

H.533

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

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

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

§ 32. JURISDICTION; CRIMINAL DIVISION

(a) The Criminal Division shall have jurisdiction to try, render judgment, and pass sentence in prosecutions for felonies ~~and~~, misdemeanors, and drug forfeiture proceedings pursuant to 18 V.S.A. chapter 84, subchapter 2.

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

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

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

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

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

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

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

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

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

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

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

~~(10)~~(9) restitution modification proceedings pursuant to 13 V.S.A. § 7043(k);

~~(11)~~(10) municipal parking violation proceedings pursuant to 24 V.S.A. § 1974a(e), if the municipality has established an administrative procedure enabling a person to contest the violation, and the person has exhausted the administrative procedure;

~~(12)~~(11) proceedings to enforce 9 V.S.A. chapter 74, relating to energy efficiency standards for appliances and equipment;

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

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

Subchapter 2. Forfeiture

§ 4241. SCOPE

\* \* \*

(c) Notwithstanding the provisions of this section, the following property shall not be subject to seizure and forfeiture under this subchapter:

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

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

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

(4) Stolen property and contraband. Stolen property shall be promptly returned to the rightful owner, and contraband shall be disposed of according to applicable State law. The Criminal Division of the Superior Court may impose reasonable conditions, including the use of photographic evidence, to protect access to the property subject to this subsection and its use in later proceedings.

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

§ 4242. SEIZURE

(a) The ~~court~~ Criminal Division of the Superior Court may issue at the request of the State ex parte a preliminary order or process to seize or secure property for which forfeiture is sought and to provide for its custody. Process

for seizure of such property shall issue only upon a showing of probable cause that the property is subject to forfeiture. ~~Application therefor~~ for a preliminary order or process and issuance, execution, and return of the order or process shall be subject to provisions of applicable law.

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

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

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

~~or~~

(3) the seizure is incident to a valid warrantless search.

(c) The State may temporarily secure property pending a request of the State ex parte for a preliminary order or process pursuant to this section.

~~(e)(d)~~ If property is seized without process under subdivision (b)(1) or (3) of this section and the State intends to seek forfeiture under this subchapter, the State shall forthwith petition the ~~court~~ Criminal Division for a preliminary order or process under subsection (a) of this section.

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

§ 4242a. PROMPT POSTSEIZURE PROCEEDINGS

(a) Following the seizure of property for which the State seeks forfeiture pursuant to section 4241 of this title, a defendant or any owner, co-owner, or regular user of the property has a right to a prompt postseizure hearing.

(b) A defendant, owner, co-owner, or regular user may petition the Criminal Division having jurisdiction for a prompt postseizure hearing.

(c) The State shall notify any owner, co-owner, or regular user of the property of which the State is aware, after a reasonable search of public records, that property has been seized pursuant to this subchapter, and the owner, co-owner, or regular user of the property may request a prompt postseizure hearing.

(d) The Criminal Division shall hold a prompt postseizure hearing:

(1) as a separate hearing; or

(2) at the same time as a hearing pursuant to Rule 41(f) of the Vermont Rules of Criminal Procedure, a probable cause determination, a post-arraignment hearing, or other pretrial hearing.

(e) A party, by agreement of all parties or for good cause shown, may move for an extension of the hearing date. Any motion may be supported by an affidavit, sworn statement, or other submission.

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

(1) the seizure was invalid;

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

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

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

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

§ 4243. ~~JUDICIAL~~ CRIMINAL FORFEITURE PROCEDURE

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

(1) a person is convicted of the criminal offense related to the action for forfeiture and the State establishes by clear and convincing evidence that the property is an instrument of or represents the proceeds of the underlying offense; ~~or~~

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

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

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

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

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

(1) The loss of property subject to forfeiture shall be considered as a criminal sanction as part of and following the prosecution of the crime that subjects the individual with an interest in the property to forfeiture of property pursuant to section 4241 of this title. Upon the State's determination that it will seek forfeiture, the State shall file a Notice of Proposed Forfeiture as shall be a separate document not later than 30 days prior to trial or at the Criminal

Division's discretion. The Notice of Proposed Forfeiture shall include the following information:

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

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

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

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

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

(2) The Notice of Potential Collateral Consequences of Conviction required pursuant to 13 V.S.A. chapter 231 shall include notification of the provisions of this subchapter.

