Code provisions on gambling devices forbid a wide range of electronic and mechanical machines beyond traditional casino-style slots.<sup>32</sup> California courts have held Section 330b’s broad scope prohibits a wide variety of devices under California’s law against gambling devices.<sup>33</sup>

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24. See *infra* Part II.B.

25. See *infra* Part IIB–IV.

26. See *infra* Part II.A.

27. See *infra* Part II.B.

28. *Id.*

29. See *infra* Part II.D.

30. See *infra* Part III–IV.

31. See *infra* Part III–IV.

32. CAL. PEN. CODE § 330b(e)(2).

33. *People ex rel. Green v. Grewal*, 61 Cal. App. 4th 544 (2015); *People ex. rel. Bill Lockyer v. Pacific Gaming Technologies*, 82 Cal. App. 4th 699, 703 (2000) (holding that a device that dispensed a five-minute phone card for \$1.00 was a gambling device because operators also received the random chance to win a sweepstakes prize); *Trinkle v. Stroh*, 60 Cal. App. 4th 771, 775–77 (1997) (holding a jukebox that dispensed four songs for \$1.00 was

At its essence, Penal Code section 330b finds a device to be a gambling device (or slot machine) if “[b]y the insertion of money and purely by chance (without any skill whatsoever), the user may receive or become entitled to receive money.”<sup>34</sup> California Penal Code 330b defines a slot machine as any device:

that is adapted . . . for use in such a way that, as a result of the insertion of any piece of money or coin or other object . . . such machine or device is caused to operate or may be operated, and by reason of any element of hazard or chance or of other outcome of such operation unpredictable by him, the user may receive or become entitled to receive any . . . thing of value. . . .<sup>35</sup>

Penal Code sections 330a and 330.1 similarly define a slot machine, however, their language is narrow.<sup>36</sup> As a result, courts interpret and prosecutor’s offices often charge Penal Code section 330b.<sup>37</sup>

## 2. Internet Sweepstakes Cafes

Internet sweepstakes cafes are thinly veiled casinos often operated out of strip malls and storefronts.<sup>38</sup> Users gamble at computer terminals that simulate traditional Vegas-style slot machines and other casino games.<sup>39</sup> Money or credits are inserted into computer terminals that simulate game play similar to a slot machine or other games of chance.<sup>40</sup> The computer then reveals a predetermined outcome that either causes the customer to win or lose credits.<sup>41</sup> Those credits are then redeemed for cash or kept for the house.<sup>42</sup> At all times, the user has no way to

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a gambling device because operators also received the random chance to win a cash jackpot).

34. *Pacific Gaming Technologies*, 82 Cal. App. 4th at 703.

35. CAL. PEN. CODE § 330b (In its entirety, the statute defines an unlawful “slot machine or device” as one: that is “adapted, or may readily be converted, for use in a way that, as a result of the insertion of any piece of money or coin or other object, or by any other means, the machine or device is caused to operate or may be operated, and by reason of any element of hazard or chance or of other outcome of operation unpredictable by him or her, the user may receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or additional chance or right to use the slot machine or device, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value, or which may be given in trade, irrespective of whether it may, apart from any element of hazard or chance or unpredictable outcome of operation, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.”).

36. *Grewal*, 61 Cal. App. 4th at 556.

37. *Id.*

38. *Id.* at 552.

39. *Id.*

40. *Id.*

41. *Id.* at 553.

42. *Green v. Grewal*, 61 Cal. App. 4th 544 (2015).

predict the outcome of each play.<sup>43</sup>

Café owners who operate these businesses claim that customers are playing harmless games.<sup>44</sup> Indeed, they argue that their business model is no different than legal sweepstakes held by corporations and businesses for promotional purposes.<sup>45</sup> More recently, cases have begun to emerge where operators have required the user to perform some skill-based task after gambling.<sup>46</sup> Despite these elaborate ruses, both the customers and the California courts see this as indistinguishable from traditional gambling.<sup>47</sup> Courts from around the country have analyzed these sweepstakes café gaming systems and found them illegal.<sup>48</sup> These

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43. *Id.* at 553.

44. *See id.* at 552.

45. *Id.* at 566. (For example, McDonalds has been running their famous Monopoly Sweepstakes since 1998. Customers who purchase food receive a game token which can be either combined in certain combinations and redeemed for prizes of up to a million dollars, or reveal “instant win” that can be redeemed for menu items at McDonalds. Traditional Sweepstakes differ in important ways. They are held to promote a product and are limited in duration. The goal is to attract customers to purchase a legitimate product and a majority of the revenue of the company comes from selling a product. The odds of winning are so remote that customers are not enticed to purchase the product by the chance of winning but may receive a prize incidental to their main purchase. In Sweepstake Cafés on the other hand, ostensibly, players buy some product such as phone or internet time and receive free credits that can be used to play video casino games, but the players are only interested in the gambling on the chance to make money. Most cafes offer a limited number of free credits daily that can be requested at the counter or by mail order, but the main revenue, sometimes of millions of dollars, comes from players purchase of useless products in order to receive more credits to gamble. Contrary to the claims of these cafes the primary motivation of these customers is the chance to win money.)

46. Recently, there have been reports of gaming devices that require users to press their keyboard’s space bar at a certain point to stop a target that slowly moves between green to red before their credits can be redeemed. The purpose is to apply some element of skill in a ruse to overcome the current gambling laws. It obviously fails the standard articulated in *Grewal*, 61 Cal. 4th at 564.

47. *Grewal*, 61 Cal. App. 4th at 564–65.

48. *Barber v. Jefferson Cty. Racing Ass’n*, 960 So. 2d 599 (Ala. 2006) (overruled on other grounds by *Tyson v. Macon County*, 43 So. 3d 587, 591 (2010)) (a computer gaming device is a slot machine when customers purchased internet time plus predetermined sweepstakes entries, where customers “revealed” entries, the reader looked like slot machine, and the outcome was unknown at the time of purchase. The court held that in the “computer age” it is “simply inconsequential” that chances take place at the point of sale and not at the readers); *Moore v. Mississippi Gaming Commission*, 64 So. 3d 537 (Miss. App. 2011) (rejecting argument that the element of chance was missing because the internet café’s computer terminals—which displayed the results of the sweepstakes entries through simulated slot machine games—did not control the outcome of the predetermined winners and losers. “The element of chance is viewed from the player’s [perspective.]”); *Telesweeps of Butler Valley v. Kelly*, No. 3:12-CV-1374, 2012 U.S. Dist. LEXIS 146157 (M.D. Pa. Oct. 10, 2012) (holding that whether randomization occurred through the operation of the game display, or through predetermined distribution of game entries, “both methods present to the player in a game of chance.” It was “too much for this Court to accept” that sweepstakes systems did not

cases further highlight the seriousness of the issue.

*B. The Legality of Sweepstakes Cafes in California*

*1. The Law Prior to People ex rel. Green v. Grewal*

Café owners have significant resources that they use to thwart law enforcement efforts.<sup>49</sup> Indeed, the game between law enforcement and illegal gambling operators is often one of cat and mouse. It is not unusual for defendants to hire professional experts to expound on the “legality” of their conduct.<sup>50</sup>

Below is a list of key opinions clearly stating the illegality of video slot machines. Yet, even with these clear discussions, café owners continue to challenge the laws:

*Lockyer*: As early as 2000, the California Court of Appeal reversed a trial court and held that a vending machine that dispensed five-minute phone cards for \$1, and also had a sweepstakes feature that randomly paid out money, was an illegal slot machine.<sup>51</sup> The sweepstakes rules were posted on the machine (e.g., no purchase is necessary, users must be 18 years of age or older), a preset computer program determined the results of the sweepstakes, and the user had no control over the outcome.<sup>52</sup> In overruling the trial court, the Court of Appeal warned that: “If it looks like a duck, walks like a duck, and sounds like a duck, it is a duck. And so it is with this duck.”<sup>53</sup>

*Attorney General Opinion (December 5, 2012)*: On December 5, 2012, the California Attorney General’s Bureau of Gambling Control issued a “Law Enforcement Advisory” concerning Internet cafes.<sup>54</sup>

The advisory stated, in part:

With increasing frequency, so-called “Internet cafes” that sell Internet time or phone cards in conjunction with a “promotional sweepstakes,” are opening throughout California. The “sweepstakes aspect” of Internet cafes permits customers to play gambling-themed games on computers to win cash prizes. The Bureau of Gambling Control considers Internet cafes that offer these types of sweepstakes

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constitute gambling when they worked to create an “experience which mimics casino-style games as closely as possible.”).

49. See *infra* Part II.C; see *supra* notes 1–3.

50. *Id.*

51. *Lockyer v. Pacific Gaming Technologies*, 82 Cal. App. 4th 699, 703–04 (2000).

52. *Id.* at 702.

53. *Id.* at 701.

54. 11 Op. Cal. Att’y Gen., Bureau of Gambling Control, Law Enforcement Advisory on Internet Cafes (December 5, 2012), [https://oag.ca.gov/sites/all/files/agweb/pdfs/gambling/internet\\_cafes.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/gambling/internet_cafes.pdf).

to be illegal gambling operations . . .

Computers that offer the sweepstakes generally described above [Internet time for sweepstakes entries] are illegal ‘slot machines[s] or device[s]’ prohibited by Penal Code section 330b, subdivision (d).”<sup>55</sup>

*Lucky Bob’s*: In May of 2013, the United States District Court for the Southern District of California in *Lucky Bob’s* examined a computer gaming system virtually identical to the *Grewal* system and held that it constituted an unlawful gaming device in violation of Penal Code section 330b.<sup>56</sup>

Yet, even with these clear opinions outlawing sweepstakes style slot machines, café operators continue to operate their illegal gambling businesses and thwart law enforcement under a misapplied interpretation from the case *Trinkle v. California State Lottery (Trinkle II)*.<sup>57</sup>

In *Trinkle II*, the Court of Appeal reached the unsurprising conclusion that a vending machine (that simply dispenses California State Lottery tickets in the sequential order that they were loaded into the machine) is not an unlawful slot machine.<sup>58</sup> Illegal slot machine operators, however, rely on certain statements made by the Court of Appeal in reaching that conclusion. Specifically, in explaining why the element of chance was not present, *Trinkle II* observed: “If a player purchases his ticket from a [Scratchers vending machine, or SVM], the player obtains the ticket by inserting money into the machine and pushing a button, which releases the next ticket in sequence, according to the order in which it was printed and loaded into the SVM bin. Nothing about the machine or its operation by the customer alters the order in which the tickets were arranged at the time they were printed.”<sup>59</sup> The court further observed that “SVM’s do not have computer programs that generate random numbers or symbols, nor do they have any capability of conducting a process of random selection or other kind of chance selection.”<sup>60</sup> Since the only element of chance was due to “the printing of the winning tickets and the placement of those tickets in a predetermined sequence” at the time the tickets were manufactured, the SVM itself had no role in outcomes because no further element of chance

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55. *Id.*

56. *Lucky Bob’s Internet Cafe, LLC. v. Cal. Dep’t of Justice*, No. 11-CV-148 BEN (JMA), 2013 WL 1849270, at \*3 (S.D. Cal. 2013); *see* *People ex rel. Green v. Grewal*, 61 Cal. 4th 544, 550 (2015).

57. *Trinkle II*, 105 Cal. App. 4th 1401, 1408–09 (2003).

58. *Id.* at 1404, 1408–09.

59. *Id.* at 1411–12.

60. *Id.*

was involved in connection with the operation or play of the machine.<sup>61</sup> In other words, *Trinkle II* explained that unless the element of chance is generated by the machines themselves at the time the customer plays or operates it (like the spinning wheels of the original mechanical slot machines or a computer program that randomizes the entries), it is only a vending machine.<sup>62</sup> Illegal slot machine operations would—and often still do—insist that their systems are on par with the vending machines in *Trinkle II*, since customers playing defendants’ computer sweepstakes games merely receive the next available entry result from a stack that is in a previously arranged, sequential order.<sup>63</sup> According to illegal gambling operators, this issue remained an open question. This issue was finally put to rest by the California Supreme Court in *People v. Grewal*.<sup>64</sup>

## 2. *The Law Since People ex rel. Green v. Grewal*

In *Grewal*, the California Supreme Court reviewed the lawfulness of several different sweepstakes gaming systems used at various internet cafés including the “I Zone Internet Café.”<sup>65</sup> At I Zone, customers purchased internet time or other services from an employee and, in return, were given a card with a magnetic strip.<sup>66</sup> The customer would then swipe the card at a computer terminal and would be given the option to use the internet or play computer games.<sup>67</sup> For every dollar spent, the customer received 100 sweepstakes credits.<sup>68</sup> The customer also received additional sweepstakes points for being a new customer and for his first purchase of the day.<sup>69</sup> The customer could use his sweepstakes points in selected increments to play slot machine style games, simulating bets.<sup>70</sup> Participants in the sweepstakes had an opportunity to win cash prizes in various amounts.<sup>71</sup>

According to the owners of I Zone, their gaming system simply revealed the results of the sweepstakes, which were *predetermined and*

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61. *Id.* at 1412.

