

# FORFEITURE

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HOUSE COMMITTEE ON JUDICIARY

MARCH 17, 2021

## 2 AGENDA

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  - Seizure vs. Forfeiture
  - Two types of property owners
  - Civil forfeiture vs. Criminal forfeiture
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# 3 BIG PICTURE

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- Crime should not pay.
- Legitimate for Vermont to:
  - Disgorge fruit of crime; and
  - Confiscate instruments of crime.
- Policy question: “How”
  - Civil forfeiture process vs.
  - Criminal forfeiture process

## 4 #1— SEIZURE VS. FORFEITURE

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### SEIZURE

- Police do seizures
- Take possession
- On streets

### FORFEITURE

- Prosecutors do forfeitures
- Transfer title
- In court rooms and offices

## 5 #2 — PROPERTY OWNERS

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### SUSPECT

- The person suspected of a crime.

### INNOCENT OWNERS

- A person who owns property used by someone else in crime:
  - Spouse
  - Parent
  - Creditor
  - Rent-a-car company

## 6 #3 — CIVIL VS CRIMINAL FORFEITURE

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### CIVIL FORFEITURE

- Two-track process:
  - Person prosecuted in criminal court;
  - Title to property litigated in civil court.

### CRIMINAL FORFEITURE

- One-track process:
  - Person prosecuted in criminal court;
  - Title litigated in the same criminal court after conviction.

## 7 #3:B — JURISDICTION

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### CIVIL FORFEITURE

- **In rem** jurisdiction
  - Against the thing

### CRIMINAL FORFEITURE

- **In personam** jurisdiction
  - Against the person

## 8 #4 — DUAL JURISDICTION

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### VERMONT

- State law
  - Title 18: Health
  - 18V.S.A. § 4241 et seq.

### U.S.

- Federal Law
  - Controlled Substances Act  
Public Law 91-513 of Oct. 27, 1970
  - Equitable Sharing Program



# 9 WHEN DOES CIVIL FORFEITURE MAKE SENSE?

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## ADMIRALTY LAW

- When the suspect is beyond outside the jurisdiction



# 10 WHEN DOES CIVIL FORFEITURE NOT MAKE SENSE?

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- When the State gains personal jurisdiction over the suspect.

ARREST



# MYTHS & REALITY

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# 12 MYTH



# 13 REALITY

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- Cash seized is small



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# 14 MYTH

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- 2 tracks offer enough due process:
  - Civil forfeiture
  - Criminal prosecution



# 15 REALITY

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- Property owners don't engage in civil process
  - No public defender
  - Litigation costs exceed value of seized property
    - 94% failure rate in MN.
- Results:
  - Many default judgments in civil court.
  - Title transfers to State without judicial oversight.



## 16 MYTH

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- Effective tool to get drugs off the street.





# 17 REALITY

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- No effect on drug use or crime.
  - Brian D. Kelly, Ph.D.
- Law incentivizes seizing cash—not drugs.

# VERMONT

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# 19 CURRENT LAW

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- Judicial forfeiture:
  - Hybrid approach in 18 V.S.A. § 4243
    - Requires a conviction as a prerequisite to civil forfeiture.
  - Extended timeline:
    - Prosecutors give first notice 60-90 days after seizure
    - Prosecutors file petition within 14 days later
    - Property owner answers the complaint in 30 days per rules of civil procedure.

## 20 CURRENT LAW

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- Innocent owner
  - Affirmative defense under 18 V.S.A. § 4244
  - Innocent owner must initiate civil lawsuit within 60 days from notice
  - Court must hold hearing within 90 days
  - Confusing burdens of proof
  - Standard of proof of “implied knowledge”
  - 2<sup>nd</sup> hardship hearing under 18 V.S.A. § 4245

## 21 CURRENT LAW

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- Proceeds
  - 45% to the Governor's Criminal Justice and Substance Abuse Cabinet to distribute to:
    - Attorney General's office
    - Department of State's Attorney and Sheriffs
    - State and local law enforcement agencies
  - 55% distributed to the general fund
- Prior to 2015 all proceeds were distributed to the general fund

