HOUSE DOCKET, NO. 1970 FILED ON: 2/16/2021

HOUSE . . . . . No. 1757

The Commonwealth of Massachusetts

PRESENTED BY:

Jay D. Livingstone

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to forfeiture reform.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	DATE ADDED:
Jay D. Livingstone	*8th Suffolk*	*2/16/2021*
Elizabeth A. Malia	*11th Suffolk*	*2/24/2021*
Tami L. Gouveia	*14th Middlesex*	*3/3/2021*
Jack Patrick Lewis	*7th Middlesex*	*9/3/2021*
Mindy Domb	*3rd Hampshire*	*10/7/2021*
Lindsay N. Sabadosa	*1st Hampshire*	*1/4/2022*
Christine P. Barber	*34th Middlesex*	*1/4/2022*

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HOUSE . . . . . No. 1757

By Mr. Livingstone of Boston, a petition (accompanied by bill, House, No. 1757) of Jay D. Livingstone, Elizabeth A. Malia and Tami L. Gouveia relative to human trafficking forfeiture reform. The Judiciary.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. *3367* OF 2019-2020.]

The Commonwealth of Massachusetts

In the One Hundred and Ninety-Second General Court
(2021-2022)

An Act relative to forfeiture reform.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 94C of the General Laws is hereby amended by striking section 47.

SECTION 2. Chapter 265 of the General Laws is hereby amended by striking section 56.

SECTION 3. Chapter 280 of the General Laws is hereby amended by inserting after section 16 the following new section:-

Section 17

(a) For the purposes of this section the following terms, shall, unless the context clearly indicates otherwise, have the following meanings:-

8 “Abandoned property”, personal property left by an owner who intentionally relinquishes
9 all rights to its control. Real property may not be abandoned.

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

11 “Contraband”, goods that are unlawful to import, export, or possess under the laws of the
12 commonwealth. “Contraband” does not include marijuana grown, manufactured, bought, sold, or
13 possessed lawfully under Massachusetts law.

14 “Constructive knowledge”, awareness of information, a fact, or a condition that a person
15 is presumed to have, since such knowledge is obtainable by the exercise of reasonable care.

16 “Conveyance”, a device used for transportation and includes a motor vehicle, trailer,
17 snowmobile, airplane, and vessel, and any equipment attached to it.

18 “Instrumentality”, property otherwise lawful to possess that is used in the furtherance or
19 commission of an offense of a law subject to forfeiture. An “instrumentality” may include land,
20 buildings, a container, a conveyance, equipment, materials, products, a tool, a computer,
21 computer software, a telecommunications device, a firearm or ammunition.

22 “Law enforcement agency”, any non-federal police department, law enforcement council,
23 or other entity with employees duly and properly authorized under the law of the commonwealth
24 to engage in seizure and forfeiture.

25 “Law subject to forfeiture”, a law of the commonwealth that carries a felony penalty and
26 that explicitly includes forfeiture as a punishment or sanction for the offense.

27 “Proceeds”, money, securities, negotiable instruments or other means of exchange
28 obtained by the sale of property.

29 (b) (1) When a person is convicted of violating a law subject to forfeiture, the court,
30 consistent with this section, may order the person to forfeit: (i) Proceeds the person derived from
31 the commission of the crime; (ii) Property directly traceable to proceeds derived from the
32 commission of the crime; and (iii) Instrumentalities the person used in the commission of the
33 crime.

34 (2) An estate of homestead, a motor vehicle of less than $10,000 in market value, and
35 U.S. currency totaling $200 or less are exempt from forfeiture.

36 (3) No property right exists in contraband. Contraband is subject to seizure and shall be
37 disposed of according to state law. Contraband is not subject to forfeiture under this section.

38 (c) Property may be forfeited if:

39 (1) the offense is a violation of section 32, 32A, 32B, 32C, 32D, 32E, 32F, 32G, 32I, 32J
40 or 40 of chapter 94C, or section 50 or 51 of chapter 256;

41 (2) the offense is established by proof of a criminal conviction; and

42 (3) the commonwealth establishes that the property is forfeitable under this section by
43 clear and convincing evidence.

44 Nothing herein prevents property from being forfeited by plea agreement approved by the
45 presiding criminal court, but only if the property is shown by clear and convincing evidence to
46 be otherwise subject to forfeiture.

47 The court may waive the conviction requirement if the commonwealth shows by clear
48 and convincing evidence that the defendant:

49 (1)died;

50 (2)was deported by the U.S. government;

51 (3)is granted immunity in exchange for testifying or otherwise assisting a law
52 enforcement investigation or prosecution; or

53 (4) without justification, failed to appear in court for a properly-noticed proceeding after
54 being charged, arraigned, and released on bail or personal recognizance, and failed to remove the
55 default within 90 days.

56 A waiver may be granted only if the property is shown by clear and convincing evidence
57 to be otherwise subject to forfeiture. Notwithstanding a motion for a waiver, the property shall
58 remain subject to claims by innocent owners, creditors and other third parties pursuant to this
59 section.

