

1 H.533

2 Introduced by Representatives Rachelson of Burlington, Leffler of Enosburgh,
3 and Grad of Moretown

4 Referred to Committee on

5 Date:

6 Subject: Criminal procedure; forfeiture; seizure

7 Statement of purpose of bill as introduced: This bill proposes to convert civil
8 seizure and forfeiture of property related to drug crimes into a criminal process
9 where the forfeiture of property is an available criminal sanction. This bill also
10 prohibits State and local law enforcement from sharing in proceeds forfeited
11 under federal law except for cases involving more than \$100,000.00. This bill
12 also provides for lienholder and innocent owner relief.

13 An act relating to converting civil forfeiture of property in drug-related
14 prosecutions into a criminal process

15 It is hereby enacted by the General Assembly of the State of Vermont:

16 Sec. 1. 4 V.S.A. § 32 is amended to read:

17 § 32. JURISDICTION; CRIMINAL DIVISION

18 (a) The Criminal Division shall have jurisdiction to try, render judgment,
19 and pass sentence in prosecutions for felonies ~~and~~, misdemeanors, and drug
20 forfeiture proceedings.

1 (b) The Criminal Division shall have jurisdiction to try and finally
2 determine prosecutions for violations of bylaws or ordinances of a village,
3 town, or city, except as otherwise provided.

4 (c) The Criminal Division shall have jurisdiction of the following civil
5 actions:

6 (1) appeals of final decisions of the Judicial Bureau;

7 (2) DUI license suspension hearings filed pursuant to 23 V.S.A.
8 chapter 24;

9 (3) extradition proceedings filed pursuant to 13 V.S.A. chapter 159;

10 ~~(4) drug forfeiture proceedings under 18 V.S.A. chapter 84, subchapter~~
11 ~~2;~~

12 ~~(5)~~(4) fish and wildlife forfeiture proceedings under 10 V.S.A. chapter
13 109;

14 ~~(6)~~(5) liquor forfeiture proceedings under 7 V.S.A. chapter 19;

15 ~~(7)~~(6) hearings relating to refusal to provide a DNA sample pursuant to
16 20 V.S.A. § 1935;

17 ~~(8)~~(7) automobile forfeiture and immobilization proceedings under
18 23 V.S.A. chapters 9 and 13;

19 ~~(9)~~(8) sex offender proceedings pursuant to 13 V.S.A. §§ 5411(e)
20 and 5411d(f);

1 ~~(10)~~(9) restitution modification proceedings pursuant to 13 V.S.A.

2 § 7043(k);

3 ~~(11)~~(10) municipal parking violation proceedings pursuant to 24 V.S.A.

4 § 1974a(e), if the municipality has established an administrative procedure

5 enabling a person to contest the violation, and the person has exhausted the

6 administrative procedure;

7 ~~(12)~~(11) proceedings to enforce 9 V.S.A. chapter 74, relating to energy

8 efficiency standards for appliances and equipment;

9 ~~(13)~~(12) proceedings to enforce 30 V.S.A. § 53, relating to commercial
10 building energy standards.

11 Sec. 2. 18 V.S.A. chapter 84, subchapter 2 is amended to read:

12 Subchapter 2. Forfeiture

13 § 4241. SCOPE

14 * * *

15 (c) Notwithstanding the provisions of this section, the following property

16 shall not be subject to seizure and forfeiture under this subchapter:

17 (1) Homestead real property, as defined in 27 V.S.A. chapter 3.

18 (2) U.S. currency totaling \$200.00 or less.

19 (3) A motor vehicle of \$2,000.00 or less in market value.

1 (4) Stolen property and contraband. Stolen property shall be promptly
2 returned to the rightful owner and contraband shall be disposed of according to
3 applicable State law.

4 (d) The Attorney General shall advise the publications that law
5 enforcement agencies may use to establish the market value of a motor vehicle.

6 § 4242 SEIZURE

7 (a) The ~~court~~ Criminal Division of the Superior Court may issue at the
8 request of the State ex parte a preliminary order or process to seize or secure
9 property for which forfeiture is sought and to provide for its custody. Process
10 for seizure of such property shall issue only upon a showing of probable cause
11 that the property is subject to forfeiture. Application therefor and issuance,
12 execution, and return shall be subject to provisions of applicable law.

