

HB 1609-FN – AS INTRODUCED

2014 SESSION

14-2295
05/04

HOUSE BILL ***1609-FN***

AN ACT relative to forfeiture of personal property.

SPONSORS: Rep. Warden, Hills 39; Rep. Sylvia, Belk 6; Rep. Wright, Carr 8; Rep. Bouchard, Merr 18; Rep. D. McGuire, Merr 21; Rep. Schroadter, Rock 17; Rep. O'Flaherty, Hills 12; Sen. Cataldo, Dist 6; Sen. Reagan, Dist 17

COMMITTEE: Judiciary

ANALYSIS

This bill recodifies RSA 617, relative to the forfeiture of personal property.

Explanation: Matter added to current law appears in ***bold italics***.
 Matter removed from current law appears [~~in brackets and struckthrough.~~]
 Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Fourteen

AN ACT relative to forfeiture of personal property.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 Forfeitures of Personal Property. RSA 617 is repealed and reenacted to read as follows:

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CHAPTER 617

3

FORFEITURES OF PERSONAL PROPERTY

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617:1 Definitions. As used in this chapter, the terms defined in this section have the following meanings:

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I. “Contraband” means goods that are unlawful to import, export, or possess.

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II. “Conveyance” means a device used for transportation and includes a motor vehicle, trailer, snowmobile, airplane, and vessel and any equipment attached to it. The term does not include property that is stolen or taken in violation of the law.

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III. “Instrumentality” means property otherwise lawful to possess that is used in an offense. An “instrumentality” includes a tool, a firearm, a conveyance, a computer, computer software, a telecommunications device, money, and other means of exchange.

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IV. “Law enforcement agency” means any non-federal police force, multijurisdictional task force, or other local, county or state agency that has the authority under state law or operates in cooperation with a federal agency under federal law to engage in seizure and forfeiture.

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V. “Law subject to forfeiture” means a state law that carries a felony penalty and that explicitly includes forfeiture as a punishment or sanction for the offense.

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VI. “Reasonable diligence” means a fair degree of diligence expected from someone of ordinary prudence under circumstances like those at issue.

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VII. “Willfully blind” means that, beyond a reasonable doubt, a person intentionally avoided knowledge of a crime by failing to make a reasonable inquiry about suspected wrongdoing despite being aware that it is highly probable. A showing of negligence or mistake is insufficient to support a finding of being willfully blind.

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617:2 Purpose. This chapter’s purpose is to:

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I. Deter criminal activity by reducing its economic incentives;

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II. Increase the pecuniary loss from criminal activity;

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III. Protect against the wrongful forfeiture of property; and

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IV. Ensure that only criminal asset forfeiture shall be allowed in this state.

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617:3 Exclusivity. This chapter sets out the exclusive process governing forfeitures in the state and supersedes any conflicting provisions in law.

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617:4 Criminal Asset Forfeiture; Property Subject to Forfeiture; Contraband.

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1 I. When a person is convicted of violating a law subject to forfeiture, the court, consistent
2 with this chapter, shall order the person to forfeit:

3 (a) Property the person derived directly from the commission of the crime;

4 (b) Property directly traceable to property derived directly from the commission of the
5 crime; and

6 (c) Instrumentalities the person used in the commission of the crime.

7 II. Property and instrumentalities subject to forfeiture are limited to land, buildings,
8 containers, conveyances, equipment, materials, products, money, securities, and negotiable
9 instruments; and ammunition, firearms, and ammunition-and-firearm accessories used in the
10 furtherance or commission of a violation of a law subject to forfeiture.

11 III. No property right exists in contraband, including scheduled drugs without a valid
12 prescription. Contraband is subject to seizure and shall be disposed of according to state law.
13 Contraband is not subject to forfeiture under this chapter.

14 617:5 Conviction Required; Standard of Proof.

15 I. Property used in or derived from the violation of a law is subject to forfeiture only if the
16 violation is of a law subject to forfeiture and the violation is established by proof of a criminal
17 conviction.

18 II. The state shall establish that seized property is forfeitable under RSA 617:4 by clear and
19 convincing evidence.

20 617:6 No Civil Asset Forfeiture. There is no civil forfeiture procedure in New Hampshire by
21 which the state may take possession of any property including the proceeds and instrumentalities of
22 a crime. All such forfeitures are criminal forfeitures subject to the requirements of this chapter.

23 617:7 Rule of Lenity. The court shall resolve any ambiguity in this chapter relating to the state
24 taking property through asset forfeiture in favor of the property owner.

25 617:8 Court-Appointed Counsel. If a court determines that a person opposing forfeiture is
26 financially unable to obtain representation by counsel, the court, at the request of the person, shall
27 insure that the person is represented by an attorney at the state's expense pursuant to RSA 604-A.

28 617:9 Authorization to Use Forfeiture.

29 I. Except for federal forfeitures consistent with RSA 617:36, forfeiture may occur only
30 pursuant to an explicit grant of authority in state law. An ordinance enacted by a county,
31 municipality, or other unit of government authorizing forfeiture is not valid.

