

# Criminal Forfeiture Process Act

## Model Legislation

June 7, 2020

**100:1 Short title and application.** This act may be cited as the Criminal Forfeiture Process Act. It shall apply to the seizure and forfeiture of property used in and derived directly from one of the following crimes:

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| (1) Controlled substances              |            | § |
| (2) Fleeing the scene of a crime       | (optional) | § |
| (3) Driving under the influence        | (optional) | § |
| (4) Prostitution                       | (optional) | § |
| (5) <i>Drafter insert other crimes</i> | (optional) | § |

**100:2 Definitions.** The terms defined in this section have the following meanings in this chapter:

A. “Abandoned property” means personal property left by an owner who relinquishes all rights to its control. Real property may not be abandoned.

B. “Actual knowledge” means direct and clear awareness of information, a fact, or a condition.

C. “Contraband” means goods that, in themselves, are unlawful to possess, including scheduled drugs without a valid prescription and a firearm that is illegal to possess.

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

E. “Innocent owner” means an owner, an owner-in-joint-tenancy, or the defendant’s heir or assigns of property subject to forfeiture who does not have actual knowledge of the use of the property in a crime that authorizes the forfeiture of property. The term does not include the defendant or a secured interest holder.

F. “Instrumentality” means property otherwise lawful to possess that is used in a crime that authorizes the forfeiture of property. It includes land, buildings, containers, conveyances, equipment, materials, products, tools, computers, computer software, telecommunications devices, firearms, ammunition and ammunition-and-firearm accessories.

G. “Law enforcement agency” means any non-federal police force, or other local, county, or state agency that has the authority under State law to engage in seizure and forfeiture.

H. "Proceeds" means money, securities, negotiable instruments or other means of exchange obtained from the sale of property or contraband.

I. "Prosecuting authority" means a municipal attorney, solicitor, district attorney, attorney general and other attorney acting under specific direction and authority, appointed or charged by law with the responsibility for prosecuting crime.

J. "Real Property" means land and anything growing on, attached to, or erected on it including a building.

K. "Secured interest holder" means a person who is a secured creditor, mortgagee, lienholder, or other person who has a valid claim, security interest, mortgage, lien, leasehold, or other interest in the property subject to forfeiture. The term does not include the defendant or an innocent owner.

**100:3 Purpose.** Forfeiture is disfavored. This chapter's purpose is to:

- A. Deter criminal activity by reducing its economic incentives;
- B. Confiscate property used in the violation of the law and disgorge the fruit of illegal conduct; and
- C. Protect the due process rights of innocent owners.

**100:4 Jurisdiction.**

- A. There shall be no civil forfeiture under this chapter.
- B. The court that has jurisdiction in the related criminal matter shall have jurisdiction over the forfeiture proceeding.
- C. The forfeiture proceeding shall be part of the trial of the related crime. It shall follow a finding of the defendant's guilt or be conducted at the court's discretion.

**100:5 Seizure of personal property with process.** At the request of the prosecuting authority, a court may issue an ex parte order to attach, seize or secure personal property for which forfeiture is sought and to provide for its custody. Application, issuance, execution, and return are subject to State law and court rules.

**100:6 Seizure of personal property without process.** Personal property may be seized, as part of a lawful search, without a court order if:

- A. The personal property subject to forfeiture is seized incident to a lawful arrest;
- B. The State has probable cause to believe the delay caused by the necessity of obtaining process would result in the removal or destruction of the personal property that is forfeitable under this chapter; or
- C. The personal property is the subject of a prior and valid judgment of forfeiture in favor of the state.

**100:7 Seizure or restraint of real property with process.**

- A. Real property may not be seized or restrained without a court order.
- B. A court may not issue an order unless the defendant and any other person with a known interest in the property receive proper notice and are given an opportunity for a contested hearing to determine the existence of probable cause for the seizure.
- C. Nothing in this section prohibits the prosecuting authority from seeking a lis pendens or restraining order to hinder the sale or destruction of real property. However, if the prosecuting authority obtains a lis pendens or restraining order, the prosecuting authority shall notify the defendant and any other person with a known interest in the property within 30 days.
- D. Application, filing, issuance, execution, and return of any order are subject to State law and court rules.

