

Amendment to HB 1296-FN

1 Amend the title of the bill by replacing it with the following:

2
3 AN ACT relative to the forfeiture of items used in connection with a drug offense.
4

5 Amend the bill by replacing all after the enacting clause with the following:
6

7 1 Controlled Drug Act; Forfeiture of Items Used in Connection With Drug Offenses. Amend
8 RSA 318-B:17-b to read as follows:

9 318-B:17-b Forfeiture of Items Used in Connection With Drug Offense.

10 I. Interests in the following property, upon petition of the attorney general, shall be subject
11 to forfeiture to the state and said property interest shall be vested in the state:

12 (a) All materials, products and equipment of any kind, including, but not limited to,
13 firearms, scales, packaging equipment, surveillance equipment and grow lights, which are used or
14 intended for use in procurement, manufacture, compounding, processing, concealing, trafficking,
15 delivery or distribution of a controlled drug in felonious violation of this chapter.

16 (b) Property interest in any conveyance, including but not limited to aircraft, vehicles, or
17 vessels, which is used or intended for use in the procurement, manufacture, compounding,
18 processing, concealing, trafficking, delivery or distribution of a controlled drug in felonious violation
19 of this chapter.

20 (c) Any moneys, coin, currency, negotiable instruments, securities or other investments
21 knowingly used or intended for use in the procurement, manufacture, compounding, processing,
22 concealing, trafficking, delivery or distribution of a controlled drug in felonious violation of this
23 chapter and all proceeds, including moneys, coin, currency, negotiable instruments, securities or
24 other investments, and any real or personal property, traceable thereto. All moneys, coin, currency,
25 negotiable instruments, securities and other investments found in proximity to controlled substances
26 are presumed to be forfeitable under this paragraph. The claimant of the property shall bear the
27 burden of rebutting this presumption.

28 (d) Any books, records, ledgers and research material, including formulae, microfilm,
29 tapes and any other data which are used or intended for use in felonious violation of this chapter.

30 (e) Any real property, including any right, title, leasehold interest, and other interest in
31 the whole of any lot or tract of land and any appurtenances or improvements, which real property is
32 knowingly used or intended for use, in any manner or part, in the procurement, manufacture,

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1 compounding, processing, concealing, trafficking, delivery or distribution of a controlled drug in
2 felonious violation of this chapter.

3 I-a. The state shall have a lien on any property subject to forfeiture under this section upon
4 seizure thereof. Upon forfeiture, the state's title to the property relates back to the date of seizure.

5 I-b. Property may be seized for forfeiture by any law enforcement agency designated by the
6 department of justice, as follows:

7 (a) Upon process issued by any justice, associate justice or special justice of the circuit or
8 superior court. The court may issue a seizure warrant on an affidavit under oath demonstrating
9 that probable cause exists for its forfeiture or that the property has been the subject of a previous
10 final judgment of forfeiture in the courts of any state or of the United States. The application for
11 process and the issuance, execution and return of process shall be subject to applicable state law.
12 The court may order that the property be seized and secured on such terms and conditions as are
13 reasonable in the discretion of the court. Such order may include an order to a financial institution
14 or to any fiduciary or bailee to require the entity to impound any property in its possession or control
15 and not to release it except upon further order of the court. The order may be made on or in
16 connection with a search warrant;

17 (b) Physically, without process on probable cause to believe that the property is subject
18 to forfeiture under this chapter; or

19 (c) Constructively, without process on probable cause to believe that the property is
20 subject to forfeiture under this chapter, by recording a notice of pending forfeiture in the registry of
21 deeds in the county where the real property is located or at the town clerk's office where the personal
22 property is located stating that the state intends to seek forfeiture of the identified property
23 pursuant to this chapter.

24 (d) A seizure for forfeiture without process under subparagraph (b) or (c) is reasonable if
25 made under circumstances in which a warrantless seizure or arrest would be valid in accordance
26 with state law.