32 II. A prosecutor having jurisdiction over a law subject to forfeiture has authority to pursue
33 forfeiture.

34 617:10 Substitution of Assets for Unreachable Property. Upon the state's motion following
35 conviction, the court may order the forfeiture of substitute property owned by the defendant up to the
36 value of unreachable property only if the state proves by a preponderance of the evidence that the
37 defendant intentionally transferred, sold, or deposited property with a third party to avoid the

1 court's jurisdiction.

2 617:11 No Additional Remedies. Except as otherwise provided in this chapter, the state may not
3 seek additional remedies, including but not limited to personal money judgments.

4 617:12 No Joint-and-Several Liability; Pro Rata Forfeitures. A defendant is not jointly and
5 severally liable for forfeiture awards owed by other defendants. When ownership is unclear, a court
6 may order each defendant to forfeit property on a pro rata basis proportional to the property that
7 each defendant personally received.

8 Process

9 617:13 Designating Property Subject To Forfeiture.

10 I. Property subject to forfeiture shall be identified by the state in an indictment of a grand
11 jury or by information in the court in any related criminal proceeding in which a person with an
12 interest in the property has been simultaneously charged with a violation of a law subject to
13 forfeiture.

14 II. The indictment or information shall specify the time and place of the violation, identify
15 the property, and particularly describe its use in the commission of the crime or derivation from the
16 commission of the crime.

17 III. At any time prior to trial, the state, with the consent of the court and any defendant with
18 an interest in the property, may file an ancillary charge alleging that property is subject to forfeiture.

19 617:14 Seizure with Process. At the request of the state, a court may issue an ex parte
20 preliminary order to seize or secure property for which forfeiture is sought and to provide for its
21 custody. Application, issuance, execution, and return are subject to state law.

22 617:15 Seizure Without Process. Property subject to forfeiture may be seized without a court
23 order if:

24 I. The seizure is incident to a lawful arrest or a lawful search;

25 II. The property subject to seizure has been the subject of a prior judgment in favor of the
26 state; or

27 III. The state has probable cause to believe that the delay occasioned by the necessity to
28 obtain process would result in the removal or destruction of the property and that the property is
29 forfeitable under RSA 617:4.

30 617:16 Receipt for Seized Property. When property is seized, the law enforcement officer shall
31 give an itemized receipt to the person in possession of the property; or in the absence of any person,
32 leave a receipt in the place where the property was found, if reasonably possible.

33 617:17 Bill of Particulars. A motion for a bill of particulars may be made before arraignment,
34 within 90 days after arraignment, or at any later time that the court permits. A bill of particulars
35 may be amended at any time subject to conditions that justice requires.

36 617:18 Title.

37 I. At the time of seizure or entry of a restraining order, the state acquires provisional title to

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1 the seized property. Provisional title authorizes the state to hold and protect the property.

2 II. Title to the property vests with the state when the trier of fact renders a final forfeiture
3 verdict and relates back to the time when the state acquired provisional title. However, this title is
4 subject to claims by third parties adjudicated under this chapter.

5 617:19 Storage. When property is seized, the state entity with custody of the property shall use
6 its best efforts to secure the property and prevent waste and deterioration.

7 617:20 Bond by Owner for Possession.

8 I. If the owner of property that has been seized seeks its possession before the criminal trial,
9 the owner may post bond or give substitute property in an amount equal to the fair market value of
10 the seized property at the time the bond amount is determined.

11 II. On the posting of bond or the giving of substitute property, the state shall return the
12 seized property to the owner within a reasonable period of time not to exceed 5 business days. The
13 forfeiture action may then proceed against the bond or substitute property as if it were the seized
14 property.

15 III. This section does not apply to property reasonably held for investigatory purposes.

16 617:21 Petition for Remission or Mitigation. Prior to the entry of a court's order disposing of the
17 forfeiture action, any person who has an interest in seized property may file with the state's attorney
18 general a petition for remission or mitigation of the forfeiture. The attorney general or the attorney
19 general's designee shall remit or mitigate the forfeiture upon reasonable terms and conditions if the
20 attorney general or the designee finds that:

21 I. The petitioner did not intend to violate the law; or

22 II. Extenuating circumstances justify the remission or mitigation of the forfeiture.

23 617:22 Pretrial Replevin Hearing.

24 I. Following the seizure of property under this chapter, a defendant or third-party has a
25 right to a pretrial hearing to determine the validity of the seizure.

26 II. The claimant may claim at any time prior to 60 days before trial of the related criminal
27 violation the right to possession of property by motion to the court to issue a writ of replevin.

28 III. The claimant shall file a motion establishing the validity of the alleged right, title, or
29 interest in the property.

30 IV. The court shall hear the motion no more than 30 days after the motion is filed.

31 V. The state shall file an answer showing probable cause for the seizure, or cross motions at
32 least 10 days before the hearing.