**100:8 Contraband.** No property right exists in contraband. Contraband is subject to seizure and shall be disposed of according to State law.

**100:9 Receipt.** When property is seized, the law enforcement officer shall give an itemized receipt to the person possessing the property at the time of the seizure. If the person possessing the property is not present, the law enforcement officer will leave a receipt in the place where the property was found, if reasonably possible.

**100:10 Property exempt from seizure and forfeiture.**

- A. Homesteaded real property is exempt from seizure and forfeiture.
- B. U.S. currency totaling \$100 or less is exempt from seizure and forfeiture.
- C. A motor vehicle of less than \$1,000 in market value is exempt from seizure and forfeiture.
- D. The prosecuting authority shall advise the publications that law enforcement agencies may use to establish the value of a motor vehicle in the prosecuting authority's jurisdiction.
- E. A prosecuting authority may establish a minimum-dollar amount larger than those in paragraphs B and C in the prosecuting authority's jurisdiction.
- F. The presence or possession of U.S. currency, without other indicia of a crime that authorizes the forfeiture of property, is insufficient probable cause under State law for the seizure of U.S. currency.

**100:11 Waiver prohibition.**

- A. A law enforcement officer, other than the prosecuting authority, may not request, require or induce a person to waive, for purpose of forfeiture, the person's interest in property.
- B. A document purporting to waive interest or rights in seized property is void and inadmissible in court.

**100:12 Title.**

- A. Title to the property subject to forfeiture vests with the State when the court issues a forfeiture judgment and relates back to the time when the State seizes or restrains the property.
- B. Title to substitute assets vests when the court issues an order forfeiting substitute assets.

**100:13 Counsel.**

- A. If the defendant in the criminal prosecution is represented by a public defender, the public defender's office may authorize representation of the defendant in the forfeiture proceeding and any other related proceeding.
- B. If the defendant and any other person with an interest in the property engages in pro se representation in the forfeiture-related proceeding before a judge, the court is not bound by the common law, court rules of evidence, statutory rules of evidence, technical or formal rules of pleading or procedure in the litigation related to the forfeiture of property.

**100.14 Notice to other known owners.**

- A. The prosecuting authority shall perform a reasonable search of public records to identify any person, other than the defendant, known to have an interest in the property subject to forfeiture.
- B. The prosecuting authority shall give notice to any person identified to have an interest in the property subject to forfeiture, who is not charged or indicted. Notice must be given as provided by the rules of the court.
- C. The following language substantially and conspicuously must appear in the notice:

"WARNING: You may lose the right to be heard in court if you do not file promptly a statement of interest or ownership. You do not have to pay a filing fee to file your notice."

- D. If notice is not served on any persons appearing to have an interest in the property and no time extension is granted or the extension period has expired, the prosecuting authority or court shall order the return of the property to the person who makes a request. Contraband shall not be returned.

**100:15 Prompt post-seizure hearing.**

A. Following seizure, a defendant or any other person with an interest in the property has a right to a prompt post-seizure hearing.

B. At the court's discretion, the court may hold a prompt post-seizure hearing:

(1) as a separate hearing; or

(2) at the same time as a probable-cause determination, a post-arraignment/omnibus hearing or other pretrial hearing.

C. A person with an interest in the property may petition the court for a hearing. A party, by agreement or for good cause, may move for one extension of no more than 10 days. Any motion may be supported by affidavits or other submissions.

D. The court shall order the return of property if it finds:

(1) the seizure was invalid;

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

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

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

(5) the property is the only reasonable means for the defendant to pay for legal representation unless the prosecuting authority shows by clear and convincing evidence the property is the instrumentality of or proceeds derived directly of the crime for which the defendant is charged.

(E) At the court's discretion, it may order the return of enough funds and property, not needed as evidence, for the defendant to obtain counsel of choice but less than the total amount seized.

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

**100.16 Charging document.**

A. In any case in which the State seeks forfeiture of property, other than section 100:17, the prosecuting authority shall include the following information in a charging document:

(1) a description of the property seized;

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

(3) a description of the property used in or derived from the alleged crime.