27 ***(e) United States currency totaling \$200 or less, or a motor vehicle of \$2,000 or***
28 ***less in market value shall be exempt from seizure and forfeiture. The department of justice***
29 ***shall notify state, county, and municipal law enforcement agencies of the publications that***
30 ***such agencies may use to establish the value of a motor vehicle in the prosecuting***
31 ***authority's jurisdiction.***

32 I-c. Upon seizure of any items or property interests the property shall not be subject to
33 alienation, sequestration or attachment but is deemed to be in the custody of the department of
34 justice subject only to the order of the court.

35 ***I-d. No waiver shall be accepted by the court, for purpose of seizure or forfeiture,***
36 ***unless the court determines that it has been executed knowingly and voluntarily and has***
37 ***not been requested, induced or required by a law enforcement officer. A document***

1 *purporting to waive interest or rights in seized property shall be void and inadmissible in*
2 *court.*

3 II.(a) Upon the seizure of any personal property under paragraph I, the person making or
4 directing such seizure shall inventory the items or property interests and issue a copy of the
5 resulting report to any person or persons having a recorded interest, or claiming an equitable
6 interest in the item within 7 days of said seizure.

7 (b) Upon seizure of any real property under paragraph I, the person making or directing
8 such seizure shall notify any person having a recorded interest or claiming an equitable interest in
9 the property within 7 days of said seizure.

10 (c) The seizing agency shall cause an appraisal to be made of the property as soon as
11 possible and shall promptly send to the department of justice a written request for forfeiture. This
12 request shall include a statement of all facts and circumstances supporting forfeiture of the property,
13 including the names of all witnesses then known, and the appraised value of the property.

14 (d) The department of justice shall examine the facts and applicable law of the cases
15 referred pursuant to subparagraph (c), and if it is probable that the property is subject to forfeiture,
16 shall cause the initiation of administrative or judicial proceedings against the property. If upon
17 inquiry and examination, the department of justice determines that such proceedings probably
18 cannot be sustained or that the ends of justice do not require the institution of such proceedings, the
19 department shall make a written report of such findings and send a copy to the seizing agency, and,
20 if appropriate, shall also authorize and direct the release of the property.

21 ~~[(e) The department of justice shall, within 60 days of the seizure, file a petition in the~~
22 ~~superior court having jurisdiction under this section. If no such petition is filed within 60 days, the~~
23 ~~items or property interest seized shall be released or returned to the owners.]~~

24 II-a. Pending forfeiture and final disposition, the law enforcement agency making the
25 seizure shall:

26 (a) Place the property under seal; or

27 (b) Remove the property to a storage area for safekeeping; or

28 (c) Remove the property to a place designated by the court; or

29 (d) Request another agency to take custody of the property and remove it to an
30 appropriate location within the state; or

31 (e) In the case of moneys, file a motion for transfer of evidence under RSA 595-A:6.
32 Upon the court's granting of the motion the moneys shall be immediately forwarded to an interest-
33 bearing seized asset escrow account to be administered by the attorney general. Upon resolution of
34 the forfeiture proceeding the moneys deposited shall be transferred to the drug forfeiture fund or
35 returned to the owners thereof as directed by the court. Unless otherwise ordered by a court in a
36 specific case, interest on all moneys deposited in the seized asset escrow account shall be deposited
37 annually into the drug forfeiture fund established under RSA 318-B:17-c.

1 III. The court may order forfeiture of all items or property interests subject to the provisions
2 of paragraph I[, except as follows:

3 ~~(a) No item or property interest shall be subject to forfeiture unless the owner or owners~~
4 ~~thereof were consenting parties to a felonious violation of this chapter and had knowledge thereof.~~

5 ~~(b) No items or property interests shall be subject to forfeiture unless involved in an~~
6 ~~offense which may be charged as a felony]~~ ***as part of a criminal prosecution and following a***
7 ***conviction for a felony violation of this chapter pursuant to paragraph III-a.***

8 ***III-a.(a)(1) If a defendant in a criminal matter is represented by a public defender***
9 ***or counsel appointed by the court, the public defender or appointed counsel shall represent***
10 ***the defendant in the forfeiture proceeding and any other related criminal proceeding.***

11 ***(2) Following seizure, a defendant or any other person with an interest in***
12 ***the property shall have a right to a post-seizure hearing. The court shall give such post-***
13 ***seizure hearings priority on the court's docket.***

14 ***(3) A person with an interest in the property may petition the court for a***
15 ***hearing.***