## 22 CURRENT LAW

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- State law
  - Unknown
- Federal law
  - \$1.3 million total from 2015-2019
  - \$275,000 average p.a.
  - 40 forfeitures p.a.
    - 12 by adoption:
    - 28 by joint task forces:
    - Median forfeiture \$5,500

# POSSIBLE REFORMS

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## 24 REPORTING

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- 18 V.S.A. § 4248 requires each agency to keep “complete records”
  - Not centralized or easily obtainable by Public Records Law
  
- Legislators in other states have more information than you.
  - Alabama, Arizona, Kansas and New Jersey enacted model.
  - Minnesota has itemized report of 8,000 forfeitures per year.



# 25 PROCESS REFORM: DEFENDANT

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- 2 process reforms
  - Keep commitment to conviction prerequisite
  - Reshape it from civil forfeiture to criminal forfeiture.
    - Streamline and unite
    - Let judge to rule on forfeiture of property in criminal court after conviction, same as sentencing.
- Proportionality following *Timbs v. Indiana* (2019).

## 26 PROCESS REFORM:

## INNOCENT OWNER

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- 3 process reforms for innocent owners and creditors
  - Prompt-post seizure hearing
  - Clarify burden of proof is on prosecutor.
  - Raise standard to “actual knowledge.”

## 27 SUBSTANTIVE REFORMS

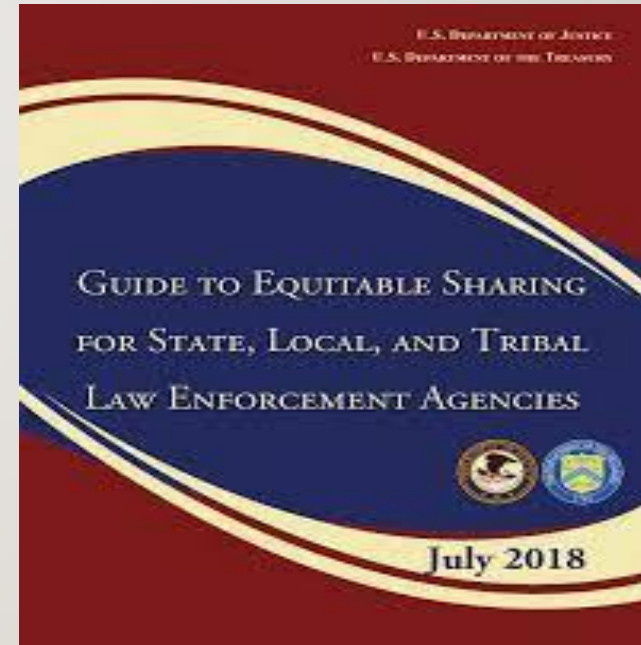
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- Establish minimum seizure of cash
- Prohibit waivers at roadside
- Return to pre-2015 law of directing proceeds to general fund

## 28 SOVEREIGNTY REFORM

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- Federal Equitably Sharing Program
- Address dual jurisdiction
- Circumvention of state law:
  1. Joint State/Federal Task Forces
  2. Adoptions
    - DEA not involved in seizure
    - Outsource forfeiture litigation to U.S. Attorney



## 29 CONTACT

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# APPENDIX

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# HISTORY

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## 32 BRITISH NAVIGATION ACTS OF THE MID-17TH CENTURY.

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- Admiralty law
- King prosecuted ships and cargo.
- Owners beyond personal jurisdiction
- Practical necessities of enforcing admiralty, piracy and custom laws.





## 33 HISTORY OF FORFEITURE IN U.S.

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- Admiralty law
- Customs Act of July 31, 1789
  - First use of forfeiture in U.S.
  - Owners beyond personal jurisdiction.



# 34 COMPREHENSIVE DRUG ABUSE PREVENTION & CONTROL ACT OF 1970

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- 1978 Amendment to allow civil forfeiture
- 1984 Amendment:
  - Proceeds go to Forfeiture Funds of Justice Department and Treasury Department
  - For “forfeiture-related expenses and various law enforcement purposes.”