B. The prosecuting authority may allege the forfeiture of property as an additional criminal charge under this chapter, a sanction related to the crime for which the defendant is charged, as part of sentencing consideration, or through other means to effectuate the forfeiture of property.

C. The State, with the consent of the court and a defendant with an interest in the property, may amend the charging document or file an ancillary charge alleging that property is subject to forfeiture at any time prior to trial.

D. The court may grant an unlimited number of 90-day extensions for the filing of a criminal charge if, for each extension, the court determines probable cause is shown and additional time is warranted.

E. The prosecuting authority shall serve the charging document or amendment as provided by the rules of the court.

F. The court shall order the return of the property to the owner if the prosecuting authority does not file a charging document as provided by the court's rules, the period of an extension expires, or the court does not grant an extension.

**100:17 Indictment.**

A. In a case that the State seeks forfeiture of property, other than section 100:16, the prosecuting authority shall present evidence to a grand jury supporting an indictment that includes:

- (1) a proposed criminal charge; and
- (2) an allegation for which forfeiture of property may be ordered.

B. The property-related allegation may be presented as an additional criminal charge under this chapter, a sanction related to the crime for which the defendant is charged, as part of sentencing consideration, or other means to effectuate the forfeiture of property.

C. The property-related allegation shall identify the specific property to be forfeited, if known, or the relevant forfeiture statutes, if specific property to be forfeited is not known at the time of the prosecuting authority requests the indictment.

D. Upon application of the prosecuting authority, the court may enter a restraining order or injunction, or take other action to preserve the availability of property only:

- (1) upon the issuance of an indictment according to paragraph A; or
- (2) prior to the issuance of an indictment, if the court determines there is a substantial probability the State will prevail on the issue of criminal forfeiture and that failure to enter the order will result in property being destroyed, removed from the jurisdiction, or otherwise made unavailable for forfeiture.

E. Any order entered pursuant to subparagraph (D)(2) shall be effective for not more than 90 days, unless extended by the court for good cause shown or an indictment described in subparagraph (D)(1) has been issued subsequently.

**100:18 Discovery.** Discovery related to the forfeiture proceeding is subject to the rules of criminal procedure.

**100:19 Trial, conviction required and standard of proof.**

A. Property may be forfeited if:

- (1) the State secures a conviction of a crime that authorizes the forfeiture of property; and
- (2) the State establishes by clear and convincing evidence the property is an instrumentality of or proceeds derived directly from the crime for which the State secured a conviction.

B. Nothing in this chapter prevents property from being forfeited by plea agreement.

C. A forfeiture proceeding of property of less than \$10,000 in value may be held before only a judge.

D. The court may waive the conviction requirement and grant permanent title of the property to the State if the prosecuting authority files a motion no fewer than 90 days after seizure and shows by clear and convincing evidence that, before conviction, the defendant:

- (1) died;
- (2) was deported by the U.S. government,
- (3) is granted immunity or reduced punishment in exchange for testifying or assisting a law enforcement investigation or prosecution,
- (4) fled the jurisdiction, or
- (5) abandoned the property.

D. The Court shall order property that is seized from a person who flees the jurisdiction or is abandoned be delivered to the State Treasurer. The State Treasurer shall sell all non-currency property and remit forfeiture proceeds according to section 100:30.

E. Notwithstanding provisions in this section, all property remains subject to claims by any person, other than the defendant, with an interest in the property as provided in this chapter.

**100:20 Proportionality.**

A. The defendant may petition the court to determine, before or at trial, whether the forfeiture is unconstitutionally excessive under the State or Federal constitution.

B. The defendant has the burden of establishing the forfeiture is unconstitutionally excessive by a preponderance of the evidence at a hearing conducted by the court without a jury.

C. In determining whether the forfeiture is unconstitutionally excessive, the court may consider all relevant factors including:

- (1) the seriousness of the crime and its impact on the community, including the duration of the activity and harm caused by the defendant;
- (2) the extent to which the defendant participated in the crime;
- (3) the extent to which the property was used in committing the crime;
- (4) the sentence imposed for committing the crime;
- (5) whether the crime was completed or attempted;
- (6) the hardship to the defendant if the forfeiture is realized and if the forfeiture would deprive the defendant of the defendant's livelihood; and
- (7) the hardship from the loss of property to the defendant's family members or others if the property is forfeited

D. In determining the value of the instrumentality subject to forfeiture, the court may consider all relevant factors related to the fair market value of the property.