33 VI. The court shall grant the motion if it finds that:

34 (a) It is likely the final judgment will be that the state must return the property to the
35 claimant; or

36 (b) The property is the only reasonable means for a defendant to pay for legal
37 representation in the forfeiture or criminal proceeding. At the court's discretion under subparagraph

1 (b), it may order the return of funds or property sufficient to obtain legal counsel but less than the
2 total amount seized, and require an accounting.

3 VII. In lieu of ordering the issuance of the writ, the court may order the state to give security
4 for satisfaction of any judgment, including damages, that may be rendered in the action, or order
5 other relief as may be just.

6 617:23 Discovery. Discovery is subject to the rules of criminal procedure.

7 617:24 Right to Trial by Jury. Any party to a forfeiture action has a right to trial by jury.

8 617:25 Trial Proceedings.

9 I. A trial related to the forfeiture of property shall be held in a single proceeding together
10 with the trial of the related alleged crime unless the defendant moves to bifurcate the trial.

11 II. The court, upon motion of a defendant, may separate the trial of the criminal matter
12 against the defendant from the matter related to the forfeiture of property.

13 III. The court, upon motion of a defendant, shall allow a defendant to waive the right to trial
14 by jury related to the forfeiture of property while preserving the right to trial by jury of any crime
15 alleged.

16 IV. If the court bifurcates the jury trial, the court shall first instruct and submit to the jury
17 the issue of the guilt or innocence of the defendant to be determined by proof beyond a reasonable
18 doubt and shall restrict argument of counsel to those issues.

19 V. If the court bifurcates the jury trial, each party may introduce evidence in the forfeiture
20 phase that was not introduced in the criminal phase.

21 VI. If the jury finds a defendant guilty of the related criminal offense and the defendant did
22 not waive the right to trial by jury related to the forfeiture, the court shall instruct and submit to the
23 jury the issue of the forfeiture. The court may use interrogatories to address the forfeiture issue.

24 617:26 Hearing on Proportionality.

25 I. At any time including following determination by the trier of fact, the owner may petition
26 the court to determine whether the forfeiture is unconstitutionally excessive under the state or
27 federal constitution.

28 II. The owner has the burden of establishing that the forfeiture is grossly disproportional to
29 the seriousness of the offense by a preponderance of the evidence at a hearing conducted by the court
30 without a jury.

31 III. In determining whether the forfeiture of an instrumentality is constitutionally excessive,
32 the court shall consider all relevant factors, including, but not limited to:

33 (a) The seriousness of the offense and its impact on the community, including the
34 duration of the activity and the harm caused by the person whose property is subject to forfeiture;

35 (b) The extent to which the person whose property is subject to forfeiture participated in
36 the offense;

37 (c) The extent to which the property was used in committing the offense;

1 (d) The sentence imposed for committing the crime subject to forfeiture; and

2 (e) Whether the offense was completed or attempted.

3 IV. In determining the value of the instrumentality subject to forfeiture, the court shall
4 consider relevant factors, including, but not limited to:

5 (a) The fair market value of the property;

6 (b) The value of the property to the person whose property is subject to forfeiture
7 including hardship to the owner if the forfeiture is realized; and

8 (c) The hardship from the loss of a motor vehicle or other property to family members or
9 others if the property is forfeited assets.

10 V. The court shall not consider the value of the instrumentality to the state in determining
11 whether the forfeiture of an instrumentality is constitutionally excessive.

12 style="text-align:center">Third-Party Interests

13 617:27 Secured Interest.

14 I. A bona fide security interest is not subject to forfeiture unless the person claiming a
15 security interest had actual knowledge that the property was subject to forfeiture at the time that
16 the property was seized or restrained under this chapter.

17 II. A person claiming a security interest bears the burden of establishing the validity of the
18 interest by a preponderance of the evidence.

19 617:28 Ancillary Hearing of Third-Party Interests.

20 I. A person not charged in the indictment or information but who has an interest in property
21 subject to forfeiture may not intervene after the criminal trial has begun.

22 II. Following the entry of a verdict of forfeiture of property pursuant to this chapter or the
23 entry of a guilty plea in court on the record, the state shall exercise reasonable diligence to identify
24 persons with a potential interest in the property and make reasonable efforts to give notice to
25 potential claimants. The state shall provide written notice of its intent to dispose of the property to
26 any person known or alleged to have an interest in the property exempted from forfeiture under this
27 chapter, including any person potentially making claims for court-ordered child support;
28 employment-related compensation; or payment of unsecured debts. The notice shall also be made by
29 publication in a reasonable geographic area.

30 III. A person other than the defendant asserting a legal interest in the property, within 60
31 days of the date of the notice, may petition the court for a hearing to adjudicate the validity of the
32 alleged interest in the property. The petitioner shall sign the request for the hearing under penalty
33 of perjury and state the nature and extent of the petitioner's right, title, or interest in the property;
34 the time and circumstances of the petitioner's acquisition of the right, title, or interest; and any
35 additional facts supporting the petitioner's claim and the relief sought.