16 ***(4) The court may hold a post-seizure hearing:***

17 ***(A) As a separate hearing; or***

18 ***(B) At the same time as a probable cause determination, a post-***
19 ***arraignment hearing, or other pretrial hearing.***

20 ***(5) A party, by agreement or for good cause, may move for one extension of no***
21 ***more than 10 days. Any motion may be supported by affidavits or other submissions.***

22 ***(6) The court shall order the return of property if it finds:***

23 ***(A) The seizure was invalid;***

24 ***(B) A criminal charge has not been filed and no extension of the filing***
25 ***period is available;***

26 ***(C) The property is not reasonably required to be held as evidence; or***

27 ***(D) The final judgment likely shall be in favor of the defendant or any***
28 ***other person with an interest in the property.***

29 ***(7) The provisions of this section shall not apply to contraband.***

30 ***(b) In a case in which the state seeks forfeiture of property the prosecuting***
31 ***authority shall file with the court a petition for forfeiture. The petition shall be a separate***
32 ***document and accompany the initial or a subsequent indictment or information. It shall***
33 ***include the following information:***

34 ***(1) A description of the property seized;***

35 ***(2) The time, date, and place of the seizure; and***

36 ***(3) A description of how the property was used in or derived from the alleged***
37 ***crime.***

1 (c)(1) *The prosecuting authority may allege, in the petition, the forfeiture of*
2 *property as a sanction related to the crime for which the defendant is charged, as part of*
3 *sentencing consideration, or through other means for the court to oversee the forfeiture*
4 *proceeding.*

5 (2) *The petition shall not be read to the jury.*

6 (3) *The prosecuting authority may amend the petition at any time before*
7 *trial.*

8 (4) *The prosecuting authority shall serve the indictment or information,*
9 *amendment, and petition as provided by the rules of the court.*

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

13 (6) *The court shall order the return of the property to the owner if the*
14 *prosecuting authority does not file an indictment or information as provided by the court's*
15 *rules, the period of an extension expires, or the court does not grant an extension.*

16 (d) *Discovery related to the forfeiture proceeding shall be subject to the rules of*
17 *criminal procedure.*

18 (e) *The court shall consider the loss of property subject to forfeiture as a*
19 *criminal sanction as part of and following the prosecution of the underlying crime.*
20 *Property may be forfeited if:*

21 (1) *The state secures a conviction under this chapter; and*

22 (2) *The state establishes by a preponderance of the evidence that the*
23 *property is an instrumentality of, or proceeds derived directly from, the crime for which the*
24 *state secured a conviction.*

25 (f) *After the defendant's conviction, the court shall hold the forfeiture*
26 *proceeding at its discretion. It shall be conducted by the court without a jury.*

27 (g) *Nothing in this paragraph shall prevent property from being forfeited as*
28 *part of:*

29 (1) *A plea agreement; or*

30 (2) *A grant of immunity or reduced punishment, with or without the filing of*
31 *a criminal charge, in exchange for testifying or assisting a law enforcement investigation*
32 *or prosecution.*

33 (h) *The court may waive the conviction requirement and grant title to the*
34 *property to the state if the prosecuting authority files a motion no fewer than 90 days after*
35 *seizure and shows by a preponderance of the evidence that, before conviction, the*
36 *defendant:*

37 (1) *Is deceased;*

1 (2) *Was deported by the United States government;*

2 (3) *Has abandoned the property; or*

3 (4) *Has fled the jurisdiction.*

4 (i) *The defendant may petition the court to determine, before trial, at trial or*
5 *upon conviction, whether the forfeiture is unconstitutionally excessive under the state or*
6 *federal constitution. The defendant shall bear the burden of establishing the forfeiture is*
7 *unconstitutionally excessive by a preponderance of the evidence at a hearing conducted by*
8 *the court without a jury. In determining whether the forfeiture is unconstitutionally*
9 *excessive, the court shall not consider the value of the property to the state, but may*
10 *consider other relevant factors including:*

11 (1) *The seriousness of the crime and its impact on the community, including*
12 *the duration of the activity, use of a firearm, and harm caused by the defendant;*