62. *Id.* at 1410–12.

63. *Green v. Grewal*, 61 Cal. App. 4th 560 (2015).

64. *Id.*

65. *Id.* at 550.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Grewal*, 61 Cal. App. 4th at 550.

70. *Id.*

71. *Id.*

were not influenced by the actions of the customer.<sup>72</sup> Furthermore, I Zone used three distinct terminals in operating its system.<sup>73</sup> At the Management Terminal, the sweepstakes entries were arranged into finite batches with a set number of winners and losers.<sup>74</sup> The customer could then reveal the results of the sweepstakes at one of the other two terminals which acted as readers and simply displayed the results that were predetermined by the Management Terminal.<sup>75</sup>

Both the Supreme Court and Court of Appeal rejected I Zone's assertion that their gaming system constituted a lawful sweepstakes.<sup>76</sup> Instead both courts found that I Zone's gaming computers met the definition of an illegal gambling device under Penal Code section 330b.<sup>77</sup> The first element—*operation*—was satisfied because the customers had to swipe a card to access the sweepstakes games and use the points from the money they put on the card to play the games, thereby using “other means” to operate the device.<sup>78</sup> The second element—*chance*—was present because even though the sweepstakes results were in a predetermined sequence, the results were “unpredictable and random from the perspective of the user.”<sup>79</sup> The third and final element—*thing of value*—was satisfied because when a customer won they were awarded cash prizes.<sup>80</sup> Pursuant to the ruling in *Grewal*, software systems operating computer sweepstakes games on the networked terminals are considered unlawful slot machines or devices.<sup>81</sup>

The Court has ruled that operating a sweepstakes café terminal satisfies the legal definition of operating a slot machine as defined in the California Penal Code.<sup>82</sup> California courts agree that simulated sweepstakes terminals are no different than illegal slot machines.<sup>83</sup>

Based on a plain reading of the statute, gaming computers satisfy

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72. *Id.*

73. *Id.* at 553.

74. *Id.*

75. *Id.*

76. *Id.* at 544.

77. *Green v. Grewal*, 61 Cal. App. 4th 554 (2015).

78. *Id.* at 559.

79. *Id.* (“Since customers playing defendants’ computer sweepstakes games can exert no influence over the outcome of their sweepstakes entries by means of skill, judgment or how well they play the game, it follows that we are dealing with systems that are based on chance or luck.”).

80. *Id.*

81. *Id.* at 560.

82. *Id.* at 559.

83. *Id.*

all three elements of Penal Code section 330b.<sup>84</sup> First, as a result of entering a number into the gaming computer, the customer can operate games available on the computer.<sup>85</sup> Second, the customer cannot predict the outcome of the games.<sup>86</sup> Finally, if the customer is lucky enough to win, he or she receives a thing of value—cash for any remaining point balance.<sup>87</sup>

### 3. Punishment Under Penal Code Section 330b

Currently, a violation of Penal Code section 330b is a misdemeanor.<sup>88</sup> A first-time offense for a violation of Penal Code section 330b includes a \$500 minimum base fine or imprisonment in county jail not exceeding six months.<sup>89</sup> A second offense has a \$1,000 fine and a third or subsequent offense has a fine of \$10,000.<sup>90</sup> In addition, if a fine is imposed the defendant *must* be fined not less than \$1,000 nor more than \$5,000 *per machine*.<sup>91</sup>

Further, “[a]ny and all money seized *in or in connection with* such machine or device shall, immediately after such machine or device has been so destroyed, be paid into the treasury of the city or county, as the case may be, where seized, said money to be deposited in the general fund.”<sup>92</sup>

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84. *Id.*

85. *Grewal*, 61 Cal. App. 4th at 559.

86. *Id.* at 560.

87. *Id.* at 559.

88. CAL. PEN. CODE § 330b.

89. CAL. PEN. CODE § 330b:

(e) Every person who violates this section is guilty of a misdemeanor.

(1) A first violation of this section shall be punishable by a fine of not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000), or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment.

(2) A second offense shall be punishable by a fine of not less than one thousand dollars (\$1,000) nor more than ten thousand dollars (\$10,000), or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment.

(3) A third or subsequent offense shall be punishable by a fine of not less than ten thousand dollars (\$10,000) nor more than twenty-five thousand dollars (\$25,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.

(4) If the offense involved more than one machine or more than one location, an additional fine of not less than one thousand dollars (\$1,000) nor more than five thousand dollars (\$5,000) shall be imposed per machine and per location.

90. *Id.*

91. *Id.* at (e)(4) “If the offense involved more than one machine or more than one location, an additional fine of not less than one thousand dollars (\$1,000) nor more than five thousand dollars (\$5,000) shall be imposed *per machine and per location*” (emphasis added).

92. CAL. PEN. CODE § 335a (emphasis added).

Penal Code sections 330.1, 330a, 330b, and specifically subsection (e) were written in the singular and, therefore, contemplate a single violation would include more than one machine.<sup>93</sup> The legislature clearly intended that a person operating multiple illegal slot machines would be charged with one violation of the Penal Code, but subject to a fine of not less than one thousand dollars nor more than five thousand dollars *per* machine; indeed, subsection (e) would be rendered mere surplusage if each machine found could be charged as a separate offense. This would defeat the purpose of the legislative amendment because charging multiple counts would result in subsection (b) cannibalizing subsection (e)(4) rendering (e)(4) mere surplusage.<sup>94</sup> It was not the legislature's intent to imprison gambling operators for years on end.<sup>95</sup> Instead, they sought to fairly purge them of ill-gotten gains.<sup>96</sup> The amendment's intent is to apply a separate fine for each machine found in operation.<sup>97</sup>

For the purposes of seizure under Penal Code section 330.3, a "slot machine" or "device" is defined by Penal Code section 330.1.<sup>98</sup> Section 330.1 defines a slot machine similarly to Penal Code section 330b.<sup>99</sup>

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93. CAL. PEN. CODE § 330.1(e) ("If the offense involved more than one machine or more than one location, an additional fine of not less than one thousand dollars (\$1,000) nor more than five thousand dollars (\$5,000) shall be imposed per machine and per location."); Senate Rules Committee, Bill Analysis of AB 1753 2 (2010), [ftp://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_1751-1800/ab\\_1753\\_cfa\\_20100803\\_100240\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1751-1800/ab_1753_cfa_20100803_100240_sen_floor.html) ("This bill provides if the above offense involved more than one machine or more than one location, an additional fine of \$1,000 to \$5,000 shall be imposed per machine per location.").

94. *See* People v. Superior Court (Sanchez-Flores), 239 Cal. App. 4th Supp. 1, 5-6 (2015); [CAL. PEN. CODE §§] 330.1, subdivision (a), makes it a misdemeanor offense to unlawfully possess slot machines or devices. The statutory scheme provides for escalating fines and/or imprisonment based on the defendant's prior convictions for the same crime and the number of machines or devices possessed at the time of the charged crime. For a first conviction, the statute provides the defendant shall pay a fine not exceeding \$1,000 and/or serve no more than six months in custody. (§ 330.1, subd. (b).) However, when a defendant is convicted of possessing more than one slot machine, the statute requires a mandatory minimum fine of at least \$1,000 and no more than \$5,000 for each machine or device. (§ 330.1, subd. (e).) Thus, a person such as real party in interest who is convicted for the first time of unlawfully possessing two slot machines would face a mandatory minimum fine of \$2,000 and/or a jail sentence not exceeding six months. All fines are subject to various state-mandated penalty assessments, fines and fees." *See* Bill Analysis of AB 1753, *supra* note 2, at 3-4; *see* *infra* Part II.A. and II.C.

95. *See* Bill Analysis of AB 1753, *supra* note 2, at 4; *see* *infra* Part. II.A., II.C., and III.B.

96. *See* Bill Analysis of AB 1753, *supra* note 2, at 4; *see* *infra* Part II.C.

97. *See* Bill Analysis of AB 1753, *supra* note 2, at 4, 5.

98. CAL. PEN. CODE § 330.1.

99. *See* Trinkle v. Stroh, 60 Cal. App. 4th 771, 777-78 (1997) (stating that sections 330.1 and 330b contain "a similar definition of a slot machine"); *see* Trinkle v. Cal. State Lottery, 105 Cal. App. 4th 1401, 1409 (2003) [hereinafter *Trinkle II*] (noting that Penal Code section

That sections 330.1 and 330b contain similar language is unsurprising given that both were enacted in the same legislative sessions, but under different bills.<sup>100</sup>

Not surprisingly, since the maximum sentence for a single violation is six months and these defendants are often making hundreds of thousands of dollars, the major issue at the trial court level is not custody time but the amount of fines and the forfeiture of any seized money.<sup>101</sup> The traditional economic model of crime views criminal decisions as the result of a cost-benefit analysis.<sup>102</sup> Law enforcement deters criminal activity by raising the cost of committing crimes or reducing the likelihood of receiving the benefit.<sup>103</sup> Considering the profitability of illegal slot machines, the criminal sanction of a simple misdemeanor does not fulfil the penological goals of the Code.<sup>104</sup> The most effective tool for law enforcement in deterring operators of illegal casinos is the expansion of legislation enabling courts to confiscate these operator's illegal gains.<sup>105</sup>

### *C. Legislative Efforts to Amend California Slot Machine Law*

#### *1. Prior Legislative History*

In 2010, the California State legislature amended Penal Code Sections 330.1, 300a, and 330b to include greater penalties.<sup>106</sup> Prior to 2010, a person convicted of owning or operating illegal slot machines could only be punished by a fine between \$100 and \$1,000.<sup>107</sup> There was no authority that accounted for multiple machines or locations.<sup>108</sup> According to the Bill's author, the legislature passed harsher penalties because, "The profits from these illegal slot machines make the minor penalty for conviction merely a cost of doing business for these offenders. Therefore, law enforcement has had few tools available to stop and deter these machines from operating throughout California."<sup>109</sup> Indeed,

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330.1 similarly defines a slot machine).

100. *Trinkle*, 60 Cal. App. 4th at n.4.

101. *See infra* Part I.D., II.C., and III.D.

102. Roger Bowles et al., *Forfeiture of Illegal Gain: An Economic Perspective*, 25.2 OXFORD J. LEGAL STUD. 275 (2005).

103. *Id.*

104. *See infra* Part I.C. and I.D.

105. *See infra* Part III.A.

106. *See supra* section I.B.

107. Bill Analysis of AB 1753, *supra* note 2, at 3-4.

108. *Id.* at 4.

109. *Id.* at 5.

The video slot machines are generally placed in businesses located in lower income communities. The profits from these machines are split between the business owner and the group that provides the video slot machines. The money is unreported and untaxed. The machines are unregulated and have high retention rates which provide these people with the ability to take advantage of lower income individuals.<sup>110</sup>

Without an amendment to the Code directing judges how to properly levy fines and applicable seizure law, the high reward coupled with the low risk associated with operating sweepstakes cafes will continue to attract criminal organizations and street gangs as sources of revenue.<sup>111</sup>

## 2. Assembly Bill (AB) 1439

In 2014, Assembly Bill (AB) 1439 was passed and clarified that gambling sweepstakes cafes were illegal.<sup>112</sup> Specifically, AB 1439 made internet gambling sweepstakes an unfair business practice.<sup>113</sup> This gives the Attorney General, district attorneys, and city attorneys the authority to bring civil suit to subject operators to civil penalties for violations as any 17200 action.<sup>114</sup> Despite the passage of the Bill and the *Grewal* decision, law enforcement has been hampered by the current state of the law in their efforts to prosecute offenders and seize their ill-gotten profits.<sup>115</sup>

## D. Related California Criminal Forfeiture Law: A Model That Can Be Followed

### 1. An Overview of Select California Forfeiture Law

A significant tool in law enforcement's arsenal to combat illegal gambling is using forfeiture proceedings to deny the operators of their ill-gotten profits. These proceedings are brought *in rem* against the property itself.<sup>116</sup> Forfeiture ensures that criminals do not profit from

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110. *Id.*

111. *See supra* Part II.C.

112. Bill Analysis of AB 1753, *supra* note 2, at 1; CAL. BUS. & PROF. CODE § 17539.1(a)12.

113. CAL. BUS. & PROF. CODE § 17539.1(a)12.

114. *Id.*

115. *See infra* Part II.C.