13 (b) Any property subject to forfeiture under this subchapter may be seized
14 upon process. Seizure without process may be made when:

15 (1) the seizure is incident to an arrest with probable cause or a search
16 under a valid search warrant;

17 (2) the property subject to seizure has been the subject of a prior
18 judgment in favor of the State in a forfeiture proceeding under this subchapter;

19 ~~or~~

20 (3) the seizure is incident to a valid warrantless search; or

1 (4) the State has probable cause to believe the delay caused by the
2 necessity of obtaining process would result in the removal or destruction of the
3 property that is forfeitable under this chapter.

4 (c) If property is seized without process under subdivision (b)(1) or (3) of
5 this section, the State shall forthwith petition the ~~court~~ Criminal Division for a
6 preliminary order or process under subsection (a) of this section.

7 (d) Notwithstanding subsection 4241(b) of this title, all regulated drugs the
8 possession of which is prohibited under this chapter are contraband and shall
9 be automatically forfeited to the State and destroyed.

10 § 4242a. PROMPT POST-SEIZURE PROCEEDINGS

11 (a) Following the seizure of property subject to forfeiture pursuant to
12 section 4241 of this title, a defendant or any other person with an interest in the
13 property has a right to a prompt post-seizure hearing.

14 (b) A person with an interest in property subject to this chapter may
15 petition the Criminal Division having jurisdiction for a prompt post-seizure
16 hearing.

17 (c) At the Criminal Division's discretion, it may hold a prompt post-seizure
18 hearing:

19 (1) as a separate hearing; or

20 (2) at the same time as a probable cause determination, a post-
21 arraignment hearing, or other pretrial hearing.

1 (d) A party, by agreement of all parties or for good cause shown, may
2 move for one extension of the hearing date of not more than 10 days. Any
3 motion may be supported by an affidavit, sworn statement, or other
4 submission.

5 (e) The Criminal Division shall order the return of the seized property if it
6 finds:

7 (1) the seizure was invalid;

8 (2) a criminal charge has not been filed and no extension of the filing
9 period established under this section is available;

10 (3) the property is not reasonably required to be held as evidence; or

11 (4) the final judgment will likely be in favor of the defendant or any
12 other person with an interest in the property.

13 (f) The provisions of this section do not apply to contraband.

14 § 4243. ~~JUDICIAL~~ CRIMINAL FORFEITURE PROCEDURE

15 (a) Conviction or agreement required. An asset is subject to forfeiture ~~by~~
16 ~~judicial determination~~ as a criminal sanction under section 4241 of this title
17 and 13 V.S.A. § 364 if:

18 (1) a person is convicted of the criminal offense related to the action for
19 forfeiture and the State establishes by a preponderance of the evidence that the
20 property is an instrument of or represents the proceeds of the underlying
21 offense; or

1 (2) a person enters into ~~an~~ a plea agreement with the prosecutor,
2 including an agreement under which ~~he or she~~ the person is not charged with a
3 criminal offense ~~related to the action for forfeiture~~ subjecting the person to
4 forfeiture under section 4241 of this title; or

5 (3) a person is granted immunity or a reduced punishment, with or
6 without the filing of a criminal charge, in exchange for testifying or assisting a
7 law enforcement investigation or prosecution.

8 (b) ~~Evidence. The State may introduce into evidence in the judicial~~
9 ~~forfeiture case the fact of a conviction in the Criminal Division~~ Discovery.
10 Discovery related to the criminal forfeiture proceeding is subject to the
11 Vermont Rules of Criminal Procedure.

12 (c) Burden of proof. The State bears the burden of proving by ~~clear and~~
13 ~~convincing~~ a preponderance of the evidence that the property is an instrument
14 of or represents the proceeds of the underlying offense.

15 (d) ~~Notice. Within 60 days from when the seizure occurs, the State shall~~
16 ~~notify any owners, possessors, and lienholders of the property of the action, if~~
17 ~~known or readily ascertainable. Upon motion by the State, a court may extend~~
18 ~~the time period for sending notice for a period not to exceed 90 days for good~~
19 ~~cause shown.~~ Notice of proposed forfeiture accompanying indictment or
20 information.