13 (2) *The extent to which the defendant participated in the crime;*

14 (3) *The extent to which the property was used in committing the crime;*

15 (4) *Whether the crime was completed or attempted;*

16 (5) *The sentence or fine to be imposed for committing the crime;*

17 (6) *The hardship to the defendant if the forfeiture of a motor vehicle would*
18 *deprive the defendant of the defendant's livelihood;*

19 (7) *An unjust hardship to the defendant's family if the property is forfeited;*
20 *and*

21 (8) *All relevant factors related to the fair market value of the property.*

22 (j)(1) *Property encumbered by a security interest shall not be forfeited. The*
23 *prosecuting authority shall return property to a secured interest holder, other than the*
24 *defendant or rightful owner, up to the value of the interest. Contraband shall not be*
25 *returned.*

26 (2) *If the property is not returned, the secured interest holder may petition*
27 *the court at any time before the court enters judgment in the criminal prosecution or*
28 *grants the motion in subparagraph (h).*

29 (3) *The court shall hear the petition within 30 days after its filing or at the*
30 *court's discretion. The hearing shall be held before the court without a jury. The court*
31 *may consolidate the hearing on the petition with any other hearing before the court in the*
32 *case.*

33 (4) *The secured interest holder shall establish by a preponderance of the*
34 *evidence the validity of the security interest, mortgage, lien, leasehold, lease, rental*
35 *agreement, or other agreement.*

1 (5) *If the secured interest holder alleges a valid interest but the prosecuting*
2 *authority seeks to proceed, the prosecuting authority shall prove by a preponderance of the*
3 *evidence that:*

4 (A) *The interest is invalid;*

5 (B) *The interest resulted from a fraudulent conveyance; or*

6 (C) *The secured interest holder consented to the use of the property in the*
7 *crime for which the defendant is charged.*

8 (6) *If the state fails to meet its burden under subparagraph (5), the court*
9 *shall order the state to relinquish claims to the property, up to the value of the interest,*
10 *and return the interest to the secured interest holder.*

11 (k)(1) *Property of an innocent owner shall not be forfeited. The prosecuting*
12 *authority summarily shall return property to such owner. Contraband shall not be*
13 *returned.*

14 (2) *If the property is not summarily returned, an innocent owner may*
15 *petition the court at any time before the court enters judgment in the criminal prosecution*
16 *or grants the motion in subparagraph (h).*

17 (3) *An innocent owner shall file with the court a simple statement that sets*
18 *forth:*

19 (A) *The owner's interest or regular use of the property;*

20 (B) *Additional facts supporting the owner's claim; and*

21 (C) *The relief sought by the owner.*

22 (4) *The court shall hear the petition within 30 days after its filing or at the*
23 *court's discretion. The hearing shall be held before the court alone without a jury. The*
24 *court may consolidate the hearing on the petition with any other hearing before the court*
25 *in the case.*

26 (5) *The innocent owner shall establish by a preponderance of the evidence*
27 *the validity of interest or regular use of the property.*

28 (6) *If the innocent owner meets the burden under subparagraph (5) and the*
29 *prosecuting authority seeks to proceed, the prosecuting authority shall prove by a*
30 *preponderance of the evidence that the innocent owner is not entitled to the property*
31 *because:*

32 (A) *The innocent owner's interest in the property is invalid;*

33 (B) *The innocent owner did not regularly use the property;*

34 (C) *The innocent owner had actual knowledge the property was used in*
35 *or derived directly from the crime for which the defendant is charged;*

36 (D) *The innocent owner was willfully blind to the crime for which the*
37 *defendant is charged; or*

1 (E) *The innocent owner was not a bona fide purchaser without notice of*
2 *any defect in title and for valuable consideration.*

3 (7) *If the prosecuting authority fails to meet its burden in subparagraph (6),*
4 *the court shall order the state to relinquish all claims and return the property to the*
5 *innocent owner.*

6 (8) *No information in the innocent owner's statement shall be used as*
7 *evidence in the criminal portion of the case.*

8 (9) *Nothing in this paragraph shall prohibit the innocent owner from*
9 *providing information to any party or testifying in any trial as to facts the innocent owner*
10 *knows.*