116. Based on a legal fiction that the property itself is the guilty party. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (holding that the government may seize a yacht on which authorities had found marijuana owned by an innocent party *in rem* since the forfeiture statute furthered punitive and deterrent purposes); *People v. Superior Court*, 215

their illegal acts, strips gangs of their economic base, and abates nuisances in the community.<sup>117</sup>

The common-law doctrine of *Deodand* that a felon forfeits his property upon conviction is not applied in the United States.<sup>118</sup> Instead, in the United States forfeiture must be explicitly stated.<sup>119</sup> Indeed, since forfeiture is not favored, the rule of lenity applies in the Defendant's favor.<sup>120</sup>

The straightforward and detailed procedure set forth in the Code for forfeiture of profits realized from illegal narcotics and money laundering can be used as a model to clarify the law in regard to forfeiture of profits realized from illegal gambling.

## 2. California Narcotics Forfeiture Law

Health & Safety Code section 11470 *et seq.* sets the framework for forfeiture of money associated with illegal drug sales. It provides a broad and detailed process to seize money in connection with narcotics offenses.<sup>121</sup> Courts have held that the only requirement for law

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Cal. App. 3d 1411 (1989) (holding money traceable to exchanges of controlled substances is subject to forfeiture under HEALTH & SAFETY CODE, § 11470 *et seq.* even after defendants transferred or disposed of the money); HEALTH & SAFETY CODE § 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.").

117. *See* U.S. v. Ursery, 518 U.S. 267, 290–91 (1996); U.S. v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); *People v. Super. Ct. (Clements)*, 200 Cal. App. 3d 491 (1988).

118. *Lee On v. Long*, 37 Cal.2d 499, 502 (1951) ("No conviction of any person for a crime works any forfeiture of any property, except in *cases* in which a forfeiture is expressly imposed by law.").

119. *Id.*

120. U.S. v. Bass, 404 U.S. 336, 348 (1971); CAL. PEN. CODE § 335(a); "Statutes imposing forfeitures are not favored and are to be strictly construed in favor of the persons against whom they are sought to be imposed." *Baca v. Minier*, 229 Cal. App. 3d 1253, 1265 (1991) (citing *People v. One 1937 Lincoln etc. Sedan*, 26 Cal.2d 736, 738 (1945)); *People v. One 1986 Toyota Pickup*, 31 Cal. App. 4th 254, 261–62 (1995).

121. CAL. HEALTH & SAFETY CODE § 11470 ("all moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities used or intended to be used to facilitate any

enforcement to seize money in connection with illegal drug sales is to establish some nexus between seized currency and narcotics transaction.<sup>122</sup> Narcotics forfeiture is bifurcated from the criminal trial.<sup>123</sup> It is tried before the same jury or court that convicted the defendant, unless waived by all the parties.<sup>124</sup>

There are two kinds of narcotics forfeiture proceedings under California law, non-judicial and judicial.<sup>125</sup> Non-judicial forfeiture, namely a forfeiture of cash or negotiable instruments of not less than \$25,000 in value where no person filed a claim opposing forfeiture, does not require a conviction.<sup>126</sup> In such a proceeding, the People must present evidence that establishes probable cause that the money is connected to specified sales violation.<sup>127</sup>

A judicial forfeiture, a forfeiture of any asset valued at \$25,000 or more or for any amount if the forfeiture is contested, requires the filing of a civil action.<sup>128</sup> Generally, the evidentiary standard required for forfeiture is proving connection to a narcotics offense violation beyond a reasonable doubt.<sup>129</sup>

In 2017, the California legislature passed Senate Bill 443. It adds that cases over \$40,000 require a judicial forfeiture. No criminal

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violation of Section 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, or 11383 of this code, or Section 182 of the Penal Code, or a felony violation of Section 11366.8 of this code, insofar as the offense involves manufacture, sale, possession for sale, offer for sale, or offer to manufacture, or conspiracy to commit at least one of those offenses, if the exchange, violation, or other conduct which is the basis for the forfeiture occurred within five years of the seizure of the property, or the filing of a petition under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first.”).

122. *See* *People v. \$47,050 U.S. Currency*, 17 Cal. App. 4th 1319 (1993); *See* *People v. Super. Ct. (Moraza)*, 210 Cal. App. 3d 592 (1989) (“In determining whether property is forfeitable as money or thing furnished in exchange for controlled substance or used or intended to be used to facilitate violation of controlled substance laws, People must show by clear and convincing evidence that property is forfeitable, but claimant can defeat forfeiture if he can demonstrate lack of probable cause to believe the property is forfeitable.”).

123. CAL. HEALTH & SAFETY CODE § 11488.4(i)(3); *See* *People v. Mendocino Cty Assessor’s Parcel No. 056-500-09*, 58 Cal. App. 4th 120, 126–27 (1997) (if forfeiture proceeding is uncontested, prosecution is entitled to forfeiture on establishing a prima facie case; no conviction in a related criminal action is required).

124. *Id.*

125. *See* Cal. Health & Safety Code §§ 11469, 11470, 11470.1, 11470.2, 11471, 11488.4, 11488.5, 11495 11471.2.

126. CAL. HEALTH & SAFETY CODE § 11488.4(i)(4),(5); *see* *People v. Parcel No. 056-500-09*, 58 Cal. App. 4th 120 (1997) (conviction only required if forfeiture is contested).

127. *Id.*

128. CAL. HEALTH & SAFETY CODE §§ 11488.4–11488.5.

129. *Id.*

convictions are required.<sup>130</sup> The standard is clear and convincing evidence.<sup>131</sup> Gap cases, which are those between \$25,000 and \$40,000 require judicial forfeiture and a criminal conviction.<sup>132</sup> They must be proven beyond a reasonable doubt.<sup>133</sup>

Courts have ruled that the amount of money seized, or the way that that money is packaged and stored, can be indicative of a nexus between the seized funds and illegal narcotics violations.<sup>134</sup>

Regarding money found in connection with narcotics offenses, for property, other than cash or negotiable instruments worth less than \$25,000, a judgment of forfeiture requires as a condition precedent that a defendant be convicted in a related criminal action of an offense specified in Health and Safety Code section 11470(f) or (g), within five years of the seizure of the property or five years of notice of the intent to seize the property.<sup>135</sup>

The prevalent legal theory addressing the requirement to prove money and assets are connected with a narcotics sales violation in California law is proceeds theory.<sup>136</sup> theory states that any money or property directly traceable to a violation of a statutorily defined narcotics

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130. S.B. 443, 2017 Leg., Reg. Sess. (Cal. 2017).

131. *Id.*

132. *Id.*

133. *Id.*

134. *People v. \$497,590 U.S. Currency*, 58 Cal. App. 4th 145, 155 (1997) (A large stash of cash supplies “strong evidence” the money was exchanged for illegal drugs). A second circumstance the courts have found to support an inference the money is connected to drug trafficking is the way currency is wrapped or stored. *People v. \$30,000 U.S. Currency*, 35 Cal. App. 4th 936, 939 (1995) (\$100 bills stapled together in stacks of \$1,000 secreted in spare tire of abandoned vehicle in backyard); *People v. \$28,500 U.S. Currency*, 51 Cal. App. 4th 447, 450 (1996) (currency was placed in brown paper bag inside brown plastic bag); *U.S. v. \$31,990 in U.S. Currency*, 982 F.2d 851, 854 (1993) (“(w)hile we recognize that the method of bundling may be probative of drug activity, we emphasize that it is but one factor weighing in favor of a finding of probable cause”); *U.S. v. Jenkins*, 78 F.3d 1283, 1288 (1996) (“the defendant had over \$100,000 in cash stored in a garbage bag in his home. A jury certainly could have concluded from this evidence that the defendant was aware that the money in question had resulted from drug activity”); *U.S. v. \$29,959 U.S. Currency*, 931 F.2d 549, 553 (1991) (currency found in men’s clothing dresser and hidden in a man’s sock); *U.S. v. U.S. Currency, \$83,310.78*, 851 F.2d 1231, 1235–36 (1988) (currency found in a brown shopping bag).

135. CAL. HEALTH & SAFETY CODE § 11488.4(i)(3); *People v. \$10,153.38 in U.S. Currency*, 179 Cal. App. 4th 1520, 1525 (2009) (where property at issue is valued at less than \$25,000, trial of forfeiture issue must be held in conjunction with trial of underlying criminal case). *But see People v. \$31,500 U.S. Currency*, 32 Cal. App. 4th 1442, 1463 (1995), *as modified on denial of reh’g*, (March 29, 1995) (for proceedings commenced before January 1, 1994, no conviction required).

136. DEE R. EDGEWORTH, ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 188–91 (3d ed. 2008).

crime is subject to forfeiture.<sup>137</sup> The state is entitled to a judgment of forfeiture on cash amounts of less than \$ 25,000 only if it can prove beyond a reasonable doubt that the cash consists of "[m]oneys . . . furnished by any person in exchange for a controlled substance" or "proceeds traceable to such an exchange . . . ." (§ 11470, subd. (f), 11488.4, subd. (i)(2).)<sup>138</sup> Thus, if money earned from the sales of narcotics is used to purchase a home or vehicle law enforcement may seize the property.<sup>139</sup> Further, if a known drug dealer who has no legitimate source of income is found with expensive cars, jewelry, or property that he cannot justify, there is a rebuttable presumption that the money was made in connection with a violation of a narcotics crime and the asset is subject to forfeiture.<sup>140</sup>

If the property owner is not successful in disproving<sup>141</sup> the nexus

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137. *Id.*; Alice W. Dery, *Interplay Between the Forfeiture and Bankruptcy Proceedings*, 61 U.S. ATTORNEYS' BULLETIN 5, at 61 (September 2013), <https://www.justice.gov/sites/default/files/usao/legacy/2013/09/16/usab6105.pdf>; Douglas A. Leff, *Money Laundering and Asset Forfeiture: Taking the Profit Out of Crime*, 61 U.S. ATTORNEYS' BULLETIN 5, at 9 (September 2013), <https://www.justice.gov/sites/default/files/usao/legacy/2013/09/16/usab6105.pdf>.

138. *People v. 9,632.50 United States Currency*, 64 Cal. App. 4th 163, 168 (1998).

139. *9,632.50 United States Currency*, 64 Cal. App. 4th at 173.

"Without a doubt, an asset purchased with drug proceeds can be forfeited because the asset is directly traceable to drug money. Hence, if evidence showed claimant took his \$ 8,000 and purchased a car for \$ 8,000, that car could be seized; it would be the product of drug proceeds." *See also* Dery, *supra* note 137; Leff, *supra* note 137.

140. *United States v. Taylor*, 239 F.3d 994, 998–99 (9th Cir. 2001) [Defendant] argues that the government did not offer sufficient evidence that the money in question came from specified unlawful activity, and not from legal sources. This argument is unconvincing. The government sought to prove the origin of the funds by presenting evidence that Taylor had no money other than what he was deriving from specified unlawful activity. This is a permissible approach to proving that funds in allegedly illicit transactions violate the money laundering statutes. *See U.S. v. Hanley*, 190 F.3d 1017, 1025 (9th Cir. 1999) (finding the approach permissible for Section 1957 offenses); *U.S. v. Marbella*, 73 F.3d 1508, 1514 (finding the approach permissible for Section 1956 offenses).

141. CAL. HEALTH & SAFETY CODE § 11488:

(a) Any peace officer of this state, subsequent to making or attempting to make an arrest for a violation of Section 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, or 11382 of this code, or Section 182 of the Penal Code insofar as the offense involves manufacture, sale, purchase for the purpose of sale, possession for sale or offer to manufacture or sell, or conspiracy to commit one of those offenses, may seize any item subject to forfeiture under subdivisions (a) to (f), inclusive, of Section 11470. The peace officer shall also notify the Franchise Tax Board of a seizure where there is reasonable cause to believe that the value of the seized property exceeds five thousand dollars (\$5,000).

(b) Receipts for property seized pursuant to this section shall be delivered to any person out of whose possession such property was seized, in accordance with Section 1412 of the Penal Code. In the event property seized was not seized out of anyone's possession, receipt for the property shall be delivered to the individual in possession

between the property seized and criminal activity, then the government obtains title, and the government can use the property in future law enforcement endeavors.<sup>142</sup> The money seized and proceeds from forfeiture sales are divided between the state, the district attorney, and the arresting agency or agencies.<sup>143</sup>

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of the premises at which the property was seized.

(c) There shall be a presumption affecting the burden of proof that the person to whom a receipt for property was issued is the owner thereof. This presumption may, however, be rebutted at the forfeiture hearing specified in Section 11488.5.