1 (1) The loss of property subject to forfeiture shall be considered as a
2 criminal sanction as part of and following the prosecution of the crime that
3 subjects the individual with an interest in the property to forfeiture of property
4 pursuant to section 4241 of this title. A Notice of Proposed Forfeiture shall be
5 a separate document and accompany the initial indictment or information of a
6 crime that subjects the individual with an interest in the property to forfeiture
7 pursuant to section 4241 of this title. The Notice of Proposed Forfeiture shall
8 include the following information:

9 (A) the facts upon which the forfeiture is requested, including a
10 description of the property subject to forfeiture and the type and quantity of
11 regulated drug involved;

12 (B) the time, date, and place of the seizure;

13 (C) the names of the apparent owner or owners, lienholders who have
14 properly recorded their interests, and any other person appearing to have an
15 interest, and, in the case of a conveyance, the name of the person holding title;
16 the registered owner; and the make, model, and year of the conveyance;

17 (D) the current location and custodian of the seized property; and

18 (E) warning that seized property may be forfeited as a sanction
19 related to the crime for which the individual was charged, as part of a
20 sentencing consideration, as part of a plea agreement, or through other means
21 for the court to oversee.

1 (2) The State shall serve the Notice in accordance with the Vermont
2 Rules of Criminal Procedure. The State shall inform any owners, possessors,
3 and lienholders of the property of the action, if known or readily ascertainable.
4 In addition, the State shall cause the Notice to be published in a newspaper of
5 general circulation in the State, as ordered by the Criminal Division.

6 (3) The Notice shall not be read to the jury of the underlying
7 prosecution.

8 (4) The State may amend the Notice at any time before trial of the
9 underlying prosecution.

10 (5) The Criminal Division may grant an unlimited number of 30-day
11 extensions for the filing of the Notice if, for each extension, the court
12 determines that probable cause is shown and additional time is warranted.

13 (e) Return of property. If notice is not sent in accordance with subsection
14 (d) of this section, and no time extension is granted or the extension period has
15 expired, the law enforcement agency shall return the property to the person
16 from whom the property was seized. ~~An agency's return of property due to~~
17 ~~lack of proper notice does not restrict the agency's authority to commence a~~
18 ~~forfeiture proceeding at a later time.~~ Nothing in this subsection shall require
19 the agency to return contraband, evidence, or other property that the person
20 from whom the property was seized is not entitled to lawfully possess.

1 ~~(f) Filing of petition. The State shall file a petition for forfeiture of any~~
2 ~~property seized under section 4242 of this title promptly, but not more than~~
3 ~~14 days from the date the preliminary order or process is issued. The petition~~
4 ~~shall be filed in the Superior Court of the county in which the property is~~
5 ~~located or in any court with jurisdiction over a criminal proceeding related to~~
6 ~~the property.~~

7 ~~(g) Service of petition. A copy of the petition shall be served on all persons~~
8 ~~named in the petition as provided for in Rule 4 of the Vermont Rules of Civil~~
9 ~~Procedure. In addition, the State shall cause notice of the petition to be~~
10 ~~published in a newspaper of general circulation in the State, as ordered by the~~
11 ~~court. The petition shall state:~~

12 ~~(1) the facts upon which the forfeiture is requested, including a~~
13 ~~description of the property subject to forfeiture, and the type and quantity of~~
14 ~~regulated drug involved;~~

15 ~~(2) the names of the apparent owner or owners, lienholders who have~~
16 ~~properly recorded their interests, and any other person appearing to have an~~
17 ~~interest; and, in the case of a conveyance, the name of the person holding title,~~
18 ~~the registered owner, and the make, model, and year of the conveyance.~~

19 § 4244. FORFEITURE ~~HEARING~~ HEARINGS

20 ~~(a) Within 60 days following service of notice of seizure and forfeiture~~
21 ~~under section 4243 of this title, a claimant may file a demand for judicial~~