11 (10) *The defendant or convicted offender may invoke the right against self-*
12 *incrimination or the marital privilege during the forfeiture proceeding. The trier of fact*
13 *may draw an adverse inference from the invocation of the right or privilege.*

14 (1)(1) *If the prosecuting authority fails to meet its burden in the criminal or*
15 *forfeiture proceeding, the court shall enter judgment dismissing the forfeiture proceeding*
16 *and ordering the return of property to the innocent owner unless the owner's possession of*
17 *the property is illegal.*

18 (2) *If the prosecuting authority meets its burden in the criminal and*
19 *forfeiture proceeding, the court shall enter judgment forfeiting the property.*

20 (3) *A court may enter judgment following a hearing, pursuant to a*
21 *stipulation or plea agreement, or at the court's discretion.*

22 (m) *Upon the prosecuting authority's motion following conviction or at the*
23 *court's discretion, the court may order the forfeiture of substitute property owned solely by*
24 *the defendant up to the value of property that is beyond the court's jurisdiction or cannot*
25 *be located through due diligence, only if the state proves by a preponderance of the*
26 *evidence that the defendant intentionally:*

27 (1) *Dissipated the property;*

28 (2) *Transferred, sold, or deposited property with a third party to avoid*
29 *forfeiture;*

30 (3) *Diminished substantially the value of property; or*

31 (4) *Commingled property with other property that cannot be divided without*
32 *difficulty.*

33 (n) *A defendant shall not be jointly and severally liable for forfeiture awards*
34 *owed by other defendants. When ownership is unclear, a court may order each defendant*
35 *to forfeit property on a pro rata basis or by another means the court finds equitable.*

36 (o)(1) *A party to forfeiture proceeding, other than the defendant, may appeal the*
37 *court's decision.*

1 (2) *The defendant may appeal the court's decision regarding the seizure or*
2 *forfeiture of property following final judgment in the forfeiture proceeding.*

3 (p)(1) *If the court orders the return of property, the law enforcement agency that*
4 *holds the property shall return the property to the rightful owner within a reasonable*
5 *period not to exceed 5 days after the date of the order.*

6 (2) *The rightful owner shall not be subject to any expenses related to towing,*
7 *storage or preservation of the property.*

8 (3) *The law enforcement agency that holds the property shall be responsible*
9 *for any damages, storage fees, and related costs applicable to property returned under this*
10 *section.*

11 (q) *No law enforcement agency shall sell forfeited property directly or indirectly*
12 *to any employee of the law enforcement agency, to a person related to an employee by blood*
13 *or marriage, or to another law enforcement agency.*

14 (r)(1) *No state or local law enforcement agency shall transfer or offer for*
15 *adoption property, seized under state law, to a federal agency for the purpose of forfeiture*
16 *under the federal Controlled Substances Act, Public Law 91-513.*

17 (2) *Subparagraph (1) shall only apply to a seizure by state and or local law*
18 *enforcement agencies pursuant to their own authority under state law and without*
19 *involvement of the federal government. Nothing in this paragraph shall be construed to*
20 *limit state and local agencies from participating in joint task forces with the federal*
21 *government.*

22 (3) *No state, county, or local law enforcement agency shall accept payment*
23 *of any kind or distribution of forfeiture proceeds from the federal government in violation*
24 *of subparagraph (1). Any such law enforcement agency that violates this subparagraph*
25 *shall forfeit such proceeds to the state's general fund.*

26 ~~IV. (a) The department of justice may petition the superior court in the name of the state in~~
27 ~~the nature of a proceeding in rem to order forfeiture of items or property interests subject to~~
28 ~~forfeiture under the provisions of this section. Such petition shall be filed in the court having~~
29 ~~jurisdiction over any related criminal proceedings which could be brought under this chapter.~~

30 ~~(b) Such proceeding shall be deemed a civil suit in equity in which the state shall have~~
31 ~~the burden of proving all material facts by a preponderance of the evidence and in which the owners~~
32 ~~or other persons claiming an exception pursuant to paragraph III shall have the burden of proving~~
33 ~~such exception.~~