142. Cal. Health and Safety Code § 11488.5(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.

143. CAL. HEALTH & SAFETY CODE § 11489:

Notwithstanding Section 11502 and except as otherwise provided in Section 11473, in all cases where the property is seized pursuant to this chapter and forfeited to the state or local governmental entity and, where necessary, sold by the Department of General Services or local governmental entity, the money forfeited or the proceeds of sale shall be distributed by the state or local governmental entity as follows:

(a) To the bona fide or innocent purchaser, conditional sales vendor, or mortgagee of the property, if any, up to the amount of his or her interest in the property, when the court declaring the forfeiture orders a distribution to that person.

(b) The balance, if any, to accumulate, and to be distributed and transferred quarterly in the following manner:

(1) To the state agency or local governmental entity for all expenditures made or incurred by it in connection with the sale of the property, including expenditures for any necessary costs of notice required by Section 11488.4, and for any necessary repairs, storage, or transportation of any property seized under this chapter.

(2) The remaining funds shall be distributed as follows:

(A) Sixty-five percent to the state, local, or state and local law enforcement entities that participated in the seizure distributed so as to reflect the proportionate contribution of each agency.

(i) Fifteen percent of the funds distributed pursuant to this subparagraph shall be deposited in a special fund maintained by the county, city, or city and county of any agency making the seizure or seeking an order for forfeiture. This fund shall be used for the sole purpose of funding programs designed to combat drug abuse and divert gang activity, and shall wherever possible involve educators, parents, community-based organizations and local businesses, and uniformed law enforcement officers. Those programs that have been evaluated as successful shall be given priority. These funds shall not be used to supplant any state or local funds that would, in the absence of this clause, otherwise be made available to the programs.

It is the intent of the Legislature to cause the development and continuation of positive intervention programs for high-risk elementary and secondary school age students. Local law enforcement should work in partnership with state and local agencies and the private sector in administering these programs.

(ii) The actual distribution of funds set aside pursuant to clause (i) is to be determined by a panel consisting of the sheriff of the county, a police chief selected by the other chiefs in the county, and the district attorney and the chief probation

### 3. California Forfeiture under Penal Code section 186.2

California has enacted a California Control of Profits of Organized Crime Act. The purpose of the statute is to punish and deter criminal activities of organized crime through the forfeiture of profits acquired and accumulated as a result of the criminal activities.<sup>144</sup>

The law defines “criminal profiteering activity” as one of 34 specific crimes and “pattern of criminal profiteering activity” as at least two incidents of criminal profiteering activity where the incidents have (a) “the same or similar purpose, result, principals, victims, or methods . . . or are otherwise interrelated . . . ,” (b) “[a]re not isolated events,”

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officer of the county.

(B) Ten percent to the prosecutorial agency which processes the forfeiture action.

(C) Twenty-four percent to the General Fund. Notwithstanding Section 13340 of the Government Code, the moneys are hereby continuously appropriated to the General Fund. Commencing January 1, 1995, all moneys deposited in the General Fund pursuant to this subparagraph, in an amount not to exceed ten million dollars (\$10,000,000), shall be made available for school safety and security, upon appropriation by the Legislature, and shall be disbursed pursuant to Senate Bill 1255 of the 1993–94 Regular Session, as enacted.

(D) One percent to a private nonprofit organization composed of local prosecutors which shall use these funds for the exclusive purpose of providing a statewide program of education and training for prosecutors and law enforcement officers in ethics and the proper use of laws permitting the seizure and forfeiture of assets under this chapter.

(c) Notwithstanding Item 0820-101-469 of the Budget Act of 1985 (Chapter 111 of the Statutes of 1985), all funds allocated to the Department of Justice pursuant to subparagraph (A) of paragraph (2) of subdivision (b) shall be deposited into the Department of Justice Special Deposit Fund-State Asset Forfeiture Account and used for the law enforcement efforts of the state or for state or local law enforcement efforts pursuant to Section 11493.

All funds allocated to the Department of Justice by the federal government under its Federal Asset Forfeiture program authorized by the Comprehensive Crime Control Act of 1984 may be deposited directly into the Narcotics Assistance and Relinquishment by Criminal Offender Fund and used for state and local law enforcement efforts pursuant to Section 11493.

Funds which are not deposited pursuant to the above paragraph shall be deposited into the Department of Justice Special Deposit Fund-Federal Asset Forfeiture Account.

(d) All the funds distributed to the state or local governmental entity pursuant to subparagraphs (A) and (B) of paragraph (2) of subdivision (b) shall not supplant any state or local funds that would, in the absence of this subdivision, be made available to support the law enforcement and prosecutorial efforts of these agencies.

The court shall order the forfeiture proceeds distributed to the state, local, or state and local governmental entities as provided in this section.

For the purposes of this section, “local governmental entity” means any city, county, or city and county in this state.

144. CAL. PEN. CODE § 186.2.

and (c) “[w]ere committed as a criminal activity of organized crime.”<sup>145</sup>

Asset forfeiture under section 186.3 through 186.8 is possible only when there has been a criminal conviction. The conviction has to be for a “pattern of criminal profiteering activity.”<sup>146</sup> This means that all of the following have to be true: (1) the conviction needs to be based on at least two criminal acts as defined in 186.2 that have similar distinguishing characteristics and are not isolated events, which includes money laundering; (2) the crimes need to have been committed as a pattern of organized crime, which includes gambling generally; and (3) the crimes need to have been “criminal profiteering activity,” which means crimes committed for financial gain.<sup>147</sup>

The act allows for forfeiture by petition of either a prosecuting district attorney or the state attorney general where certain prerequisites are met. The prosecuting agency must notify all third-parties who may have an interest in the property to be forfeited.<sup>148</sup> The third-party may then file a verified claim of interest in the property with the superior court hearing the underlying criminal action.<sup>149</sup> The court will then hold a forfeiture proceeding if the defendant is convicted of the underlying criminal charge.<sup>150</sup> At the forfeiture hearing, the People have the burden of establishing beyond a reasonable doubt that the Defendant was engaged in a pattern of criminal profiteering activity and that the property acquired meets the requirements of section 186.3.<sup>151</sup>

Penal Code section 186.3 subdivision (c) defines property subject to forfeiture as “[a]ll proceeds of a pattern of criminal profiteering

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145. *Id.*

146. CAL. PEN. CODE § 186.2.

147. CAL. PEN. CODE § 186.2(a):

“Criminal profiteering activity” means any act committed or attempted or any threat made for financial gain or advantage, which act or threat may be charged as a crime . . . ; CAL. PEN. CODE § 186.2(b)(1):

“Pattern of criminal profiteering activity” means engaging in at least two incidents of criminal profiteering, as defined by this chapter, that meet the following requirements: (A) Have the same or a similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics. (B) Are not isolated events. (C) Were committed as a criminal activity of organized crime.

148. CAL. PEN. CODE § 186.4.

149. CAL. PEN. CODE § 186.5(a).

150. CAL. PEN. CODE § 186.5(c)(2).

151. CAL. PEN. CODE § 186.5(d):

(d) At the forfeiture hearing, the prosecuting agency shall have the burden of establishing beyond a reasonable doubt that the defendant was engaged in a pattern of criminal profiteering activity and that the property alleged in the petition comes within the provisions of subdivision (b) or (c) of Section 186.3.

activity, which property shall include all things of value that may have been received in exchange for the proceeds immediately derived from the pattern of criminal profiteering activity.”<sup>152</sup> “Criminal profiteering activity,” in turn, is defined as “any act committed or attempted or any threat made for financial gain or advantage, which act or threat may be charged as a crime under any of the following sections” of an enumerated list including “gambling as defined in sections 337a through 337f, inclusive, and 337i,” but excluding sections 330a, 330b or 330.1.<sup>153</sup> That enumerated list includes money laundering as defined in section 186.10.

#### 4. California Money Laundering Forfeiture

To prove a defendant guilty of money laundering, as defined in penal code section 186.10, the People must demonstrate that: (1) the defendant conducted or attempted to conduct one or more financial transactions involving at least one monetary instrument through at least one financial institution; (2) the financial transactions occurred within 7 days and involved monetary instruments with a total value of more than \$5,000 or within a 30-day period and the monetary instruments involved had a total value of more than \$25,000; and (3) when the defendant did so, he intended to promote, manage, establish, carry on or facilitate a criminal activity or he knew that the monetary instrument represented the proceeds of a criminal activity or were directly from a criminal activity.<sup>154</sup> A criminal activity is defined as a felony.<sup>155</sup> Again, illegal

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152. CAL. PEN. CODE § 186.3(d):

(c) All proceeds of a pattern of criminal profiteering activity, which property shall include all things of value that may have been received in exchange for the proceeds immediately derived from the pattern of criminal profiteering activity; *see also* CAL. PEN. CODE § 186.3(a)–(b).

153. CAL. PEN. CODE § 186.2 (a)(8).

154. CAL. CRIM. JURY INSTRUCTIONS § 2997 (2017); *see* CAL. PEN. CODE § 186.10:

(a) Any person who conducts or attempts to conduct a transaction or more than one transaction within a seven-day period involving a monetary instrument or instruments of a total value exceeding five thousand dollars (\$5,000), or a total value exceeding twenty-five thousand dollars (\$25,000) within a 30-day period, through one or more financial institutions (1) with the specific intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any criminal activity, or (2) knowing that the monetary instrument represents the proceeds of, or is derived directly or indirectly from the proceeds of, criminal activity, is guilty of the crime of money laundering; *see* *People v. Conners*, 168 Cal. App. 4th 443, 452 (2008), *as modified*, (Dec. 8, 2008), *rev'd*, (Feb. 11, 2009).

155. *See* CAL. CRIM. JURY INSTRUCTIONS § 2997 (“Criminal activity means (a) criminal offense punishable under the laws of the state of California by [death or] imprisonment in the state prison/ [or] a criminal offense committed in another jurisdiction, which, under the laws

gambling sections 330a, 330b, and 330.1 do not apply as they are misdemeanors.

Under Code section 186.10, to prove a nexus between the assets forfeited and illegal money laundering based on the criminal proceeds theory, the People must prove that: “(1) the defendant’s entire business was illegal; (2) there were deposit[s] of \$5,000 or more in criminally-derived funds; or (3) there was a transfer of all funds out of the account.”<sup>156</sup> It is not sufficient merely to show the transaction was of more than \$ 5,000 and from an account with commingled funds.<sup>157</sup> At the forfeiture hearing, the People have the burden of establishing beyond a reasonable doubt that the Defendant was engaged in a pattern of criminal profiteering activity and that the property acquired meets the requirements of section 186.3.<sup>158</sup> If so, then the property enters the government’s coffers.<sup>159</sup>

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of that jurisdiction is punishable by death or imprisonment for a term exceeding one year).”).

156. *People v. Mays*, 148 Cal. App. 4th 13, 14 (2007).

157. CAL. PEN. CODE § 186.10; *see People v. Mays*, 148 Cal. App. 4th 13, 14 (2007) (holding “prosecution based on a defendant conducting a transaction through a financial institution with monetary instrument(s) of \$5,000 or more based on the knowledge of criminal proceeds theory, requires proof that: (1) the defendant’s entire business was illegal; (2) there were deposit(s) of \$5,000 or more in criminally-derived funds; or (3) there was a transfer of all funds out of the account.” It is not sufficient merely to show the transaction was of more than \$5,000 and from an account with commingled funds).

158. CAL. PEN. CODE § 186.5:

“(a) Any person claiming an interest in the property or proceeds may, at any time within 30 days from the date of the first publication of the notice of seizure, or within 30 days after receipt of actual notice, file with the superior court of the county in which the action is pending a verified claim stating his or her interest in the property or proceeds. A verified copy of the claim shall be given by the claimant to the Attorney General or district attorney, as appropriate.

(b)(1) If, at the end of the time set forth in subdivision (a), an interested person, other than the defendant, has not filed a claim, the court, upon motion, shall declare that the person has defaulted upon his or her alleged interest, and it shall be subject to forfeiture upon proof of the provisions of subdivision (d).

(2) The defendant may admit or deny that the property is subject to forfeiture pursuant to the provisions of this chapter. If the defendant fails to admit or deny or to file a claim of interest in the property or proceeds, the court shall enter a response of denial on behalf of the defendant.

(c)(1) The forfeiture proceeding shall be set for hearing in the superior court in which the underlying criminal offense will be tried.

(2) If the defendant is found guilty of the underlying offense, the issue of forfeiture shall be promptly tried, either before the same jury or before a new jury in the discretion of the court, unless waived by the consent of all parties.

(d) At the forfeiture hearing, the prosecuting agency shall have the burden of establishing beyond a reasonable doubt that the defendant was engaged in a pattern of criminal profiteering activity and that the property alleged in the petition comes within the provisions of subdivision (b) or (c) of Section 186.3.”