(3) The State shall serve the Notice in accordance with the Vermont Rules of Criminal Procedure. The State shall inform any owners, possessors, and lienholders of the property of the action, if known or readily ascertainable.



In addition, the State shall cause the Notice to be published in a newspaper of general circulation in the State, as ordered by the Criminal Division.

(4) The Notice shall not be read to the jury of the underlying prosecution.

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

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

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

~~(f) Filing of petition. The State shall file a petition for forfeiture of any property seized under section 4242 of this title promptly, but not more than 14 days from the date the preliminary order or process is issued. The petition shall be filed in the Superior Court of the county in which the property is~~

~~located or in any court with jurisdiction over a criminal proceeding related to the property.~~

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

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

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

#### § 4244. FORFEITURE HEARING HEARINGS

~~(a) Within 60 days following service of notice of seizure and forfeiture under section 4243 of this title, a claimant may file a demand for judicial determination of the forfeiture. The demand must be in the form of a civil complaint accompanied by a sworn affidavit setting forth the facts upon which the claimant intends to rely, including, if relevant, the noncriminal source of the asset or currency at issue. The demand must be filed with the court~~

~~administrator in the county in which the seizure occurred.~~ Defendant's forfeiture hearing. The Criminal Division shall consider the loss of property subject to forfeiture as a criminal sanction as part of and following the prosecution of the underlying crime. The Criminal Division has discretion to schedule the criminal forfeiture hearing as soon as practicable after the defendant's conviction of the offense subjecting the person to forfeiture under section 4241 of this title, including concurrent with sentencing. The hearing shall be conducted by the Criminal Division without a jury.

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

- (1) died;
- (2) was deported by the U.S. government;
- (3) abandoned the property; or
- (4) fled the jurisdiction.

(c) ~~A lienholder who has received notice of a forfeiture proceeding may intervene as a party. If the court finds that the lienholder has a valid, good~~

~~faith interest in the subject property which is not held through a straw purchase, trust, or otherwise for the actual benefit of another and that the lienholder did not at any time have knowledge or reason to believe that the property was being or would be used in violation of the law, the court upon forfeiture shall order compensation to the lienholder to the extent of the lienholder's interest.~~ Proportionality.

(1) The defendant, owner, co-owner, or other regular user of the property may petition the Criminal Division to determine whether the forfeiture is unconstitutionally excessive under the Constitutions of the State of Vermont or the United States. At the Criminal Division's discretion, it may hold a proportionality hearing:

(A) as a separate hearing; or

(B) at the same time as a hearing pursuant to Rule 41(f) of the Vermont Rules of Criminal Procedure, a prompt postseizure proceeding pursuant to section 4242a of this title or a forfeiture hearing pursuant to section 4244 of this title.

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

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

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

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

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

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

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

(3) In determining the value of the instrumentality subject to forfeiture, the Criminal Division may consider all relevant facts related to the fair market value of the property, including any publications identified by the Attorney General pursuant to subsection 4241(d) of this title.

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

~~(d) The court shall not order the forfeiture of property if an owner, co-owner, or person who regularly uses the property, other than the defendant,~~

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

to the extent of value of the lienholder's interest, whichever is of less cost or expense to effectuate.

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

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

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

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

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

(C) additional relevant facts supporting the petition; and

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

(3) The Criminal Division shall hear the petition within 30 days after its filing or at the court's discretion. The hearing shall be conducted by the Criminal Division without a jury and the hearing may be consolidated with any other hearing before the trial in the underlying prosecution.