1 ~~determination of the forfeiture. The demand must be in the form of a civil~~
2 ~~complaint accompanied by a sworn affidavit setting forth the facts upon which~~
3 ~~the claimant intends to rely, including, if relevant, the noncriminal source of~~
4 ~~the asset or currency at issue. The demand must be filed with the court~~
5 ~~administrator in the county in which the seizure occurred. Defendant's~~
6 ~~forfeiture hearing. The Criminal Division shall consider the loss of property~~
7 ~~subject to forfeiture as a criminal sanction as part of and following the~~
8 ~~prosecution of the underlying crime. The Criminal Division has discretion to~~
9 ~~schedule the criminal forfeiture hearing as soon as practicable after, and in any~~
10 ~~event not later than 90 days following, the defendant's conviction of the~~
11 ~~offense subjecting the person to forfeiture under section 4241 of this title. The~~
12 ~~hearing shall be conducted by the Criminal Division without a jury.~~

13 (b) ~~The court shall hold a hearing on the petition as soon as practicable~~
14 ~~after, and in any event no later than 90 days following, the conclusion of the~~
15 ~~criminal prosecution. Exceptions to the conviction requirement. The Criminal~~
16 ~~Division may waive the conviction requirements of section 4243 of this title~~
17 ~~and subsection (a) of this section and grant title to the subject property to the~~
18 ~~State if the State files a motion not fewer than 90 days after seizure and shows~~
19 ~~by a preponderance of the evidence that, before conviction, the defendant:~~

20 (1) died;

21 (2) was deported by the U.S. government;

1 (3) abandoned the property; or

2 (4) fled the jurisdiction.

3 ~~(c) A lienholder who has received notice of a forfeiture proceeding may~~
4 ~~intervene as a party. If the court finds that the lienholder has a valid, good~~
5 ~~faith interest in the subject property which is not held through a straw~~
6 ~~purchase, trust, or otherwise for the actual benefit of another and that the~~
7 ~~lienholder did not at any time have knowledge or reason to believe that the~~
8 ~~property was being or would be used in violation of the law, the court upon~~
9 ~~forfeiture shall order compensation to the lienholder to the extent of the~~
10 ~~lienholder's interest. Proportionality.~~

11 (1) The Defendant may petition the Criminal Division to determine,
12 before trial of the underlying crime, at trial, or upon conviction, whether the
13 forfeiture is unconstitutionally excessive under the Constitutions of the State of
14 Vermont or the United States.

15 (2) The defendant has the burden of establishing that the forfeiture is
16 unconstitutionally excessive by a preponderance of the evidence at a hearing
17 conducted by the Criminal Division without a jury. In determining whether the
18 forfeiture is unconstitutionally excessive, the Criminal Division may consider
19 all relevant factors including:

1 (A) the seriousness of the underlying crime and its impact on the
2 community, including the duration of the activity, use of a firearm, and harm
3 caused by the defendant;

4 (B) the extent to which the defendant participated in the underlying
5 crime;

6 (C) the extent to which the subject property was used in committing
7 the crime;

8 (D) whether the underlying crime was completed or attempted;

9 (E) the hardship to the defendant if the forfeiture of a motor vehicle
10 would deprive the defendant of the defendant's livelihood; and

11 (F) if forfeiture of the subject property is an undue hardship to the
12 defendant's family.

13 (3) In determining the value of the instrumentality subject to forfeiture,
14 the Criminal Division may consider all relevant facts related to the fair market
15 value of the property.

16 (4) The Criminal Division shall not consider the value of the subject
17 property to the State in determining whether the forfeiture is unconstitutionally
18 excessive.

19 ~~(d) The court shall not order the forfeiture of property if an owner, co-~~
20 ~~owner, or person who regularly uses the property, other than the defendant,~~
21 ~~shows by a preponderance of the evidence that the owner, co-owner, or regular~~

1 ~~user did not consent to or have any express or implied knowledge that the~~
2 ~~property was being or was intended to be used in a manner that would subject~~
3 ~~the property to forfeiture, or that the owner, co-owner, or regular user had no~~
4 ~~reasonable opportunity or capacity to prevent the defendant from using the~~
5 ~~property.~~ Lienholder hearing. The Criminal Division shall not order the
6 forfeiture of property subject to a lienholder's interest without a hearing upon
7 petition by the lienholder, other than the defendant. A lienholder who has
8 received notice of a criminal forfeiture proceeding may petition the Criminal
9 Division at any time before it enters judgement in the prosecution of the
10 underlying offense or grants a motion pursuant to subsection (b) of this section.
11 The Criminal Division shall hear the petition within 30 days after its filing or
12 at the court's discretion. The hearing shall be conducted by the Criminal
13 Division without a jury and the hearing may be consolidated with any other
14 hearing before the trial in the underlying prosecution. If a lienholder shows by
15 a preponderance of the evidence that the lienholder has a valid, good faith
16 interest in the subject property that is not held through a straw purchase, trust,
17 or otherwise for the actual benefit of another and that the lienholder did not at
18 any time have actual knowledge or reason to believe that the property was
19 being or would be used in violation of the law, the Criminal Division shall
20 order compensation to the lienholder to the extent of value of the lienholder's
21 interest.

