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STATE OF VERMONT
OFFICE OF THE EXECUTIVE DIRECTOR
DEPARTMENT OF STATE'S ATTORNEYS & SHERIFFS

TO:	House Judiciary Committee
FROM:	Evan Meenan, Deputy State's Attorney
RE:	H.533 – An act relating to converting civil forfeiture of property in drug-related prosecutions into a criminal process
DATE:	February 7, 2022
CC:	Ben Novogroski, Legislative Counsel Lee McGrath, Institute for Justice

Introduction

This memorandum summarizes the February 2, 2022 testimony of the Department of State's Attorneys about H.533.

Current Use of Vermont's Forfeiture Laws

Prior to its testimony, the Department reached out to Vermont's 14 State's Attorneys to determine the degree to which they currently use Vermont's existing forfeiture laws (18 V.S.A. §§ 4241-4248). Based on the responses the Department received, it appears that these laws are *very* rarely used. Specifically, it appears some State's Attorney don't seek forfeiture and when others do, it is typically done for illicit cash through the plea agreement process.

Potential Fiscal Impacts

As stated during the Department's testimony, the State's Attorneys do receive some federal forfeiture money that they primarily use for training. It is unclear what the fiscal impacts proposed Section 4248a would have on the State's Attorneys. If the Department can determine what these impacts are, it will ask to supplement its testimony.

Summary of Department's Position

As also stated during its testimony, the Department does not object to the H.533's ultimate goal, which is to move away from civil forfeitures and make forfeitures a criminal sanction, i.e., move from a two-track system to a one-track system. The Department did flag some questions and issues about the specific language in H.533. Those questions and concerns generally follow three principles:

1. Ensure the law is consistent with Vermont Rule of Criminal Procedure 41(f), which currently permits any person whose property has been seized by law enforcement to ask the court to order the return of that property. This will minimize the chances that

someone will make the same claim twice before the same court in two different proceedings.

2. Consider treating tangible property differently from cash, especially cash seized directly from a defendant. This recognizes that the interests of third parties in cash may be less than their interest in tangible property.
3. Especially because H.533 would make forfeiture a criminal sanction, more closely align the timing of forfeiture notifications and hearings with trial and sentencing instead of charging. This gives the prosecution time to decide whether it even wants to seek forfeiture and gives the court the benefit of the evidence presented at trial, at sentencing, and in any presentence investigation report.

The Department welcomes the opportunity to work legislative counsel, the Institute for Justice, and any other stakeholders to resolve the questions and issues it identified. It has already had some productive conversations with the Institute for Justice and will continue to do so to determine whether there is any joint language they can propose.

The Department also appreciates the Committee's desire to learn more about federal forfeitures and supports any invitation to testify it extends to state and federal law enforcement.

Specific Comments

Page 3, lines 18-19 (Secs. 4241(c)(2) and (3))

> These proposed sections make money less than $200 and vehicles less than $2,000 in value ineligible for forfeiture. The Department pointed out that this would modify Sections 4241(a)(5) and (6), which make money and vehicles used in connection with the crime eligible for forfeiture. The Department does not oppose this modification, but questioned whether that was the intent, especially if the money at issue is the controlled buy money provided by law enforcement.

Page 4, lines 1-3 (Sec. 4241(c)(4))

> This section requires stolen property to be promptly returned to the rightful owner. It does not take into consideration property that might be needed for evidence in later proceedings. Rule 41(f) accounts for this through the following language: "The court may impose reasonable conditions to protect access to the property and its use in later proceedings." If similar language were included in Section 4241(c)(4), the court could establish a way to preserve information about the property (such as through photographs and videos) for use at future court hearings while permitting the return of the property to the rightful owner.

Page 4, lines 4-5 (Sec. 4241(d)) and Page 13, lines 13-15 (Sec. 4244(c)(3))

> Section 4241(d) requires the Attorney General to "advise the publications that law enforcement agencies may use to establish the market value of a motor vehicle." The Department asked how that is supposed work with Section 4244(c)(3), which requires the court to determine the value of property considering "all relevant facts related to the fair market value of the property." One potential option would be for the court to give due consideration to the publications identified by the Attorney General. Another option would be to eliminate Section 4241(d).

Page 5, lines 4-6 (Sec. 4242(c))

The Department suggested that this provision should only apply to situations in which the State is seeking forfeiture of the property. If the legislature decides to make it applicable to all property, the Department suggested not including property that has been seized pursuant to a search warrant, which it currently does due to the reference to Section 4242(b)(1). This is because if law enforcement obtained a warrant from a court to seize property it is redundant to require law enforcement to obtain a preliminary order authorizing it to seize that same property. One way to accomplish this change could be to reword Section 4242(c) to read something like: "If property is seized without process either incident to an arrest or incident to a valid warrantless search, the State shall forthwith petition the Criminal Division for a preliminary order or process under subsection (a) of this section."

Page 5, lines 10 to Page 6, line 13 (Sec. 4242a)

The Department asked whether this section is necessary given that any person aggrieved by a seizure of property can seek its return pursuant to Rule 41(f). If this section remains in the bill, the Department asked: (i) whether subsection (a) should specify that it is only available to individuals with a "property interest" rather than simply an "interest"; and (ii) whether subsection (d) should not contain a limit on the number and length of extensions. Instead, should the agreement of the parties and the basis for "good cause" dictate the appropriate length of any extension. This may be particularly important, for example, if a case can't move forward because a defendant has absconded and an arrest warrant can't be executed within 10 days. This may also be important during the COVID-19 pandemic when court time is precious.