(4) The owner, co-owner, or person who regularly uses the property, other than the defendant, has the burden to prove by clear and convincing evidence the validity of ownership interest or regular use. If the owner, co-owner, or person who regularly uses the property meets the burden, the State has the burden to prove by clear and convincing evidence that the owner, co-owner, or regular user did consent to or have actual knowledge that the property was being or was intended to be used in a manner that would subject the property to forfeiture. If the State fails to meet its burden, the Criminal Division shall order return of the property. As used in this subsection and subsection (d) of this section, "actual knowledge" means a direct and clear awareness of information, a fact, or a condition.

(5) The Criminal Division may impose reasonable conditions, including the use of photographic evidence, to protect access to property subject to this section and its use in later proceedings.

~~(f) The court shall make findings of fact and conclusions of law and shall issue a final order. If the petition is granted, the court shall order the property held for evidentiary purposes, delivered to the State Treasurer, or, in the case~~



~~of regulated drugs or property which is harmful to the public, destroyed~~

Judgment. The Criminal Division shall enter judgment:

(1) dismissing the forfeiture proceeding and returning the subject property to the rightful owner if the State fails to meet its burden in the underlying criminal prosecution or the defendant's forfeiture hearing pursuant to subsection (a) of this section except, in the case of regulated drugs or property that is harmful to the public, the subject property shall be destroyed;

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

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

§ 4244a. APPEAL

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

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

~~(a) On petition filed within 90 days after completion of a forfeiture proceeding, a court that issued a forfeiture order pursuant to section 4244 of this title~~ request by an owner, co-owner, or person who regularly uses the

property, other than by the defendant, made at any time before the Criminal Division enters judgment in the prosecution of the underlying offense or grants a motion pursuant to subsection (b) of section 4244 a State's Attorney may  
~~order~~ exercise prosecutorial discretion and determine that the forfeiture be remitted or mitigated. The ~~petition~~ request shall be sworn and shall include all information necessary for its resolution or shall describe where such information can be obtained. Upon receiving a ~~petition~~ request, the ~~court~~ State's Attorney shall investigate and may conduct a hearing interview if in ~~its~~ the State's Attorney's judgment it would be helpful to the resolution of the ~~petition~~ request. The ~~court~~ State's Attorney shall either approve or reject the ~~petition~~ request within ~~90~~ 30 days.

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

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§ 4247. DISPOSITION OF PROPERTY

(a) Whenever property is forfeited and delivered to the State Treasurer under this subchapter, the State Treasurer shall, ~~no~~ not sooner than 90 days ~~of~~ after the date the property is delivered but not later than one year after the property is delivered, sell the property at a public sale held under 27 V.S.A. chapter ~~13~~ 18, subchapter 7.

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

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

- (i) the Office of the Attorney General;
- (ii) the Department of State's Attorneys and Sheriffs; and
- (iii) State and local law enforcement agencies.

(B) ~~The Governor's Criminal Justice and Substance Abuse Cabinet~~ State Treasurer is authorized to determine the allocations among the groups listed in subdivision (A) of this subdivision (1), and may only reimburse the prosecutor and law enforcement agencies ~~that participated~~ for their

proportionate participation in the prosecution or enforcement effort resulting in the forfeiture for expenses incurred, including controlled drug-buy money, investigation costs, salaries, benefits, overtime, and any other actual expenses for involved personnel. ~~The proceeds shall be held by the Treasurer until the Cabinet notifies the Treasurer of the allocation determinations, at which time~~ the Upon determination of the allocations, the Treasurer shall ~~forward~~ promptly distribute the allocated amounts to the appropriate agency's operating funds.

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

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§ 4248a. LIMITATION ON FEDERAL ADOPTION

(a) A State or local law enforcement agency shall not transfer or offer for adoption property seized from a defendant, owner, co-owner, or regular user of the property pursuant to this subchapter to a federal agency for the purpose of forfeiture under 18 U.S.C. chapter 46 or other federal law unless the seized property includes U.S. currency exceeding \$25,000.00. This subsection only applies to seizure by State or local law enforcement agencies pursuant to their own authority under State law and without involvement of the U.S. government. Nothing in this subsection shall be construed to limit State or local agencies from participating in joint task forces with the U.S. government.

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

Sec. 3. EFFECTIVE DATE

This act shall take effect on July 1, 2022.