159. *See* CAL. PEN. CODE § 186.8:

*E. California Aggravated White-Collar Crime Enhancement, Penal Code section 186.11*

California Penal Code section 186.11 adds an aggravated white-

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“Notwithstanding that no response or claim has been filed pursuant to Section 186.5, in all cases where property is forfeited pursuant to this chapter and, if necessary, sold by the Department of General Services or local governmental entity, the money forfeited or the proceeds of sale shall be distributed by the state or local governmental entity as follows:

(a) To the bona fide or innocent purchaser, conditional sales vendor, or holder of a valid lien, mortgage, or security interest, if any, up to the amount of his or her interest in the property or proceeds, when the court declaring the forfeiture orders a distribution to that person. The court shall endeavor to discover all those lienholders and protect their interests and may, at its discretion, order the proceeds placed in escrow for up to an additional 60 days to ensure that all valid claims are received and processed.

(b) To the Department of General Services or local governmental entity for all expenditures made or incurred by it in connection with the sale of the property, including expenditures for any necessary repairs, storage, or transportation of any property seized under this chapter.

(c) To the General Fund of the state or a general fund of a local governmental entity, whichever prosecutes.

(d) In any case involving a violation of subdivision (b) of Section 311.2, or Section 311.3 or 311.4, in lieu of the distribution of the proceeds provided for by subdivisions (b) and (c), the proceeds shall be deposited in the county children’s trust fund, established pursuant to Section 18966 of the Welfare and Institutions Code, of the county that filed the petition of forfeiture. If the county does not have a children’s trust fund, the funds shall be deposited in the State Children’s Trust Fund, established pursuant to Section 18969 of the Welfare and Institutions Code.

(e) In any case involving crimes against the state beverage container recycling program, in lieu of the distribution of proceeds provided in subdivision (c), the proceeds shall be deposited in the penalty account established pursuant to subdivision (d) of Section 14580 of the Public Resources Code, except that a portion of the proceeds equivalent to the cost of prosecution in the case shall be distributed to the local prosecuting entity that filed the petition of forfeiture.

(f)(1) In any case described in paragraph (29) or (30) of subdivision (a) of Section 186.2, or paragraph (33) of subdivision (a) of Section 186.2 where the victim is a minor, in lieu of the distribution provided for in subdivision (c), the proceeds shall be deposited in the Victim-Witness Assistance Fund to be available for appropriation to fund child sexual exploitation and child sexual abuse victim counseling centers and prevention programs under Section 13837. Fifty percent of the funds deposited in the Victim-Witness Assistance Fund pursuant to this subdivision shall be granted to community-based organizations that serve minor victims of human trafficking.

(2) Notwithstanding paragraph (1), any proceeds specified in paragraph (1) that would otherwise be distributed to the General Fund of the state under subdivision (c) pursuant to a paragraph in subdivision (a) of Section 186.2 other than paragraph (29) or (30) of subdivision (a) of Section 186.2, or paragraph (33) of subdivision (a) of Section 186.2 where the victim is a minor, shall, except as otherwise required by law, continue to be distributed to the General Fund of the state as specified in subdivision (c).”

collar crime enhancement that under specific conditions allow law enforcement to seize assets that are then used to pay fines and restitution to victims.<sup>160</sup> In order for the enhancement to apply the defendant must be: (1) convicted of two or more felonies, a material element of which is fraud or embezzlement; (2) involve a pattern of related felony conduct; and (3) the taking must involve over \$100,000.<sup>161</sup> A “pattern of related felony conduct” is defined similarly to “pattern of criminal profiteering activity” in § 186.2 (a)(8)a.<sup>162</sup> To initiate a seizure under § 186.11, the prosecutor must file a complaint alleging a § 186.11 enhancement, and file a petition with the criminal court requesting the protective relief necessary to preserve the property.<sup>163</sup> The filing of the petition commences a proceeding precedent to the criminal proceeding, empowering the court to issue temporary restraining orders and conduct any subsequent hearings on the petition in the subsequent criminal case.<sup>164</sup> Upon filing of the petition, the prosecuting agency may obtain

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160. CAL. PEN. CODE § 186.11 (a)(1), (d)(1):

(1) Any person who commits two or more related felonies, a material element of which is fraud or embezzlement, which involve a pattern of related felony conduct, and the pattern of related felony conduct involves the taking of, or results in the loss by another person or entity of, more than one hundred thousand dollars (\$100,000), shall be punished, upon conviction of two or more felonies in a single criminal proceeding, in addition and consecutive to the punishment prescribed for the felony offenses of which he or she has been convicted, by an additional term of imprisonment in the state prison as specified in paragraph (2) or (3). . . .

(d) (1) If a person is alleged to have committed two or more felonies, as specified in subdivision (a), and the aggravated white collar crime enhancement is also charged, or a person is charged in an accusatory pleading with a felony, a material element of which is fraud or embezzlement, that involves the taking or loss of more than one hundred thousand dollars (\$100,000), and an allegation as to the existence of those facts, any asset or property that is in the control of that person, and any asset or property that has been transferred by that person to a third party, subsequent to the commission of any criminal act alleged pursuant to subdivision (a), other than in a bona fide purchase, whether found within or outside the state, may be preserved by the superior court in order to pay restitution and fines. Upon conviction of two or more felonies, as specified in subdivision (a), or a felony, a material element of which is fraud or embezzlement, that involves the taking or loss of more than one hundred thousand dollars (\$100,000), this property may be levied upon by the superior court to pay restitution and fines if the existence of facts that would make the person subject to the aggravated white collar crime enhancement or that demonstrate the taking or loss of more than one hundred thousand dollars (\$100,000) in the commission of a felony, a material element of which is fraud or embezzlement, have been charged in the accusatory pleading and admitted or found to be true by the trier of fact.

161. *Id.*

162. *See supra* Part I.D.

163. CAL. PEN. CODE § 186.11(d)(2).

164. *Id.* § 186.11(d)(2), (d)(5).

from the court an order directing a banking or financial institution to disclose the account numbers and value of assets of the defendant.<sup>165</sup> The prosecutor can then file a temporary restraining order, preliminary injunction, or other protective relief to preserve the accounts.<sup>166</sup> Notice of the petition must be served, advising the interested party to file an interest of claim, on every person who may have an interest in the property specified in the petition and published in a newspaper of general circulation one day per week for three weeks.<sup>167</sup>

To contest the action a claimant must file a claim with the superior court stating the nature and amount of his or her interest in the seized property within 30 days of receipt of notice or from the first publication and serve a verified copy of the claim on the Attorney General or district attorney.<sup>168</sup>

If the defendant is found guilty of two or more felonies as specified in the petition and the aggravated white-collar enhancement is admitted or found true any preliminary injunction is continued until a judgement is pronounced.<sup>169</sup> If the aggravated white-collar enhancement is dismissed, however, the preliminary injunction is dissolved.<sup>170</sup>

When the court has levied the assets pursuant to § 186.11, a receiver is appointed in order to liquidate all property and distribute the assets to any victims for restitution alleged in the pleadings and proven as part the pattern of fraudulent acts.<sup>171</sup> Fines are payable to the treasurer of the county where the judgement was entered, or if the action was prosecuted by the Attorney General, it is paid to the State Treasurer.<sup>172</sup> Proceeds of the fine are then used by the county to reimburse local prosecutors and enforcement agencies for reasonable costs of investigation and prosecution.<sup>173</sup>

### III. CALIFORNIA'S FAILURE TO PROPERLY PROSECUTE AND ELIMINATE ILLEGAL SLOT MACHINES AND A PROPOSED SOLUTION

#### *A. Forfeiture and Penal Code 335a*

Money earned from illegal slot machines is subject to forfeiture under California Penal Code section 335(a). Penal code 335a states that:

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165. *Id.* § 186.11(d)(5).

166. *Id.*

167. *Id.* § 186.11 (d)(3).

168. *Id.* § 186.11(d)(6).

169. CAL. PEN CODE § 186.11(h)(1)(A).

170. *Id.* § 186.11(g).

171. *Id.* § 186.11(i) (3).

172. *Id.* § 186.11(i)(4).

173. *Id.*

In addition to any other remedy provided by law any machine or other device the possession or control of which is penalized by the laws of this State prohibiting lotteries or gambling may be seized by any peace officer, and a notice of intention summarily to destroy such machine or device as provided in this section must be posted in a conspicuous place upon the premises in or upon which such machine or device was seized. Such machine or device shall be held by such officer for 30 days after such posting, and if no action is commenced to recover possession of such machine or device, within such time, the same shall be summarily destroyed by such officer, or if such machine or device shall be held by the court, in any such action, to be in violation of such laws, or any of them, the same shall be summarily destroyed by such officer immediately after the decision of the court has become final.

The superior court shall have jurisdiction of any such actions or proceedings commenced to recover the possession of such machine or device or any money seized in connection therewith.

Any and all money seized in or in connection with such machine or device shall, immediately after such machine or device has been so destroyed, be paid into the treasury of the city or county, as the case may be, where seized, said money to be deposited in the general fund.

In short, the statute as currently drafted allows an officer to enter a gambling establishment, seize all illegal slot machines and money found “in or in connection with” those machines, post a notice on the front door, wait 30 days, and then destroy the machines and forfeit all funds if the operator fails to commence recovery of the money or machines.<sup>174</sup> This has a number of practical difficulties. In particular, the machines are often the evidence of the crime. As a result, law enforcement may have an obligation to preserve the machines. Accordingly, they cannot comply with section 335a’s destruction requirement.

In addition, there is often no cash inside the machines as operators and their technology become more sophisticated.<sup>175</sup> As a result, officers are utilizing search warrants to seize large sums of money from bank accounts.<sup>176</sup> Yet, the statute fails to provide a clear explanation of what actions the court, prosecutors, or defendants should take after officers

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174. CAL. PEN. CODE § 335(a).

175. See *supra* notes 1–2; see also *infra* Part III.C.

176. See Katie Nelson, *Santa Clara: Police Warrant Served on Gambling Ring Nets 27 Arrests*, THE MERCURY NEWS (Feb. 25, 2015, 12:34 PM), <https://www.mercurynews.com/2015/02/25/santa-clara-police-warrant-served-on-gambling-ring-nets-27-arrests/>; see also *infra* Part II.C.

execute those warrants and hold the machines and money under the courts authority.

More confounding is that the plain meaning of the statute is clear—by using the phrase “in and in connection with” the Legislature must have intended for law enforcement to seize profits of illegal slot machines irrespective of the fact that they were transferred to a bank account.<sup>177</sup> Otherwise, the statute need only say “money found within such machine or device.”<sup>178</sup> Any other reading renders the words “or in connection with” mere surplusage.<sup>179</sup> Based on settled rules of statutory construction, courts must presume that every word, phrase, and provision employed in a statute has meaning and performs a useful function.<sup>180</sup> Yet, California courts have erroneously applied the statute to mean that only money found within the slot machines is subject to seizure.<sup>181</sup>

### B. Net Connections

*Net Connections* is an example of a case where the limitations in the current gambling laws led a court to return a large portion of money to a criminal defendant who had plead to running an illegal gambling operation. In *Net Connections*, the defendant built a sophisticated illegal gaming network that earned a significant profit from the summer of 2012 until May 7, 2014.<sup>182</sup> The defendant operated a total of sixty-eight video slot machines at Net Connections, Milpitas (thirty-eight) and the Gilroy Bizzness Center (thirty).<sup>183</sup> Between February 2013 to May 2014, the Milpitas store realized profits of over one million dollars based on daily counts.<sup>184</sup> The main defense was that the defendant was operating legally pursuant to the decision in *Trinkle II*.<sup>185</sup> The defendant

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177. See CAL. PEN. CODE § 335(a).

178. *Id.*

179. *Id.*

180. *Merandette v. City and County of San Francisco*, 88 Cal. App. 3d 105, 113 (1979).

181. See *infra* Part II.B.

182. *People v. Doyle* C1494436 and F1450824, People’s Sentencing Memorandum. *Net Connection Hayward, LLC, v. City of Hayward*, 2013 WL 10996761 (N.D. Cal.).