1 (e) ~~The proceeding shall be against the property and shall be deemed~~
2 ~~civil in nature. The State shall have the burden of proving all material facts by~~
3 ~~clear and convincing evidence. Innocent owner hearing. The Criminal~~
4 ~~Division shall not order the forfeiture of property of an owner, co-owner, or~~
5 ~~person who regularly uses the property, other than the defendant, without a~~
6 ~~hearing upon petition by the owner, co-owner, or person who regularly uses~~
7 ~~the property.~~

8 (1) An owner, co-owner, or person who regularly uses the property may
9 petition the Criminal Division at any time before it enters judgement in the
10 prosecution of the underlying offense or grants a motion pursuant to subsection
11 (b) of this section.

12 (2) The petition may be a simple written statement that sets forth:

13 (A) the right, title, or interest in the property of the owner, co-owner,
14 or person who regularly uses the property;

15 (B) the time and circumstances of the acquisition of the interest in the
16 property;

17 (C) additional relevant facts supporting the petition; and

18 (D) a request for the return of the property or other relief sought by
19 the owner, co-owner, or person who regularly uses the property.

20 (3) The Criminal Division shall hear the petition within 30 days after its
21 filing or at the court's discretion. The hearing shall be conducted by the

1 Criminal Division without a jury and the hearing may be consolidated with any
2 other hearing before the trial in the underlying prosecution.

3 (4) The owner, co-owner, or person who regularly uses the property,
4 other than the defendant, has the burden to prove by a preponderance of the
5 evidence the validity of ownership interest or regular use. If the owner, co-
6 owner, or person who regularly uses the property meets the burden, the State
7 has the burden to prove by a preponderance of the evidence that the owner, co-
8 owner, or regular user did not consent to or have actual knowledge that the
9 property was being or was intended to be used in a manner that would subject
10 the property to forfeiture, or that the owner, co-owner, or regular user had no
11 reasonable opportunity or capacity to prevent the defendant from using the
12 property, the Criminal Division shall order return of the property. As used in
13 this subsection and subsection (d) of this section, “actual knowledge” means a
14 direct and clear awareness of information, a fact, or a condition.

15 ~~(f) The court shall make findings of fact and conclusions of law and shall~~
16 ~~issue a final order. If the petition is granted, the court shall order the property~~
17 ~~held for evidentiary purposes, delivered to the State Treasurer, or, in the case~~
18 ~~of regulated drugs or property which is harmful to the public, destroyed~~
19 Judgment. The Criminal Division shall enter judgment:

20 (1) dismissing the forfeiture proceeding and returning the subject
21 property to the rightful owner if the State fails to meet its burden in the

1 underlying criminal prosecution or the defendant's forfeiture hearing pursuant
2 to subsection (a) of this section except, in the case of regulated drugs or
3 property that is harmful to the public, the subject property shall be destroyed;

4 (2) forfeiting the subject property if the State meets its burden in the
5 underlying criminal prosecution and the forfeiture proceedings pursuant to
6 subsection (a) of this section; or

7 (3) enter judgment following a hearing or at court's discretion pursuant
8 to a stipulation or plea agreement.

9 § 4244a. APPEAL

10 The defendant may appeal the Criminal Division's decision regarding the
11 seizure of forfeiture of property following final judgment in the forfeiture
12 proceeding pursuant to the Vermont Rules of Criminal Procedure.