36 IV. Upon the filing of a petition, the court shall schedule the hearing as soon as practicable
37 but in no event later than 6 months after the sentencing of any defendant convicted upon the same

1 indictment. The court shall issue or amend a final order of forfeiture in accordance with its
2 determination if, after the hearing, the court determines that:

3 (a) The petitioner has a legal right, title, or interest in the property, and such right, title
4 or interest renders the order of forfeiture invalid in whole or in part because the right, title or
5 interest was vested in the petitioner rather the defendant or was superior to any right, title or
6 interest of the defendant at the time of the property was seized or restrained under this chapter; or

7 (b) The petitioner is a bona fide purchaser for value of the right, title, or interest in the
8 property and was at the time of purchase without cause to believe that the property was subject to
9 forfeiture under this chapter. The state has the burden of proof with respect to the issue of whether
10 the petitioner was without cause to believe that the property was subject to forfeiture at the time of
11 purchase or other acquisition of value.

12 V. A qualified indigent who wishes to contest the forfeiture of property and appears to have
13 an exempt interest has a right to court-appointed counsel as provided in RSA 617:8. In addition, the
14 court shall waive the person's court fees.

15 617:29 Innocent Partial or Joint Owner.

16 I. The property of an innocent partial or joint owner may not be forfeited under any
17 forfeiture statute. The process for determining whether a person is an innocent partial or joint
18 owner is set out in this section.

19 II. A person who has any form of partial or joint interest, including joint tenancy, tenancy in
20 common, or tenancy by the entirety, in property subject to forfeiture existing at the time the illegal
21 conduct giving rise to forfeiture occurred and who claims to be an innocent partial or joint owner
22 shall make a prima facie case that the person has a legal right, title, or interest in the property
23 seized or restrained under this chapter.

24 III. If paragraph II is satisfied and the state seeks to proceed with the forfeiture against the
25 person's ownership interest, the state shall prove by a preponderance of the evidence that the person
26 had actual knowledge of the underlying crime giving rise to the forfeiture or was willfully blind to its
27 commission.

28 IV. If paragraph III is satisfied and the person seeks to establish the person's innocent
29 owner status, the person shall show by a preponderance of the evidence that the person did all that
30 reasonably could be expected under the circumstances to prohibit, abate, or terminate the illegal use
31 of the property. The person may show that the person did all that reasonably could be expected by
32 demonstrating, among other things, that the person, to the extent permitted by law:

33 (a) Gave timely notice to an appropriate law enforcement agency of information that led
34 the person to know the conduct giving rise to a forfeiture would occur or had occurred; or

35 (b) In a timely fashion revoked or made a good-faith attempt to revoke permission for
36 those engaging in the illegal conduct to use the property or took reasonable actions in consultation
37 with a law enforcement agency to discourage or prevent the illegal use of the property.

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1 I. Currency seized and proceeds from the sale of forfeited property shall only be distributed
2 by the state treasurer following a court order, which shall include findings of fact and rulings of law.

3 II. At any time when unclaimed property or contraband held for evidentiary purposes is no
4 longer needed for that purpose, the court may order it be delivered to the state treasurer within 30
5 days, or, in the case of contraband, be destroyed within 30 days.

6 III. If the forfeiture is granted, the court shall order the property be delivered to the state
7 treasurer within 30 days, or, in the case of contraband, be destroyed within 30 days.

8 IV. Upon motion, the court may order that a portion of the currency seized or proceeds from
9 public auction be allocated to pay the reasonable non-personnel expenses of the seizure, storage, and
10 maintenance of custody of any forfeited items.

11 V. The state treasurer shall dispose of all non-currency forfeited property at public auction.
12 The auction proceeds and forfeited currency shall first be used to pay all outstanding recorded liens
13 on the forfeited property, then to comply with an order of the court to pay reasonable non-personnel
14 expenses, with all remaining funds to be deposited into the general fund.

15 617:32 Prohibition on Retaining Property; Sale Restrictions. No law enforcement agency that
16 seized property forfeited under this chapter may retain it for its own use or sell it directly or
17 indirectly to any employee of the agency, to a person related to an employee by blood or marriage, or
18 to another law enforcement agency.

19 617:33 Reporting.

20 I. On an annual basis, each law enforcement agency shall report the following information
21 about each individual seizure and forfeiture completed by the agency under state forfeiture law and
22 federal forfeiture law:

23 (a) Data on seizures and forfeitures including the following:

24 (1) Date that currency, vehicles, houses or other types of property were seized.

25 (2) Type of property seized, including year, make and model, as applicable.

26 (b) Type of alleged crime associated with the seizure of the property.

27 (c) Outcome of related criminal action, such as whether no charges were brought, a plea
28 bargain was reached, a conviction was obtained, or an acquittal was issued.

29 (d) Whether the property owner was represented by an attorney in the forfeiture case.

30 (e) Market value of the property seized.

31 (f) Gross amount received from the forfeiture.

32 (g) Total administrative and other expenses deducted as part of the forfeiture process.

33 (h) Net amount received from the forfeiture.