183. *Id.*

184. *Id.*

185. *Trinkle II*, 105 Cal. App. 4th 1401, 1409 (2003) (In *Trinkle II*, a vending machine dispensed lottery tickets sequentially, which the court held made its operation predictable. There, however, the vending machine simply delivered the finished product—the lottery ticket.); see also *People v. Doyle* C1494436 and F1450824, Defense Motion to Dismiss and Defense Sentencing Memorandum *Net Connection Hayward, LLC, v. City of Hayward*, 2013 WL 10996761 (N.D. Cal.); see also T.V. Interview with ABC, [http://abclocal.go.com/story?section=news/local/east\\_bay&id=8999306](http://abclocal.go.com/story?section=news/local/east_bay&id=8999306); see also <http://abc7news.com/archive/8999306/>.

maintained a consistent and public position that his operation was entirely legal, including when he appeared on local television where he called the slot machines “family entertainment.”<sup>186</sup> Indeed, *Net Connections* filed an *amicus* brief in *Grewal*.<sup>187</sup> After almost a year of litigation, however, the defendant plead “no contest.”<sup>188</sup> He then contested the seizure of \$202,170.26 of funds located in bank accounts associated with his different gambling businesses.<sup>189</sup> Interestingly, the defendant plead only days after its software provider Capital Sweepstakes and its CEO plead guilty to federal gambling charges and a parallel state civil action and agreed to forfeiture and penalties of \$2.3 million.<sup>190</sup>

The trial court ultimately ordered that the \$202,170.26 seized from bank accounts associated with defendant’s illegal gambling operation be returned because 335a only applied to money found physically within a slot machine.<sup>191</sup> That narrow reading ran counter to the plain reading of the statute. Yet, it is likely that the court felt compelled to rule as it did because of section 335a’s failure to clearly state what the officers could or could not seize, or delineate a clear forfeiture process.<sup>192</sup>

Indeed, in *Net Connections* the court held that Section 335a is ambiguous as to whether the money subject to seizure is limited to money contained within a traditional one-armed bandit or otherwise in immediate physical proximity to the prohibited machine or device, or whether the statute authorizes seizure—at any time and place—of money potentially traceable to the prior operation of prohibited gambling devices.<sup>193</sup> The court also compared the language of section 335a to forfeiture language in other sections of the California Penal Code.<sup>194</sup> Section 335a is notably silent as to the standard of proof by

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186. T.V. Interview with ABC, [http://abclocal.go.com/story?section=news/local/east\\_bay&id=8999306](http://abclocal.go.com/story?section=news/local/east_bay&id=8999306); see also <http://abc7news.com/archive/8999306/>.

187. Brief for Grewal, Walker & Stidman as Amici Curiae Supporting Appellants, *People v. Grewal*, 224 Cal. App. 4th 527 (2014) (No. F065450), 2013 WL 5609178, at \*1.

188. *People v. Doyle* C1494436 and F1450824. *Net Connection Hayward, LLC, v. City of Hayward*, 2013 WL 10996761 (N.D.Cal.).

189. *Id.*

190. Settlement with Capital Sweepstakes, *supra* note 1.

191. *People v. Doyle* C1494436 and F1450824. *Net Connection Hayward, LLC, v. City of Hayward*, 2013 WL 10996761 (N.D.Cal.).

The full opinion by Hon. Cynthia Lie of the Santa Clara Cty Super. Ct of Cal. can be found in Appendix A, *infra*.

192. See *infra* Part II.B.

193. *Net Connection Hayward, LLC, v. City of Hayward*, 2013 WL 10996761 (N.D.Cal.). *People v. Doyle* C1494436 and F1450824.

194. *Id.*

which the prosecution must establish the requisite nexus between the money seized and the illegal slot machines.<sup>195</sup>

Putting the reasoning for the court's decision aside,<sup>196</sup> it ruled in a manner inconsistent with the legislative intent that slot machine operators be deprived of their illicit gains to disincentive illegal activity.<sup>197</sup> As these operations become more technologically advanced our current legal framework is becoming strained.<sup>198</sup> The law needs to develop as computerized gaming allows operators to uncouple the money from the gaming machine.<sup>199</sup>

### C. Inadequacies of Penal Code 335a

Illegal casinos can make millions of unreported dollars each year.<sup>200</sup>

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195. CAL. PEN. CODE § 335(a).

196. The *Doyle* Court improperly applied *Lee On v. Long*, 37 Cal. 2d 499 (1951). The Court there held that illegal casino operators lack standing in court to recover the seized property. The holding there took care to note that its opinion “does not concern the law of forfeitures” and addressed instead whether plaintiffs arrested in a gambling raid were entitled to the return of money seized (along with dice, dominoes, playing cards and lottery tickets) from the tables at which plaintiffs were seated at the time of the raid. The *Doyle* Court, in distinguishing forfeiture law, characterized the holding of the case to be based on the legal axiom that “a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out, nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim.” The *Lee On* court explicitly did not come to the question of whether or not section 330a legislates forfeiture of money seized in connection to gambling, which it most certainly does, it simply held that since the plaintiffs were engaged in illegal activities they had no standing to sue for their ill-gotten profits. This ruling only further underlines the state of the law that can only support a conclusion that all money made in connection with illegal gambling is forfeited. The court also misapplied *Lee v. City of Oakland*, 193 Cal. App. 2d 165 (1961). In *Lee v. City of Oakland*, the court found that a money found on a man who was present at an illegal gambling game must be returned as the officers did not seize it in the course of play. There, marked money was given to an undercover man with instructions to enter a gambling game. Although the same officer testified that the undercover man did so, it was deemed conjecture on the part of the officer since he was not present and did not see gambling in progress nor see the undercover man from the time the money was given to him to the later time when the undercover man gave the police officers access through the door of the premises. Later, some of the marked money was found in the possession of the Defendant. The holding there, however, also supports the fact that the law of seizures described in section 330a is no different than other seizure statutes found in the Code. The money was returned in *Lee v. City of Oakland* not because it was not found in a game of chance, but only because the circumstantial evidence that the People presented failed to establish a nexus between the illegal gambling and the money found on Defendant's person. The bar to forfeiture regarding illicit gambling in *Lee* was simply that the People were unable to prove beyond a reasonable doubt a nexus between the gaming and the money seized.

197. Bill Analysis of AB 1753, *supra* note 2.

198. *See infra* Part II.C.

199. *Id.*

200. *See* *People v. Doyle* C1494436 and F1450824; *People v. Sangabousey* C1504489;

Indeed, as technology progresses and criminals becomes more sophisticated, it is becoming increasingly difficult to curb illegal gambling in California.<sup>201</sup> Illegal gambling providers have the money and funds to skirt the law and avoid or delay prosecution.<sup>202</sup> This is a significant problem for local law enforcement at all stages.<sup>203</sup>

As currently drafted, California law fails to adequately explain how prosecutors and courts should go about seizing, freezing, and forfeiting the millions of dollars of ill-gotten profits amassed by criminals each year who operate illegal gaming machines.<sup>204</sup> This issue plagues all the courts, People, and the defense.<sup>205</sup> Without clear instruction from the Legislature, judges and prosecutors have been unable to carry out the legislature's intent to eliminate illegal gaming operations.<sup>206</sup> Indeed, the legislature is so clear in its intent to have illegal gambling establishments actively shutdown that it has made it a Misdemeanor for prosecutors not to do so.<sup>207</sup>

California Penal Code 330b governs the prosecution of illegal gaming machines. The Code should be updated to deal with seizure of money in illegal slot machine cases where money is found in cash registers, homes, and bank accounts.<sup>208</sup> A plain reading of this statute strongly suggests that the legislature intended to allow the authorities to seize money not just "in" but also outside or "in connection with" slot machines.<sup>209</sup> At the bare minimum, the California statute on illegal slot machines requires an overhaul to clarify the process of seizing profits made by criminals "in connection with" illegal gambling operations to ensure prosecutors can fulfil the legislature's intent to curb illegal gambling.<sup>210</sup>

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*see supra* notes 1 and 2; *see also* Settlement with Capital Sweepstakes, *supra* note 1.

201. *See supra* notes 1 and 2.

202. *See* People v. Doyle C1494436 and F1450824; People v. Sangabousey C1504489; *see supra* notes 1 and 2; *see also* Settlement with Capital Sweepstakes, *supra* note 1.

203. *See supra* Part II.A.

204. *Id.*

205. *Id.*

206. *See infra* Part II.C.; Bill Analysis of AB 1753, *supra* note 2.

207. CAL. PEN. CODE § 335.

208. *See generally* CAL. PEN. CODE § 335(a).

209. *Id.*

210. *See supra* Part III; Bill Analysis of AB 1753, *supra* note 2.

## IV. CALIFORNIA ASSEMBLY BILL 1395

*A. Proposed Solution AB1395: An Amendment to California Penal Code 186.9 And 186.10*

In 2016, the Legislature attempted to pass a bill titled AB-1395.<sup>211</sup>

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211. Assembly Committee on Pub. Safety, Bill Analysis of AB 1395 (2016) [hereinafter Bill Analysis of AB 1395], [http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab\\_1351-1400/ab\\_1395\\_cfa\\_20160111\\_093949\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_1351-1400/ab_1395_cfa_20160111_093949_asm_comm.html).

AB1395 would have amended section 186.9 of the Penal Code is amended to read:

186.9. As used in this chapter:

(a) “Conducts” includes, but is not limited to, initiating, concluding, or participating in conducting, initiating, or concluding a transaction.

(b) “Financial institution” means, when located or doing business in this state, any national bank or banking association, state bank or banking association, commercial bank or trust company organized under the laws of the United States or any state, any private bank, industrial savings bank, savings bank or thrift institution, savings and loan association, or building and loan association organized under the laws of the United States or any state, any insured institution as defined in Section 401 of the National Housing Act (*former* 12 U.S.C. Sec. 1724(a)), any credit union organized under the laws of the United States or any state, any national banking association or corporation acting under Chapter 6 (commencing with Section 601) of Title 12 of the United States Code, any agency, agent or branch of a foreign bank, any currency dealer or exchange, any person or business engaged primarily in the cashing of checks, any person or business who regularly engages in the issuing, selling, or redeeming of traveler’s checks, money orders, or similar instruments, any broker or dealer in securities registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 or with the Commissioner of Corporations under Part 3 (commencing with Section 25200) of Division 1 of Title 4 of the Corporations Code, any licensed transmitter of funds or other person or business regularly engaged in transmitting funds to a foreign nation for others, any investment banker or investment company, any insurer, any dealer in gold, silver, or platinum bullion or coins, diamonds, emeralds, rubies, or sapphires, any pawnbroker, any telegraph company, any person or business regularly engaged in the delivery, transmittal, or holding of mail or packages, any person or business that conducts a transaction involving the transfer of title to any real property, vehicle, vessel, or aircraft, any personal property broker, any person or business acting as a real property securities dealer within the meaning of Section 10237 of the Business and Professions Code, whether licensed to do so or not, any person or business acting within the meaning and scope of subdivisions (d) and (e) of Section 10131 and Section 10131.1 of the Business and Professions Code, whether licensed to do so or not, any person or business regularly engaged in gaming within the meaning and scope of Section 330, any person or business regularly engaged in pool selling or bookmaking within the meaning and scope of Section 337a, any person or business regularly engaged in horse racing whether licensed to do so or not under the Business and Professions Code, any person or business engaged in the operation of a gambling ship within the meaning and scope of Section 11317, any person or business engaged in controlled gambling within the meaning and scope of subdivision (f) of Section 19805 of the Business and Professions Code, whether registered to do so or not, and any person or business defined as a “bank,” “financial agency,” or “financial institution” by Section 5312 of Title 31 of the United States Code or Section 103.11 *1010.100* of Title 31 of the Code of Federal Regulations and any successor provisions thereto.

(c) “Transaction” includes the deposit, withdrawal, transfer, bailment, loan, pledge, payment, or exchange of currency, or a monetary instrument, as defined by subdivision (d), or the

Unfortunately, that bill was not passed. The proposed bill would make certain gambling offenses predicate offenses for money laundering under Penal Code sections 186.9 and 186.10.<sup>212</sup> The bill would assist law enforcement with the current sweepstake café models.<sup>213</sup> Under AB 1395, if the sweepstakes gambling software providers and local operators of the gambling storefronts meet the significant monetary transaction thresholds set forth in Penal Code section 186.10, subdivision (a), they will be subject to money laundering charges and forfeiture of their ill-gotten gains from “criminal profiteering activity”

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electronic, wire, magnetic, or manual transfer of funds between accounts by, through, or to, a financial institution as defined by subdivision (b).

(d) “Monetary instrument” means United States currency and coin; the currency, coin, and foreign bank drafts of any foreign country; payment warrants issued by the United States, this state, or any city, county, or city and county of this state or any other political subdivision thereof; any bank check, cashier’s check, traveler’s check, or money order; any personal check, stock, investment security, or negotiable instrument in bearer form or otherwise in a form in which title thereto passes upon delivery; gold, silver, or platinum bullion or coins; and diamonds, emeralds, rubies, or sapphires. Except for foreign bank drafts and federal, state, county, or city warrants, “monetary instrument” does not include personal checks made payable to the order of a named party which have not been endorsed or which bear restrictive endorsements, and also does not include personal checks which have been endorsed by the named party and deposited by the named party into the named party’s account with a financial institution.