13 § 4245. REMISSION OR MITIGATION OF FORFEITURE TO THE
14 STATE'S ATTORNEY

15 ~~(a) On petition filed within 90 days after completion of a forfeiture~~
16 ~~proceeding, a court that issued a forfeiture order pursuant to section 4244 of~~
17 ~~this title~~ request by an owner, co-owner, or person who regularly uses the
18 property, other than by the defendant, made at any time before the Criminal
19 Division enters judgment in the prosecution of the underlying offense or grants
20 a motion pursuant to subsection (b) of section 4244 a State's Attorney may
21 ~~order~~ exercise prosecutorial discretion and determine that the forfeiture be

1 remitted or mitigated. The ~~petition request~~ shall be sworn and shall include all
2 information necessary for its resolution or shall describe where such
3 information can be obtained. Upon receiving a ~~petition request~~, the ~~court~~
4 State's Attorney shall investigate and may conduct ~~a~~ an hearing interview if in
5 ~~its~~ the State's Attorney's judgment it would be helpful to the resolution of the
6 ~~petition request~~. The ~~court~~ State's Attorney shall either approve or reject the
7 ~~petition request~~ within ~~90~~ 30 days.

8 (b) The ~~court~~ State's Attorney may remit or mitigate a forfeiture pursuant
9 to this chapter upon finding that relief should be granted to avoid extreme
10 hardship or upon finding that the ~~petitioner requestor~~ requestor has a valid, good faith
11 interest in the property ~~which~~ that is not held through a straw purchase, trust,
12 or otherwise for the benefit of another ~~and that the petitioner did not at any~~
13 ~~time have knowledge or reason to believe that the property was being or would~~
14 ~~be used in violation of the law.~~

15 * * *

16 § 4247. DISPOSITION OF PROPERTY

17 (a) Whenever property is forfeited and delivered to the State Treasurer
18 under this subchapter, the State Treasurer shall, ~~no~~ not sooner than 90 days of
19 the date the property is delivered, sell the property at a public sale held under
20 27 V.S.A. chapter 13.

1 (b) The proceeds from the sale of forfeited property, upon exhaustion of all
2 appeals or at the Criminal Division's discretion, shall be used first to pay
3 restitution to any victim of the underlying crime, then to offset any costs of
4 selling the property, and then, after any liens on the property have been paid in
5 full, applied to payment of seizure, storage, and forfeiture expenses, including
6 animal care expenses related to the underlying violation. Remaining proceeds
7 shall be distributed as follows:

8 (1)(A) 45 percent shall be distributed among:

9 (i) the Office of the Attorney General;

10 (ii) the Department of State's Attorneys and Sheriffs; ~~and~~

11 (iii) State and local law enforcement agencies;

12 (iv) the Office of the Defendant General;

13 (v) the Office of the Public Defender;

14 (vi) court assigned attorneys; and

15 (vii) the Public Defender Special Fund.

16 (B) The Governor's Criminal Justice and Substance Abuse Cabinet is
17 authorized to determine the allocations among the groups listed in subdivision
18 (A) of this subdivision (1), and may only reimburse the ~~prosecutor~~ attorneys
19 and law enforcement agencies that participated in the prosecution and
20 enforcement effort resulting in the forfeiture for expenses incurred, including
21 controlled drug-buy money and actual expenses for involved personnel. The

1 proceeds shall be held by the Treasurer until the Cabinet notifies the Treasurer
2 of the allocation determinations, at which time the Treasurer shall forward the
3 allocated amounts to the appropriate agency's operating funds.

4 (2) The remaining 55 percent shall be deposited in the General Fund.

5 * * *

6 § 4248a. LIMITATION ON FEDERAL ADOPTION

7 (a) A State or local law enforcement agency shall not transfer or offer for
8 adoption property seized pursuant to this subchapter to a federal agency for the
9 purpose of forfeiture under 21 U.S.C. § 812 or other federal law unless the
10 seized property includes U.S. currency exceeding \$100,000.00. This
11 subsection only applies to seizure by State or local law enforcement agencies
12 pursuant to their own authority under State law and without involvement of the
13 U.S. government. Nothing in this subsection shall be construed to limit State
14 or local agencies from participating in joint task forces with the U.S.
15 government.

16 (b) State and local law enforcement agencies are prohibited from accepting
17 payment of any kind or distribution of forfeiture proceeds from the U.S.
18 government if the State or local law enforcement agency violates subsection
19 (a) of this section. Any payments or forfeiture proceeds that violate subsection
20 (a) of this section shall be directed to the State's General Fund.

1 Sec. 3. EFFECTIVE DATE

2 This act shall take effect on July 1, 2022.