34 (i) Disposition of property following seizure, such as whether the property was returned
35 to the owner, destroyed, sold after forfeiture, or retained after forfeiture.

36 (j) Date of the aforementioned disposition of property.

37 (k) Whether the forfeiture resulted from an adoptive seizure. For purposes of this

1 subparagraph:

2 (1) An adoptive seizure occurs when 100 percent of the pre-seizure activity and
3 related investigations are performed by the state or local seizing agency before a request is made to
4 the federal government for adoption. There must be a state violation and a federal basis for forfeiture
5 in order for the seizure to be an adoptive seizure.

6 (2) A seizure resulting from a joint investigation or task force case is not an adoptive
7 seizure.

8 II. On an annual basis, each law enforcement agency shall report data on expenditures of
9 forfeiture funds by law enforcement agencies, including the following:

10 (a) Crime, gang, and substance-abuse prevention programs.

11 (b) Witness protection and victim reparations.

12 (c) Informant fees and buy money.

13 (d) Regular-time salaries, overtime pay, and employee benefits of prosecutors.

14 (e) Regular-time salaries, overtime pay, and employee benefits of law enforcement
15 agency personnel other than prosecutors.

16 (f) Professional or outside services, including services related to auditing, court
17 reporting, expert witnesses, and other court costs.

18 (g) Travel, meals, and entertainment.

19 (h) Training and conferences.

20 (i) Other operating expenses, including supplies.

21 (j) Vehicles purchased.

22 (k) Canines, firearms, and equipment, such as tactical gear.

23 (l) Capital expenditures, such as furniture, computers, and office equipment.

24 (m) Any other uses of forfeiture property and proceeds.

25 III. The department of justice may require information not specified in this section also be
26 reported.

27 IV. Each law enforcement agency shall file with the department of justice the report
28 required under paragraph I for the law enforcement agency and the corresponding prosecutor's
29 office. The law enforcement agency shall file separate reports for forfeitures completed under state
30 forfeiture law and federal forfeiture law. A null report shall be filed by a law enforcement agency
31 that did not engage in seizures or forfeitures during the reporting period.

32 V. The department of justice shall develop a standard form, process, and deadlines for
33 electronic data entry for annual submission of forfeiture data by law enforcement agencies. The
34 department of justice shall compile the submissions and issue an aggregate report of all forfeitures in
35 the state.

36 VI. By April 1 of each year, the department of justice shall make available on its website the
37 reports submitted by law enforcement agencies and its aggregate report. It shall distribute printed

1 copies of its aggregate report to legislators, other government officials, and the public upon request.

2 VII. The department of justice may recoup its costs by charging a fee to law enforcement
3 agencies that engage in seizures or forfeitures during the reporting period. Each law enforcement
4 agency may use forfeiture proceeds to pay the cost of compiling and reporting data under this
5 chapter, including any fee imposed by the department of justice.

6 VIII. The data and reports compiled and prepared under this chapter about completed
7 forfeitures are public information under RSA 91-A. They are not exempted from disclosure by
8 RSA 91-A:5.

9 IX. The department of justice shall include in its aggregate report recommended changes to
10 forfeiture law to better ensure that forfeiture proceedings are reported and handled in a manner that
11 is fair to crime victims, innocent property owners, secured interest holders, citizens, and taxpayers.

12 X. The department of justice shall include in its aggregate report information on law
13 enforcement agencies not in compliance with this section. It shall order the state to withhold
14 payment of any funds to those agencies until compliance is achieved.

15 Miscellaneous Provisions

16 617:34 Return of Property, Damages, and Costs.

17 I. The state shall return property to the owner within a reasonable period of time not to
18 exceed 5 days after:

19 (a) The court finds that owner had a bona fide security interest;

20 (b) The court finds that the owner was an innocent owner;

21 (c) The owner is found not guilty of the criminal charge that is the basis for the forfeiture
22 proceedings;

23 (d) The acquittal of or dismissal of the owner of the criminal charge that is the basis of
24 the forfeiture proceedings; or

25 (e) The disposal of the criminal charge that is the basis of the forfeiture proceedings by
26 nolle presequi.

27 II. If property returned under paragraph I has been damaged, the owner may make a claim
28 in court for the damages to the seized property against the agency that seized the property.

29 III. The state is responsible for any storage fees and related costs applicable to property
30 returned under paragraph I.

31 617:35 Penalty for Violations. Any person acting under color of law, official title, or position who
32 takes any action intending to conceal, transfer, withhold, retain, divert, or otherwise prevent any
33 proceeds, conveyances, real property, or any other property of value forfeited under the law of the
34 state or the United States from being applied, deposited, used, or returned to the owner in
35 accordance with this chapter is subject to a civil penalty in an amount equal to 3 times the value of
36 the forfeited property concealed, transferred, withheld, retained, or diverted.

37 617:36 Interaction with Federal Government.

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1 I. No unit of state government may transfer a criminal investigation or proceeding to the
2 federal government to circumvent state forfeiture law.