(e) “Criminal activity” means a criminal offense punishable under the laws of this state by death, imprisonment in the state prison, or imprisonment pursuant to subdivision

(h) of Section 1170 or a criminal offense committed in another jurisdiction punishable under the laws of that jurisdiction by death or imprisonment for a term exceeding one year. “Criminal activity” also means a criminal offense specified in Section 320, 321, 322, 323, 326, 330a, 330b, 330c, 330.1, or 330.4. *This subdivision does not apply to any controlled game within the scope of Section 19943.5 of the Business and Professions Code that is approved by the Department of Justice.*

(f) “Foreign bank draft” means a bank draft or check issued or made out by a foreign bank, savings and loan, casa de cambio, credit union, currency dealer or exchanger, check cashing business, money transmitter, insurance company, investment or private bank, or any other foreign financial institution that provides similar financial services, on an account in the name of the foreign bank or foreign financial institution held at a bank or other financial institution located in the United States or a territory of the United States.

SEC. 2.

*No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.*

A.B. 1395, 2016 Leg., Reg. Sess. (Cal. 2016) (emphasis added).

212. *Id.*

213. Bill Analysis of AB 1395, *supra* note 211.

under Penal Code sections 186.3.<sup>214</sup> According to the Kern County District Attorney's Office, the sponsor of this bill:

Based on the new sweepstakes law and the *Grewal* decision, one might think that the industry responsible for developing and promoting this form of gambling would abdicate. Unfortunately, however, they have not been dissuaded. To the contrary, the industry continues to slightly modify their business model in an effort to avoid the new sweepstakes law and the *Grewal* decision. The current models they are using were designed to give the appearance that the games involve 'social gaming and mining' or 'games of skill.'

Although the law enforcement community intends to continue pursuing these gambling promoters, current California law offers prosecutors very limited tools with which to fight this battle. Specifically, all violations of the Penal Code provisions regarding slot machines and lotteries are misdemeanors, and misdemeanors only. As it stands now, a large, organized criminal enterprise engaged in operating illegal slot machines or lotteries can only be charged under the gambling statutes with misdemeanors. Although the operators could be charged for violations related to unfair business practices, the prospect of paying civil penalties does not seem particularly appropriate for egregious criminal conduct and this far has only been partially effective. We strongly support the passage of AB 1395 because it would enable prosecutors to pursue money laundering violations in limited, severe cases of illegal gambling when the proceeds of the gambling operations exceed \$5000.00 within a seven-day period or \$25,000.00 within a thirty-day period. We believe that without this proposed legislative change, the industry responsible for developing and promoting this form of gambling may very well continue to move forward with their operations with the understanding that it is 'worth the risk.'<sup>215</sup>

#### *B. Opposition to AB1395*

The California Office of Finance opposed the Bill based on a general policy that legislation be scrutinized for its impact on prisons.<sup>216</sup> The Office of Finance noted that any new law that imposes additional criminal sanctions further burdens our strained criminal justice system by imposing additional fiscal burdens on county and public safety resources.<sup>217</sup> The Department opposed including misdemeanor

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214. *Id.*

215. Bill Analysis of AB 1395, *supra* note 211, at 6–7.

216. AB 1395 Department of Finance Opposition Letter.

217. *Id.*

gambling violations within the money laundering statutes and thus making them potentially punishable as felonies.<sup>218</sup> The Department noted that AB1395 is likely to have a relatively minor impact on the prison population; however, they note numerous bills that each negligibly increase prison populations could have a cumulative effect that hinders the Government's efforts to bring the California prison population down to the 137.5% capacity required by the United States Supreme Court.<sup>219</sup>

Whether these concerns are well founded, there is reason to make an exception to the general policy in this instance. Numerous District Attorneys and law enforcement organizations have written to express their fervent support of the Bill highlighting the need for the Bill and its narrow scope.<sup>220</sup> The Bill only provides for the application of money laundering prosecution in limited, severe cases of illegal gambling when the proceeds of the gambling operations exceeds \$5,000 within a seven-day period or \$25,000 within a thirty-day period.<sup>221</sup>

The amendment will likely not influence current prison populations. The intent and anticipated effect of the Bill is to allow law enforcement to seize the proceeds of illegal gambling.<sup>222</sup> The number of

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218. *Id.*

219. *Id.*; see also *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011) (holding that a court-mandated population limit was necessary to remedy a violation of prisoners' Eighth Amendment rights and ordered California to reduce its prison population to 137.5% of design capacity within two years).

220. See letter from the Kern County District Attorney *supra* Part IV.A; see also support letter from the Mayor of Oakland: "On behalf of the City of Oakland I would like to express our support for Assembly Bill 1395. This bill will provide prosecutors with an important tool to combat illegal lotteries and gaming offenses that are not currently covered by our state's money laundering statutes. The City of Oakland has had reoccurring problems with these illegal businesses also known as sweepstakes cafes. Two years ago we supported your bill, AB 1439, which expressly banned businesses offering pay to play video slot machines for cash prizes. We were very pleased this bill was signed into law by the Governor. Unfortunately, in response to the regulations promulgated by AB 1439, the industry has now modified their business model to avoid the new law, and skirt the definitions of gambling. The industry continues to slightly modify their business model in an effort to avoid the new sweepstakes law and the *Grewal* decision. The current models they are using were designed to give the appearance that the games involve 'social gaming and mining' or 'games of skill.' Although the law enforcement community intends to continue pursuing these gambling promoters, current California law offers prosecutors very limited tools with which to fight this battle. Without a legislative fix, those responsible for developing and promoting illegal forms of gambling are likely to continue their operations because it is 'worth the risk' of the existing remedies."; see also Bill Analysis of AB 1395, *supra* note 211 (similar letters were submitted by the San Diego County District Attorney, the California District Attorney Association and The California Police Chief's Association.).

221. See *supra* Part III.

222. *Id.*

gambling operators state-wide is limited. Of those operators, few will face serious jail time even under the amended statute. Further, the Department's focus on a "no new felony policy" is a false economy. As noted earlier, illegal gambling in our communities acts as a magnet for other criminal activity such as drug sales, violence, illegal sales of firearms, and human trafficking.<sup>223</sup> By giving law enforcement the ability to combat these hot-beds of crime within our community crime will be reduced and, as a result, the prison population may be reduced. These illegal casinos are often operated by criminal street gangs.<sup>224</sup> These gangs use the proceeds of illegal gambling operations to further fund their other criminal activities.<sup>225</sup> Indeed, illegal gambling operations are now territorial and lead to violence. Additionally, criminal gangs often use fear and intimidation to get their machines placed in legally run establishments.<sup>226</sup> By offering law enforcement adequate tools to deprive criminal gangs of their sources of income other collateral crimes will decrease, and along with it our prison population. Finally, the Bill will not place a financial burden on law enforcement organizations and public safety resources because agencies are already expending significant resources to combat the issue, but are often unable to adequately seize the illegal funds.<sup>227</sup>

### *C. In The Alternative: Amending Penal Code section 186.2*

Alternatively, the legislature could amend Penal Code section 186.2 to include funds derived from illegal slot machines. Sections 186.2 *et seq.* are used by prosecutors to punish and deter criminal activities of organized crime through the forfeiture of profits acquired and accumulated as a result "criminal profiteering activities."<sup>228</sup> Section 186.2 could be amended to read as follows:

- a. Criminal profiteering activity" means any act committed or attempted or any threat made for financial gain or advantage, which act or threat may be charged as a crime under any of the following sections . . .

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223. *See supra* Part I.

224. *Id.*

225. *Id.*

226. *Id.*

227. *See supra* Part III.A.; *see also* John L. Worrall, *Asset Forfeiture Response Guides Series No. 7 n.2, CTR. FOR PROBLEM-ORIENTED POLICING* (2008), [http://www.popcenter.org/responses/asset\\_forfeiture/](http://www.popcenter.org/responses/asset_forfeiture/) ("Though it is an enforcement tool, asset forfeiture can assist in the budgeting realm by helping to offset the costs associated with fighting crime. . . . Forfeiture can help agencies target these difficult problems, sometimes without the need to seek additional outside resources to offset their costs.").

228. *See supra* Part II.D.

8. Gambling, as defined in *Section 330a, Section 300b, and Section 330.1*, Sections 337a to 337f, inclusive, Section 337i, except the activities of a person who participates solely as an individual bettor.

This would clarify for the court, prosecutors, and defendants how to properly initiate and conduct forfeiture proceedings against illegal casino operators without making them a predicate for money-laundering under Penal Code 186.9 and 186.10. As a result, the amendment keeps section 330a, 300b, and 330.1 misdemeanors. Additionally, by adding the proposed language to section 186.2, the courts and parties have a well-traversed area of forfeiture law. A potential downside is that sections 186.2-186.8 have a slightly more complicated process than the process proposed in the next section for Penal Code section 335a.<sup>229</sup> The proposed section 335a contains a lower burden of proof and does not require a conviction in order to allow for forfeiture.<sup>230</sup>

#### V. IN THE ALTERNATIVE: AN AMENDMENT TO PENAL CODE 335A

In the alternative, Penal Code section 335a should be amended as follows:

a. In addition to any other remedy provided by law, a law enforcement agency may seize and summarily destroy any machine or device if possession or control of the machine or device is penalized by the laws of this State prohibiting lotteries or gambling and further may seize any proceeds derived from the unlawful use of any such machine or device.

b. If such machine or device or proceeds are seized, a notice of intention *to seize and summarily destroy* such machine or device and forfeit such proceeds must be posted in a conspicuous place upon the premises in or upon which such machine or device was seized. *This notice shall include the date of the seizure, the location from which the machine or device was seized, the location and amount of proceeds seized, and the name of the law enforcement agency or prosecuting agency that seized the machine, device, or proceeds.*

c. The superior court in the county where the machines or device are seized shall have jurisdiction of any such actions or proceedings commenced to recover the possession of such machine or device or any proceeds seized from or in connection with the machines or devices *or* derived from unlawful use of the machine or device.

~~Any and all money seized in or in connection with such machine or device shall, immediately after such machine or device has been so~~

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229. *See infra* Part V.

230. *See id.*

~~destroyed, be paid into the treasury of the city or county, as the case may be, where seized, said money to be deposited in the general fund.~~

d. *Any person, including the person charged with the unlawful possession or use of the machines or device, who is claiming an interest in the device, machine or proceeds seized shall, at any time within 30 days from the date of the first posting of the notice of seizure and destruction, file in the superior court of the county in which the action is pending a verified claim establishing his or her lawful interest in the property or proceeds. A copy of the verified claim shall be served on the law enforcement agency or prosecuting agency responsible for seizing the machine, device, or proceeds.*

e. *If, at the end of the time set forth in subdivision (c), no person has filed a verified claim, the court shall declare the property and proceeds seized subject to forfeiture or destruction.*

f. *If a person files a verified claim, the superior court shall hold a forfeiture hearing. At the hearing, the People have the burden of establishing by a preponderance of the evidence a violation of Penal Code section 330a, 330b, or 330.1 occurred, and that any proceeds seized were derived from the unlawful possession or use of the machines or devices. Proceeds shall include, but are not limited to, money seized from or in connection with such machines or devices and money derived from the use of the machines or devices. Proceeds are not limited to money physically located inside the machines or devices or in the establishment where the machines or devices are located.*

g. *If the person filing a verified claim is the person charged with unlawful possession or use of the machines or devices, then the court shall, upon request of the person, delay the forfeiture hearing until such time as the pending charges are resolved in criminal court.*

h. *Any and all proceeds seized and forfeited shall be paid into the treasury of the city or county, as the case may be, where the machines or devices were seized and deposited into the general fund of the city or county.*

This proposal clarifies and follows the intent of the original statute. It also tracks Penal Code section 186.2 et. seq.<sup>231</sup> As a result, if the People can trace illegal funds and prove a nexus between the money seized and the illegal activity, then they can confiscate the criminal profits.<sup>232</sup> This solves the current issue faced by courts, prosecutors, and defendants by providing a clear understanding of the requirements

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231. See *supra* Part I.D.

232. See *supra* Part II.B.

needed to seize money from machines and bank accounts.<sup>233</sup> This proposal allows law enforcement to seize, destroy and forfeit funds where they are actually located with a clear judicial process.<sup>234</sup> As stated previously, limiting the seizure of funds to only those found inside of illegal slot machines is outdated and misinterprets the current law.<sup>235</sup> Indeed, the proposed amendment allows law enforcement to properly reduce the harmful social effects of illicit gambling cafes, while also better protecting a defendant's rights with a clearer judicial process.<sup>236</sup>

Finally, in the alternative, the legislature could amend the law to follow narcotics forfeiture statutes.<sup>237</sup> The benefit of this is that narcotics forfeiture laws are well-known and thoroughly litigated.<sup>238</sup> The downside is that they follow a civil process.<sup>239</sup>

#### CONCLUSION

Despite legislative efforts to make prosecution of illegal slot machines a priority, due to poor legislative drafting, law enforcement has not been able to curb this harmful criminal activity rampant in our communities.<sup>240</sup> The most sensible and effective solution would be to adopt AB1395 allowing the seizure of money found in connection with illegal gambling operations under existing money laundering statutes.<sup>241</sup> At the very minimum, however, the current statute governing the prosecution of illegal slot machines must be amended to fall more in line with other California Criminal Statutes governing forfeiture of illegal profits and more clearly articulate the process and parameters of forfeiture.<sup>242</sup>

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233. *See supra* Part II.A.