E. The court may not consider the value of the property to the State in determining whether the forfeiture is unconstitutionally excessive.

**100:21 Secured interest holder.**

A. Property encumbered by a security interest shall not be forfeited.

B. The prosecuting authority summarily shall return property to a secured interest holder, other than the defendant or an innocent owner, up to the value of the interest. Contraband shall not be returned.

C. If the property is not summarily returned, the secured interest holder may petition the court at any time before the court enters judgment in the criminal prosecution or grants the motion in section 100:19(D).

D. The court shall hear the petition within 30 days after its filing or be conducted at the court's discretion. The hearing shall be held before the court alone, without a jury. The court may consolidate the hearing on the petition with any other hearing before the court in the case.

E. The secured interest holder must establish by clear and convincing evidence the validity of the security interest, mortgage, lien, leasehold, lease, rental agreement or other agreement.

F. If the secured interest holder alleges a valid interest but the prosecuting authority seeks to proceed, the prosecuting authority shall prove by clear and convincing evidence that:



(1) the interest is invalid; or

(2) the secured interest holder consented to the use of the property in the crime for which the defendant is charged.

G. If the State fails to meet its burden in paragraph F, the court shall order the State to relinquish claims to the property, up to the value of the interest, and return the interest to the secured interest holder.

**100:22 Innocent owner.**

A. Property of an innocent owner shall not be forfeited.

B. The prosecuting authority summarily shall return property to an innocent owner. Contraband shall not be returned.

C. If the property is not summarily returned, an innocent owner claimant may petition the court at any time before the court enters judgment in the criminal prosecution or grants the motion in section 100:19(D).

D. The innocent owner claimant shall file with the court a simple statement that sets forth:

(1) the claimant's right, title, or interest in the property;

(2) the time and circumstances of the claimant's acquisition of the interest in the property;

(3) additional facts supporting the claimant's claim; and

(4) the relief sought by the claimant.

E. The filing fee for the statement under this section is waived.

F. The court shall hear the petition within 30 days after its filing or at the court's discretion. The hearing shall be held before the court alone without a jury. The court may consolidate the hearing on the petition with any other hearing before the court in the case.

G. The claimant must establish by clear and convincing evidence the validity of the interest in the property.

H. If paragraph G is satisfied and the prosecuting authority seeks to proceed, the prosecuting authority shall prove by clear and convincing evidence the claimant is not an innocent owner because:

(1) the claimant's interest in the property is invalid;

(2) the claimant had actual knowledge the property was used in or derived directly from the crime for which the defendant is charged;

(3) the claimant was willfully blind to the crime for which the defendant is charged; or

(4) the claimant was not a bona fide purchaser without notice of any defect in title and for valuable consideration.

I. If the prosecuting authority fails to meet its burden in paragraph H, the court shall order the State to relinquish all claims and return the property to the innocent owner.

J. No information in the claimant's statement in paragraph D shall be used as evidence in the criminal - portion of the case.

K. Nothing in this section prohibits the claimant from providing information to any party or testifying in any trial as to facts the claimant knows.

L. The defendant or convicted offender may invoke the right against self-incrimination or the marital privilege during the forfeiture proceeding. The trier of fact may draw an adverse inference from the invocation of the right or privilege.

**100:23 Judgment.**

A. If the prosecuting authority fails to meet its burden as to any claim in the criminal or forfeiture proceeding, the court shall enter judgment dismissing the forfeiture proceeding and ordering the return of property to the rightful owner, unless the owner's possession of the property is illegal.

B. If the prosecuting authority meets its burden as to all claims, the court shall enter judgment forfeiting the property.

C. A court may enter judgment following a hearing, pursuant to a stipulation or plea agreement, or at the court's discretion.