3 II. For a state government unit to transfer a criminal investigation or proceeding that
4 includes forfeiture to the federal government, a state court shall affirmatively find that:

5 (a) The suspected criminal activity giving rise to the forfeiture is interstate in nature
6 and sufficiently complex to justify the transfer; or

7 (b) The seized property is forfeitable only as a violation of federal law.

8 III. Transfers of forfeited property or proceeds from the federal government shall be to the
9 state treasurer. The state treasurer shall reimburse the state government unit involved with the
10 federal government sufficiently for investigation costs, excluding salaries, that the state government
11 unit incurred related to the seizure of the assets subject to the forfeiture action and deposit the
12 remainder in the general fund.

13 IV. In cases where a state government unit is required by federal law to accept forfeited
14 property or proceeds from the federal government the state government unit shall accept such
15 transfers and take possession of such property or proceeds. Pursuant to RSA 617:34, the state
16 government unit shall subsequently transfer such property or proceeds to the state treasurer with 5
17 days.

18 V. The state government unit shall report all transfers to the federal government of an
19 investigation or criminal proceeding that involves forfeiture per the reporting requirements in
20 RSA 617:33.

21 VI. Any person has standing in court to challenge: the transfer of a criminal investigation or
22 proceeding to the federal government or the retention of any property or proceeds by a state
23 government unit received from the federal government contrary to section.

24 617:37 Attorneys' Fees. In any forfeiture proceeding under this chapter in which the claimant
25 prevails, the state is liable for:

26 I. Reasonable attorney fees and other litigation costs reasonably incurred by the claimant.

27 II. Postjudgment interest.

28 III. In cases involving currency, other negotiable instruments, or the proceeds of an
29 interlocutory sale:

30 (a) Interest actually paid to the state from the date of seizure of the property that
31 resulted from the investment of the property in an interest-bearing account or instrument.

32 (b) An imputed amount of interest that the currency, instruments, or proceeds would
33 have earned at the rate applicable to the 30-day U.S. Treasury Bill, for any period during which no
34 interest was paid, not including any period when the property reasonably was in use as evidence in
35 an official proceeding or in conducting scientific tests for the purpose of collecting evidence,
36 commencing 15 days after the property was seized by a law enforcement agency.

37 617:38 Disposing of Property of a Person Deported.

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1 I. This section applies to disposing of property when the owner is deported from the
2 United States to a foreign country.

3 II. If the owner of property is deported after being convicted of a violation of a state law that
4 is subject to forfeiture and the property is found to be an instrumentality or proceeds directly
5 resulting from the violation of that state law, the court shall enter an order disposing of the property
6 in accordance with this chapter.

7 III. If the owner of property is deported but the owner is not convicted of violating a state
8 law that is subject to forfeiture or the property is not found to be an instrumentality or proceeds from
9 the violation of a state law subject to forfeiture for which the owner of the property is convicted, the
10 property shall be returned to the next of kin of the person deported.

11 IV. If the next of kin is not known or refuses the property, the state shall exercise reasonable
12 diligence to identify persons with a potential interest in the property and make reasonable efforts to
13 give notice to potential claimants. The state shall provide written notice to persons known or alleged
14 to have an interest in the property including other family members and any person potentially
15 making claims for court-ordered child support, employment-related compensation, or payment of
16 debts. The notice shall also be made by publication in a reasonable geographic area.

17 V. If no claim is made within 60 days of the notice's publication date, the court shall enter an
18 order disposing of the property in accordance with RSA 617:31.

19 VI. A person wanting to assert a legal claim to the property shall, within 60 days of the date
20 of the applicable notice in paragraph IV, petition the court for a hearing to adjudicate the validity of
21 the alleged interest in the property. The petition for the hearing shall be signed by the claimant
22 under penalty of perjury. It must state the nature and extent of the claimant's right, title, or interest
23 in the property; the time and circumstances of the claimant's acquisition of the right, title, or
24 interest; and any additional facts supporting the claim and the relief sought.

25 VII. The court shall schedule a hearing as soon as practicable to determine if the claimant
26 has a legal right, title, or interest in the property or is a bona fide purchaser for value of the legal
27 right, title, or interest in the property.

28 617:39 Severability. If any provision of this chapter or its application to any person or
29 circumstance is held invalid, the invalidity does not affect other provisions or applications of this
30 chapter which can be given effect without the invalid provision or application, and to this end the
31 provisions of this chapter are severable.

32 2 Forfeiture of Items Used in Connection With Drug Offense. RSA 318-B:17-b is repealed and
33 reenacted to read as follows:

34 318-B:17-b Forfeiture of Items Used in Connection With Drug Offense. Interests used in
35 connection with a drug offense may be seized and subject to forfeiture pursuant to RSA 617.