Page 6, line 18 to page 7, line 7 (Sec. 4243(a))

This section limits forfeiture to situations when a person is convicted of a criminal offense, there is a plea agreement, or the person is granted a benefit in exchange for testifying for the State. The Department questioned whether forfeiture should also be available in pre-charge resolutions such as diversion referrals to minimize any incentive to file criminal charges to facilitate an agreed upon forfeiture.

Page 8, lines 1-8 (Sec. 4243(d)(1))

This section requires the State to include notice of a proposed forfeiture with the indictment or information. The Department asked whether it would be better to have this notice correlate to trial, sentencing, or a date set in a scheduling order issued by the court. This is important because the State may not know whether it intends to seek forfeiture at the time of the indictment or information. In addition, it may not know who any lienholders are at the time of the indictment or information. If the purpose of this section is to simply provide notice to defendants that forfeiture is a possible outcome of any criminal prosecution, the Department notes that this notice is already provided in the Notice of Potential Collateral Consequences of Conviction that defendants receive pursuant to 13

V.S.A. Ch. 231. That notice directs defendants to a website maintained by the Attorney General, which has a section pertaining to forfeitures.

Page 11, lines 6-12 (Sec. 4244(a))

This section requires the court to hold the forfeiture hearing no later than 90 days following the defendant's conviction. The Department asked whether there is value in permitting the court to hold the hearing concurrent with or even after sentencing. That way, when deciding whether to grant the forfeiture, the court has the benefit of the information presented at sentencing and in any presentence investigation report. One possible way to effectuate this would be to amend lines 8-11 to read something like: "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."

Page 12, lines 11-14 (Sec. 4244(c)(1))

This section permits the defendant to petition the court to determine before trial whether forfeiture is unconstitutionally excessive. Since the bill reclassifies forfeiture as a criminal sanction, the Department asked whether it was appropriate for the court to make this determination before the defendant has been found criminally liable. In addition, the Department cautioned that this process could be used to delay the resolution of the underlying criminal conviction; for example when a defendant has reason to believe a confidential informant may become unavailable.

Page 14, lines 5-21 (Sec. 4244(d))

This section requires the court to "order compensation to the lienholder to the extent of the value of the lienholder's interest." The Department asked who would be responsible for providing this compensation. For example, if a car worth $2,500 is forfeited, the lienholder's interest is $2,000, but the car only sells for $1,500, who must come up with the additional $500 for the lienholder? One way to address this could be to reword lines 19-21 to read something like: "the Criminal Division shall order the return of the property to the lienholder or compensation to the lienholder to the extent of the value of the lienholder's interest, whichever is less."

Page 15, lines 8-11 (Sec. 4244(e)(1))

This section permits people to petition for a forfeiture hearing before the resolution of the underlying criminal case. The Department suggested limiting this to persons "other than the defendant" to minimize the risk that this process could be used to delay the resolution of the underlying criminal conviction; for example when a defendant has reason to believe a confidential informant may become unavailable. Similar language already appears on page 15, line 5 and could be inserted right after "property" on line 8 to address this concern. The Department also asked whether it would again be helpful to include language similar to that in Rule 41(f), which reads: "The court may impose reasonable

conditions to protect access to the property and its use in later proceedings." As stated above, this would enable the court to establish a way to preserve information about the property (such as through photographs and videos) for use at future court hearings while permitting the return of the property to the rightful owner.

Page 16, lines 5-12 (Sec. 4244(e)(4))

This section establishes the burden of proof of the parties to a forfeiture hearing. The Department asked whether there was a typo in the State's burden and whether it should have to prove the opposite of what this section requires.

Page 19, lines 15-21 (Sec. 4247(b)(1)(A))

This section establishes the entities that receive the proceeds of a forfeiture proceeding. The Department suggested that subsections (iv) through (vii) are duplicative and arguably funnel 4/7 of the proceeds to the Defender General's Office. One way to address this would be to consolidate subsections (iv) through (vii) into a single section that reads "the Office of the Defender General."

Page 19, lines 16-21 (Sec. 4247(b)(1)(B))

This section permits the Governor's Criminal Justice and Substance Abuse Cabinet to allocate the distribute of forfeiture proceeds amongst the entities established in Section 4247(b)(1)(A). The Department suggested confirming whether that Cabinet is still active. If it is not still active another group could be identified in this section or the proceeds could be distributed equally amounts the entities identified in Section 4247(b)(1)(A), including any victims' rights organizations the Committee chooses to include.

Page 20, lines 7-20 (Sec. 4248a(a))

This section limits the types of forfeiture that may be federally adopted to situations where the property "includes U.S. currency exceeding $100,000.00." The Department asked whether that was the intent or whether it was the intent to base the limitation on property that is valued over $100,000. The Department provided the example (which will hopefully never materialize in VT) of a $100,000 case forfeiture that would not be subject to this limitation versus a $250,000 plane forfeiture that would be subject to this limitation.