**100:24 Substitution of assets.** Upon the prosecuting authority's motion following conviction or at the court's discretion, the court may order the forfeiture of substitute property owned solely by the defendant up to the value of property that is beyond the court's jurisdiction or cannot be located through due diligence, only if the State proves by a preponderance of the evidence that the defendant intentionally:

- (1) dissipated the property;
- (2) transferred, sold, or deposited property with a third party to avoid forfeiture;
- (3) diminished substantially the value of property; or
- (4) commingled property with other property that cannot be divided without difficulty.

**100:25 No additional remedies.** The State may not seek personal money judgments or other remedies related to the forfeiture of property not provided for in this chapter.

**100:26 No joint-and-several liability.** A defendant is not jointly and severally liable for forfeiture awards owed by other defendants. When ownership is unclear, a court may order each defendant to forfeit property on a pro rata basis or by another means the court finds equitable.

**100:27 Appeals.**

- A. A party to forfeiture proceeding, other than the defendant, may appeal the court's decision.
- B. The defendant may appeal the court's decision regarding the seizure or forfeiture of property following final judgement in the forfeiture proceeding.

**100:28 Attorney fees.** In any proceeding in which a property owner's claims prevails by recovering at least half, by value, of the property or currency claimed, the seizing agency shall be liable for:

- (1) reasonable attorney fees and other litigation costs incurred by the claimant;
- (2) post-judgment interest; and
- (3) in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale, any interest actually paid from the date of seizure.

**100:29 Return of property, damages and costs.**

- A. If the court orders the return of property, the law enforcement agency that holds the property shall return the property to the rightful owner within a reasonable period not to exceed 5 days after the date of the order.
- B. The rightful owner shall not be subject to any expenses related to towing, storage or preservation of the property.
- C. The law enforcement agency that holds the property is responsible for any damages, storage fees, and related costs applicable to property returned under this section.

**100:30 Disposition of property and proceeds.**

- A. At any time when contraband held as evidence is no longer needed for that purpose, the court may order it be destroyed pursuant to State law.
- B. At any time when abandoned property held as evidence is no longer needed for that purpose, the court may order it be delivered to the State treasurer.
- C. If forfeiture is granted and upon motion, the court may order the forfeited property be used to:
  - (1) pay restitution to the victim of the crime for which the defendant is convicted;
  - (2) satisfy recorded liens, mortgages or filed security interests in the forfeited property;
  - (3) pay reasonable costs for the towing, storage, maintenance, repairs and other operating costs related to the property used in the crime for which the defendant is convicted;
  - (4) reimburse the seizing law enforcement agency for non-personnel operating costs, including

controlled-drug buy money, related to investigating the crime for which the defendant is convicted; and

(5) (OPTIONAL) reimburse the seizing law enforcement agency for the salaries, benefits and overtime pay of uniformed personnel expended in the seizure of the property and investigation of the crime for which the defendant is convicted.

D. The court shall order the currency and other property be delivered to the State treasurer.

E. The State Treasurer shall sell non-currency forfeited property.

F. The State Treasurer shall use the forfeited currency and the proceeds from sale of forfeited property to comply with the court's order in paragraph C.

G. The State Treasurer shall deposit all remaining funds in the state's general fund.

**100:31 Sale restrictions.** No law enforcement agency may sell forfeited property directly or indirectly to any employee of the law enforcement agency, to a person related to an employee by blood or marriage, or to another law enforcement agency.

**100:32 Limitation on federal adoption.**

A law enforcement agency shall not offer for adoption property, seized under State law, to a federal agency for the purpose of forfeiture under the federal Controlled Substances Act, Public Law 91-513- Oct. 27, 1970, or other federal law unless the seized property includes U.S. currency that exceeds \$5,000.

**100:33 Preemption.** This chapter preempts laws by township, municipal, county and other governments in the State which regulate civil and criminal forfeiture.

**Note to drafter:** Insert references to this chapter in the crime statutes listed in section 100:1.

CONTACT INFORMATION

Mr. Lee U. McGrath

Institute for Justice

520 Nicollet Mall-Suite 550

Minneapolis MN 55402-2626

Office:(612) 435-3451

Cell:(612) 963-0196

Email:[lmcgrath@ij.org](mailto:lmcgrath@ij.org)

Main:[www.ij.org](http://www.ij.org)

Models: [www.ij.org/legislation](http://www.ij.org/legislation)