36 3 Search Warrants; Seizure, Custody and Disposition of Articles. Amend RSA 595-A:6 to read as
37 follows:

1 595-A:6 Seizure, Custody and Disposition of Articles; Exceptions. If an officer in the execution of
2 a search warrant, or by some other authorized method, finds property or articles [~~he~~] ***the officer*** is
3 empowered to take, [~~he~~] ***the officer*** shall seize and safely keep them under the direction of the court
4 or justice so long as necessary to permit them to be produced or used as evidence in any trial. Upon
5 application by a prosecutor, defendant, or civil claimants, the court, prior to trial or upon an appeal
6 after trial, shall, upon notice to a defendant and hearing, and except for good cause shown, order
7 returned to the rightful owners any stolen, embezzled or fraudulently obtained property, or any other
8 property of evidential value, not constituting contraband. This section shall apply regardless of how
9 possession of the property was obtained by the state. Photographs or other identification or analysis
10 made of the returned property shall be admissible at trial as secondary evidence, in lieu of the
11 originals, for all relevant purposes, including ownership. In the case of unknown, unapprehended
12 defendants, or defendants willfully absent from the jurisdiction, the court shall have discretion to
13 appoint a guardian ad litem to represent the interest of such unknown or absent defendants. The
14 judicial findings on such matters as ownership, identification, chain of possession or value made at
15 such an evidentiary hearing for the restoration of property to the rightful owners shall thereafter be
16 admissible at trial, to be considered with other evidence on the same issues, if any, as may be
17 admitted before the finder of fact. All other property seized in execution of a search warrant or
18 otherwise coming into the hands of the police shall be returned to the owner of the property, or shall
19 be disposed of as the court or justice orders, which may include forfeiture ***pursuant to RSA 617*** and
20 either sale or destruction as the public interest requires, in the discretion of the court or justice, and
21 in accordance with due process of law. Any property, the forfeiture and disposition of which is
22 specified in any general or special law, shall be disposed of in accordance therewith.

23 4 Repeal. The following are repealed:

- 24 I. RSA 318-B:17-c through 318-B:17-f, relative to the forfeiture of controlled drugs.
25 II. RSA 633:8 relative to the forfeiture of items used in connection with trafficking in
26 persons.
27 III. RSA 633:9 relative to administrative forfeiture of items used in connection with
28 trafficking in persons.

29 5 Effective Date. This act shall take effect January 1, 2015.

HB 1609 FISCAL NOTE

AN ACT relative to forfeiture of personal property.

FISCAL IMPACT:

The Department of Justice, Judicial Branch, Judicial Council, New Hampshire Association of Counties, and New Hampshire Municipal Association state this bill, **as introduced**, may increase state general fund revenue, decrease state restricted revenue, decrease county and local revenue, and increase state expenditures by an indeterminable amount in FY 2015 and each year thereafter. There will be no fiscal impact on county and local expenditures.

METHODOLOGY:

The Department of Justice states this bill repeals and reenacts RSA 617 to establish a new procedure for the forfeiture of personal property. The bill may impact the Department in the following ways:

- Proposed RSA 617:31, V alters how the proceeds of state forfeitures are distributed. Under current law, after payment of the Department's expenses, 10% of the recovered funds go to the Department of Health and Human Services, 45% go to the law enforcement agency or agencies involved in the drug forfeiture, and 45% is deposited into a revolving drug forfeiture fund administered by the Department of Justice. Under the bill, after payment of the law enforcement agency's expenses for seizure, storage and maintenance of the property, all proceeds are to be deposited into the general fund. The revolving drug forfeiture fund is eliminated, as is any payment to the agencies involved in the forfeiture. This portion of the bill will have a significant fiscal impact on the Department. Over the past three fiscal years, the Department retained an average of \$65,000 per year.
- The bill recodifies the laws regarding forfeiture of personal property. Under current law, the Department's Criminal Justice Bureau is responsible for handling all drug forfeitures, by way of a civil process. The bill makes the forfeiture part of a criminal proceeding and thus responsibility for forfeitures will fall with the prosecuting agency; in a small number of cases, that will be the Department. The Department will also be responsible for responding to any petition for remission or mitigation of a forfeiture, regardless of whether or not it was involved in the underlying criminal case. In FY 12, the Department handled 14 forfeitures, none of which related to criminal cases the Department prosecuted. In FY 13, the Department handled 38 forfeitures, two of which

related to criminal cases the Department prosecuted. Passage of this bill will reduce the number of forfeiture cases the Department will handle; however, the Department will still play a role if a petition for remission or mitigation is filed. As a result, the Department cannot determine how the workload will be affected.