234. *See supra* Part II.A.

235. *See supra* Part II.A.

236. *See supra* p. 218.

237. *See supra* pp. 229–32.

238. *See supra* Part I.D.

239. *See supra* Part I.D.

240. *See supra* Part I.D.

241. *See supra* Part III.A.

242. *See supra* Part I.D. and II.A.

APPENDIX A:  
PEOPLE V. DOYLE C1493346 AND F1450824

Defendant Edward Laron Doyle (“Mr. Doyle”) was convicted and sentenced the above-captioned matters for violations of Penal Code sections 330a, 330b and 330.1, based upon his operation of internet cafe businesses violating statutory prohibitions against slot machine gaming. Consequently, the People have moved pursuant to Penal Code § 335a for forfeiture both of the computer hardware configured for use as the slot machines that were the basis for conviction and of money seized from Mr. Doyle's bank accounts, residence and business locations. For the reasons set forth below, the court denies the motion for forfeiture of seized money; as to the computer equipment, the court authorizes the destruction as contraband of software applications having no function or utility other than the facilitation of gambling, but orders that all hardware components be returned to Mr. Doyle.

STATEMENT OF RELEVANT FACTS

The details of Mr. Doyle's business ventures having previously been summarized in this court's order denying in part and granting in part Mr. Doyle's motion to suppress, it is not necessary to recapitulate them here, other than to chronicle the relevant seizures as follows:

On October 23, 2013, police executed a search warrant at Gilroy Bizzness Center, seizing property not specified in the parties' pleadings. On May 7, 2014, police executed a search warrant at Net Connections Milpitas, where they seized 38 computer terminals and \$1,128 from the cash register. Both the Gilroy Bizzness Center and Net Connections Milpitas ceased operations upon execution of the search warrants. On July 11, 2014, police seized \$8202,170.26 from 18 different Wells Fargo accounts linked to Mr. Doyle. On February 25, 2015, police executed a search warrant at Mr. Doyle's home and seized approximately \$54,000. On February 26, 2015, police executed a search warrant and seized an unspecified amount from Mr. Doyle's Bank of the West checking account. On March 4, 2015, police seized computers from 87 Jackson Street, in Hayward, the subject of this court's prior suppression order.

ANALYSIS

Forfeiture is a civil in rem action in which the property is proceeded against as a defendant on the legal fiction that the property itself is the guilty party. (See Health & Safety Code § 11488.4, subd. (a); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *People v. Superior Court, (Rishwain, Hakeem & Ellis)* 215 Cal.App.3d 1411 (1989); *People v. \$6,500 U.S. Currency*, 215 Cal.App.3d 1542 (1989)).

Forfeiture laws codified the principle that not only should a criminal actor be denied profit from certain illegal enterprises, but the government conversely enjoys a right to condemnation and possession of assets derived from or used to facilitate the crimes. (*86,500 U.S. Currency*, at 1546). However, the rule of lenity provides that “where there is ambiguity in a criminal statute, doubts are resolved in favor of the Defendant;” (*U.S. v. Bass*, 404 U.S. 336, 347-50) “Statutes imposing forfeitures are not favored and,” though civil in nature, are to be strictly construed in favor of the persons against whom they are sought to be imposed.” (*Baca v. Minier*, 229 Cal.App.3d 1253,1265 (1991), citing *People v. One 1937 Lincoln etc. Sedan* (1945) 26 Cal.2d736,738; accord *People v. One 1986 Toyota Pickup*, 31 Cal.App.4<sup>th</sup> 254, 261-62 (1995); *People v. 86,500 U.S. Currency*, *supra*, 215 Cal.App.3d at 1547).

California law authorizes forfeiture for a variety of criminal conduct and establishes both the procedures and standards by which a state or local governmental entity may seek forfeiture of money and property, as well as the manner of distribution of forfeited money and proceeds from the sale of forfeited property. (*See e.g.*, Health & Safety Code § 11470 et seq. (narcotics offenses); Pen. Code, § 186.3 et seq. (criminal profiteering, including gambling activity actionable under Pen. Code, § 337 et seq.); Pen. Code, § 236.7 et seq. (human trafficking); Pen. Code, § 502.01(computer crimes)). Section 335a of the Penal Code, which omits the detail of these established forfeiture statutes and any iteration of the terms “forfeit” or “forfeiture,” provides as follows:

In addition to any other remedy provided by law any machine or other device the possession or control of which is penalized by the laws of this State prohibiting lotteries or gambling may be seized by any peace officer, and a notice of intention summarily to destroy such machine or device as provided in this section must be posted in a conspicuous place upon the premises in or upon which such machine or device was seized. Such machine or device shall be held by such officer for 30 days after such posting, and if no action is commenced to recover possession of such machine or device, within such time, the same shall be summarily destroyed by such officer, or if such machine or device shall be held by the court, in any such action, to be in violation of such laws, or any of them, the same shall be summarily destroyed by such officer immediately after the decision of the court has become final. The superior court shall have jurisdiction of any such actions or proceedings commenced to recover the possession of such machine or device or any money seized in connection therewith.

Any and all money seized in or in connection with such machine or device shall, immediately after such machine or device has been so

destroyed, be paid into the treasury of the city or county, as the case may be, where seized, said money to be deposited in the general fund. (Pen. Code, § 335a.)

At issue for the application of section 335a to effectuate a forfeiture in the instant case is (1) whether Section 335a authorizes the destruction of computer hardware that, by virtue of discrete software applications, had been put to use as gaming terminals, and (2) whether money seized from Mr. Doyle and, in the weeks after the closure of Net Connection Milpitas, from his bank accounts, was “seized in or in connection with” the computer terminals used for gaming.

#### I. Destruction of Computer Software vs. Appropriation of Hardware

As a threshold matter, subdivision (d) of Penal Code section 330b currently defines a slot machine as “a machine, apparatus, or device that is adapted, or may readily be converted” for the specified prohibited use. This includes computer terminals forming a part of an integrated system or apparatus wherein the various parts or components work together so as to operate in a manner that does constitute an unlawful slot machine.” (*Grewal infra* at 554)). The California Supreme Court noted in *Grewal*, however, that this definition is not incorporated by reference in the seizure and disposal provisions of Penal Code sections 330.3 and 335a. Accordingly, the high court declined to express any opinion “on the separate question of to what extent the integrated components of a slot machine under section 330b may be subject to seizure” under 335a. (*Ibid.*, fn.3). Although this dictum does not itself foreclose the forfeiture sought by the People, it lends no support for the People's proposed expansion of 335a to justify the conversion to its own ends of Net Connections' computer equipment, let alone Net Connections' bank accounts. Nor may this court lightly disregard the unmistakable

caution exhibited by the *Grewal* court even in a non-punitive civil action for injunctive relief only. Such caution is particularly warranted where, as here, section 335a deviates from the pattern of California's more typical forfeiture statutes and makes no provision for disposition of the machines or devices other than by their destruction. In contrast, Penal Code section 186.7 provides that “the court shall declare that property or proceeds forfeited to the state or local governmental entity,” and section 186.8 outlines the manner by which “the money forfeited or the proceeds of sale shall be distributed by the state or local governmental entity” once the conditions precedent under section 186.5 have been satisfied. (Pen. Code 186.3 et

seq.; accord, Pen. Code, § 236.9 prosecution burden of proof beyond reasonable doubt), 236.12 (distribution of proceeds of sale of

assets), 502.01(b) prosecution burden of proof by preponderance of evidence), 502.01(9) (distribution of sale proceeds).

Where, as here, the “machine or device” consists of a computer terminal that has utility for wholly innocuous ends, and where its unlawful use related solely to the type of software installed and run on the terminals or the network server linking those terminals, the statutory end of destruction may be accomplished by means short of wholesale forfeiture. The Capital Sweepstakes software may be deleted from the server(s) and or individual terminals. If Mr. Doyle objects to further search of the system memory to surgically identify and delete particular programs, or if the People fear that the relevant digital files cannot be irretrievably removed, then the system memory may be overwritten in its entirety, leaving Mr. Doyle with effectively blank but nonetheless salvageable hardware of more than negligible value.

## II. Proceeds of Gambling Operations

The Legislature has elsewhere been explicit in providing for forfeiture of proceeds of other types of illegal activity. For example, section 186.3, subdivision (c) of the Penal Code defines as property subject to forfeiture “[a]ll proceeds of a pattern of criminal profiteering activity, which property shall include all things of value that may have been received in exchange for the proceeds immediately derived from the pattern of criminal profiteering activity.” (Pen. Code, § 186.3, subd. (c)).

“Criminal profiteering activity,” in turn, is defined as “any act committed or attempted or any threat made for financial gain or advantage, which act or threat may be charged as a crime under any of the following sections” of an enumerated list including “gambling as defined in Sections 337a through 337f, inclusive, and 337i,” but not as defined in Sections 330a, 330b or 330.1. (Pen. Code, § 186.2, subd. (a-s)).

Section 335a is ambiguous as to whether the money subject to seizure is limited to money contained within a traditional one-armed bandit or otherwise in immediate physical proximity to the prohibited machine or device, or whether the statute authorizes seizure—at any time and place—of money potentially traceable to the prior operation of prohibited gambling devices. The People's argument against return of the money in Net Connection bank accounts presumes that money is forfeitable under 335a—irrespective of the circumstances, location and timing of the seizure—so long as the money, whenever and wherever recovered, is traceable to illegal gambling activity. Mr. Doyle, on the other hand, advocates a narrower reading that would limit forfeiture to circumstances where actual currency was seized in physical proximity

to the illegal gambling machine or device. Section 335a is notably silent as to the standard of proof by which the prosecution must establish the requisite nexus between the money seized and the illegal slot machines. (Cf. Pen. Code § 186.5(d) (“At the forfeiture hearing, the prosecuting agency shall have the burden of establishing beyond a reasonable doubt that the defendant was engaged in a pattern of criminal profiteering activity and that the property alleged in the petition comes within the provisions of subdivision (b) or (c) of Section 186.3”); Pen. Code § 236.9(d) (same). This omission from section 335a of any indication of the standard of proof by which a nexus between the money seized and the prohibited machine or device is to be established tends to support the narrow interpretation advanced by Mr. Doyle: where the location and timing of the cash seizure is inextricably intertwined with the seizure of the gambling machine or device, that nexus effectively raises a non-rebuttable presumption that the money is the stake wagered or the winnings derived from the illegal slot machine. The Court in *Lee On v. Long*, 37 Cal.2d 499 (1951), relied upon by the People, took care to note that its opinion “does not concern the law of forfeiture” and addressed instead whether plaintiffs arrested in a gambling raid were entitled to the return of money seized (along with dice, dominoes, playing cards and lottery tickets) from the tables

at which plaintiffs were seated at the time of the raid. *Id.* at 501. The Court, in distinguishing forfeiture law, characterized the case on appeal as one narrowly limited to “the question of whether plaintiffs, admittedly engaged in illegal gambling activities at the time of the raid and their arrest, are in a position to assert their ownership and right to possession of the money that was then in actual use in such activities.” *Id.* at 502, (italics added). The Court's effort to narrow the scope of the holding tends to support rather than undermine Mr. Doyle's interpretation of section 335a as it applies to the disposition of money seized. The People's reliance on *Lee v. City of Oakland* (1961) 193 Cal.App.2d, is likewise unpersuasive. In *Lee*, the money seized from the claimant (including marked bills supplied prior to the raid by law enforcement through an undercover agent) had indisputably been used in gambling: Yen Lau Lung, the plaintiff's assignor, had admitted both gambling and “banking the game” the night of the raid. *Id.* at 169. However, the judgment denying return of the money was reversed on appeal, on the ground that neither admission “causes us to conclude that the money which was taken from Lung was an integral part of any gambling at the time the officers raided the premises. As previously stated, there is no evidence that gambling was in progress at the time of the raid.” *Ibid.* *Lee* supports a close nexus in time and location between

the seizure of money and the seizure of the prohibited gambling devices: “It becomes clear that money may have been part of a gambling game but when reduced to the possession and ownership of a man, its link with gambling has been lost.” *Lee*, at 170.

#### DISPOSITION

For the foregoing reasons, the motion for forfeiture is hereby denied, and the People are ordered to return to Mr. Doyle the money and computer equipment seized. This order shall be stayed pending appeal by either party.

It is so ordered.