34 ~~(c) The court shall issue summonses to all persons who have a recorded interest or claim~~
35 ~~an equitable interest in said items or property interests seized under this chapter and shall schedule~~
36 ~~a hearing on the petition to be held within 90 days of the date specified by the court on the~~
37 ~~summonses.~~

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~~(d) At the request of any party to the forfeiture proceeding, the court may grant a continuance until the final resolution of any criminal proceedings which were brought against a party under this chapter and which arose from the transaction which gave rise to the forfeiture proceeding. No asset forfeiture may be maintained against a person's interest in property if that person has been found not guilty of the underlying felonious charge.~~

~~(e) At the hearing, the court shall hear evidence and make findings of fact and rulings of law as to whether the property is subject to forfeiture under this chapter. Except in the case of proceeds, upon a finding that the property is subject to forfeiture the court shall determine whether the forfeiture of the property is not excessive in relation to the underlying criminal offense. In making this determination the court shall consider whether in addition to any other pertinent considerations:~~

~~(1) There is a substantial connection between the property to be forfeited and the underlying drug offense;~~

~~(2) Criminal activities conducted by or through the use of the property were extensive; and~~

~~(3) The value of the property to be forfeited greatly outweighs the value of the drugs that were or would have been likely to be distributed, the costs of the investigation and prosecution, and the harm caused by the criminal conduct. The court shall, thereupon, make a final order, from which all parties shall have a right of appeal.~~

~~V.]~~ Final orders for forfeiture of property under this section shall be implemented by the department of justice and shall provide for disposition of the items or property interests by the state in any manner not prohibited by law, including retention for official use by law enforcement or other public agencies or sale at public auction. The department of justice shall pay the reasonable expenses of the forfeiture proceeding, seizure, storage, maintenance of custody, advertising, court costs, and notice of sale from any money forfeited and from the proceeds of any sale or public auction of forfeited items. All outstanding recorded liens on said items or property interests seized shall be paid in full upon conclusion of the court proceedings from the proceeds of any sale or public auction of forfeited items. The balance remaining shall be distributed by the department of justice as follows:

(a) Of the first \$600,000, \$100,000 shall be credited to the police psychological stability screening fund established in RSA 106-L:16 and from the remainder:

(1) Forty-five percent shall be returned to the fiscal officer or officers of the municipal, county, state, or federal government which provided the law enforcement agency or agencies responsible for the seizure. Moneys returned to each fiscal officer shall be deposited in a special account and shall be used primarily for meeting expenses incurred by law enforcement agencies in connection with drug-related investigations. Except as provided in RSA 31:95-b, such funds shall be available for expenditure without further appropriation by the legislative body of the

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1 municipal, county, state or federal government, and shall not be transferred or expended for any
2 other purpose. Moneys returned to a state law enforcement agency shall be deposited in a special
3 nonlapsing account established within the office of the state treasurer and shall be in addition to all
4 other state appropriations to such agency;

5 (2) Ten percent shall be deposited into a special nonlapsing account established
6 within the office of the state treasurer for the department of health and human services; and

7 (3) Forty-five percent shall be deposited in a revolving drug forfeiture fund,
8 administered by the department of justice pursuant to RSA 318-B:17-c; and

9 (b) Of any balance remaining:

10 (1) Ten percent shall be deposited in the manner prescribed in subparagraph
11 ~~[V(a)(2)]~~ **IV(a)(2)** of this section; and

12 (2) Ninety percent shall be deposited in the manner prescribed in subparagraph
13 ~~[V(a)(3)]~~ **IV(a)(3)** of this section.

14 (c) The total amount of payments made to the special account for the department of
15 health and human services pursuant to subparagraphs ~~[V(a)(2) and V(b)(1)]~~ **IV(a)(2) and IV(b)(1)**
16 of this section shall not exceed \$400,000 in any fiscal year and any excess over \$400,000 which would
17 otherwise be paid to such special account under this section shall be deposited in the general fund.
18 The revolving drug forfeiture fund shall at no time exceed \$1,000,000. All sums in the revolving
19 drug forfeiture fund in excess of \$1,000,000 shall be credited to the general fund.

20 2 Effective Date. This act shall take effect January 1, 2023.

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AMENDED ANALYSIS

This bill establishes a procedure for the forfeiture of items used in connection with a drug offense.