- Funds in the drug forfeiture fund are used to support the operations of the Attorney General's Drug Task Force. The money is used to purchase investigative equipment, cover overtime expenses, and support local police departments that participate in the Task Force. In addition, if the Drug Task Force was involved in the seizure of the forfeited property or proceeds, it recovers an additional sum, which is also used to support the Task Force. Under the bill, those sources of funding are eliminated and the Department will have to seek additional general funds.
- The bill appears to prohibit the state from transferring forfeitures to the federal government, except under limited circumstances and only by court order. Under current practice, most potential state drug forfeitures in excess of \$3,000 are adopted by the US Drug Enforcement Agency. Law enforcement agencies choose to pursue federal forfeiture because the DEA will return up to 80% of the proceeds to the involved law enforcement agency or agencies, as compared to the 45% return under state law. In FY 12, the Department was involved in 39 adoptive forfeitures; in FY 13, the Department was involved in 25. The total amount received or anticipated from those forfeitures is approximately \$217,812. The bill will eliminate that stream of income to the Department, all of which is used to support the Drug Task Force.
- The bill requires every law enforcement agency to file an annual report to the Department with specific data on each seizure and forfeiture completed by the agency as well as expenses associated with the forfeitures. This bill requires the Department of Justice to develop a system of electronic data submission for these reports, and to issue an aggregate report of all forfeitures statewide and expenditures. The department is unable to determine the cost of developing this system without an analysis of all the reporting requirements and entities that are associated with forfeitures.

The Judicial Branch states that current RSA 617 sets up a relatively simple procedure for forfeiture, in which the Branch classifies proceedings as routine equity cases. The Branch projects routine equity cases will cost an average of \$234.43 in FY 2015, and \$239.53 in FY 2016; this is the projected per case cost of a forfeiture proceeding should the statute remain as is. The Branch states that the proposed bill establishes a more complicated procedure to govern forfeiture proceedings, resulting in multiple points of potential fiscal impact to the Branch. These points of impact include pre-forfeiture proceedings, jury trials on the forfeiture, and post-forfeiture proceedings such as hearings on proportional interests, third party interests, and innocent partial or joint owners. The Branch states that a new weighted caseload study would

be needed to determine the average cost of forfeiture proceedings as contemplated by the bill, but that such proceedings would be much more expensive than current proceedings. Given the complexity of the procedures in the proposed bill and the fact that a separate jury trial could result in some cases on the forfeiture alone, a criminal case with a forfeiture proceedings would qualify as two routine criminal cases – one for the criminal offense and one for the forfeiture. The Branch projects an average routine criminal case will cost \$425.27 in FY 2015, and \$433.34 in FY 2016. Therefore, the cost to the Branch of an additional criminal proceeding in such cases will be \$190.84 in FY 2015 (\$425.27 less \$234.43), and \$193.81 in FY 2016 (\$433.34 less \$239.53). These numbers do not consider the cost of any appeals that may be undertaken following trial. All costs are estimated based on case weight information from the Branch's last needs assessment completed in 2005.

The Judicial Council states the bill includes a statutory right to the assistance of counsel for a person who opposes forfeiture and cannot afford to retain counsel on his or her own. In such cases, the Council shall be responsible for paying for the attorney under the terms of RSA 604-A. The bill specifies that a person opposing forfeiture has a right to a jury trial. This bill also provides that a person facing criminal charges and a related forfeiture proceeding may seek to have the Court order that the criminal charges and the forfeiture matter be tried separately. The Council makes the following assumptions regarding the bill's fiscal impact:

- All persons opposing forfeiture, even innocent partial or joint owners, are eligible for the appointment of counsel at State expense if they cannot afford to retain counsel on their own.
- The value of the property subject to forfeiture will not be included in the analysis of the person's available funds for the purposes of determining whether the person meets the eligibility guidelines for the appointment of counsel, thus expanding the universe of people eligible for the appointment of counsel.
- The statutory order of appointment will apply to the assignment of cases under 604-A:2, II, and the court will first appoint the Public Defender Program. If the Public Defender is unavailable, then the case will be handled by a Contract Attorney. If no Contract Attorney can be found to handle the case, then it would go to a private attorney as an Assigned Counsel case.
- A forfeiture case may require the appointment of separate counsel for two or more people with a claim of title in the property subject to forfeiture.
- Jury trials will not be infrequent in forfeiture proceedings since there is no disincentive for a person opposing forfeiture to go to trial. The person either loses the property or they don't lose the property, and with the benefit of appointed counsel, there is no financial obstacle for the person opposing forfeiture to insist on a jury trial.

- There is sufficient elasticity of supply of attorney services such that the addition of several new forfeiture cases over the course of a year will not have the effect of creating pressure to increase State appropriations to the Public Defender Program.
- If an actual conflict of interest prevents the Public Defender Program from providing representation in one or more of these forfeiture cases then the representation will be provided by the Contract Attorney System. Those attorneys work on a per-unit basis. Forfeiture cases have not been assigned a unit value but would probably be paid out at the “felony” rate, or \$756.25. If a contract attorney is unavailable, then the case will go to the assigned counsel system, where the compensation is paid at \$60 per hour; there is no fee cap for a forfeiture case.

The New Hampshire Association of Counties states that to the extent the bill diminishes the number of state forfeitures, and to the extent the bill reduces or eliminates payments to counties resulting from such forfeitures, the bill will decrease county revenue by an indeterminable amount.

The New Hampshire Municipal Association states that under current law, there are instances in which a municipality may receive proceeds from forfeited property; this bill appears to eliminate that possibility. The Association states that it has no information on the amount of proceeds from forfeited property received by municipalities, and so is unable to determine the bill’s revenue impact.