60 (d) (1) A district attorney or the attorney general may petition the superior court in the
61 name of the commonwealth, following a conviction, at which time a hearing may be held
62 wherein the court may order the forfeiture of substitute property owned by the defendant up to
63 the value of unreachable property that is beyond the court's jurisdiction or cannot be located
64 through due diligence, but only if the commonwealth proves by a preponderance of the evidence
65 that the defendant intentionally transferred, sold, or deposited property with a third party to avoid
66 the court's jurisdiction.

67 (2) The commonwealth may not seek personal money judgments or other remedies not
68 provided for in this section.

69 (f) A defendant is not jointly and severally liable for forfeiture awards owed by other
70 defendants. When ownership is unclear, a court may order each defendant to forfeit property on a
71 pro rata basis or by another means the court finds equitable.

72 (g) (1) At the request of the commonwealth at any time, a court may issue an ex parte
73 preliminary order to attach, seize or secure personal property for which forfeiture is sought and
74 to provide for its custody. Application, issuance, execution, and return are subject to the laws of
75 the commonwealth and court rules.

76 (2) Personal property subject to forfeiture may be seized at any time without a court order
77 if: (i) The seizure of personal property is incident to a lawful arrest or a search lawfully
78 conducted; (ii) The personal property subject to seizure has been the subject of a prior judgment
79 in favor of the commonwealth; or (iii) The commonwealth has probable cause to believe that the
80 delay occasioned by the necessity to obtain process would result in the removal or destruction of
81 the personal property and that the personal property is forfeitable under this section.

82 (3) The mere presence or possession of U.S. or other currency, without other indicia, is
83 insufficient probable cause for seizure.

84 (4) Seizure of real property requires a court order. A court may issue an order to seize or
85 secure real property for which forfeiture is sought only after proper notice to property owners
86 and an opportunity for a contested hearing to determine the sufficiency of probable cause for the
87 seizure. Nothing in this section prohibits the prosecuting authority from seeking a lis pendens or
88 restraining order to hinder the sale or destruction of the real property. Application, issuance,
89 execution, and return of any order are subject to the laws and court rules of the commonwealth.

90 (5) When property is seized, the law enforcement officer shall give an itemized receipt to
91 the person possessing the property; or in the absence of any person, leave a receipt in the place
92 where the property was found, if reasonably possible.

93 (6) At the time of seizure or entry of a restraining order, the commonwealth acquires
94 provisional title to the seized property. Provisional title authorizes the commonwealth to hold
95 and protect the property. Title to the property vests with the commonwealth when the trier of fact
96 renders a final forfeiture verdict and relates back to the time when the state acquired provisional
97 title. However, this title is subject to claims by third parties adjudicated under this section.

98 (h) Following the seizure of property, a defendant or third party claimant has a right to a
99 pretrial hearing to determine the validity of the seizure. Reasonable notice of the right to a
100 pretrial hearing must be provided to claimants who may have a right to possession of property.

101 At any time before trial of the related criminal offense the claimant may claim the right to
102 possession of property by motion to the court to issue a writ of replevin, which motion shall
103 establish the validity of the alleged interest in the property.

104 The court shall issue a writ of replevin if it finds that: (1) it is likely the final judgment
105 will be that the commonwealth must return the property to the claimant; (2) the property is not
106 reasonably required to be held for investigatory reasons; or (3) the property is the only
107 reasonable means for a defendant to pay for legal representation in the forfeiture or criminal
108 proceeding. At the court's discretion, it may order the return of funds or property sufficient to
109 obtain legal counsel but less than the total amount seized, and require an accounting.

110 In lieu of ordering the issuance of the writ, the court may order the commonwealth to
111 give security or written assurance for satisfaction of any judgment, including damages, that may
112 be rendered in the action, or order other relief as may be just.

113 (i) The litigation related to the forfeiture of property shall be held in a single proceeding
114 following the trial of the related alleged offense. The litigation of whether property of less than
115 $10,000 in value shall be forfeited shall be held before only a judge.

116 Within 7 days of the seizure of property or simultaneously upon filing a related criminal
117 indictment, the commonwealth shall file a forfeiture charge that shall include: (1) a description
118 of the property seized; (2) the date and place of seizure of the property; (3) the name and address
119 of the law enforcement agency making the seizure; (4) the specific statutory and factual grounds
120 for the seizure; (5) whether the property was seized pursuant to an order of seizure, and if the
121 property was seized without an order of seizure, an affidavit from a law enforcement officer
122 stating the legal and factual grounds why an order of seizure was not required; and (6) the names
123 of persons known to the commonwealth who may claim an interest in the property and the basis
124 for each person's alleged interest.

125 The charging document shall be served upon the person from whom the property was
126 seized, the person's attorney of record and all persons known or reasonably believed to claim an
127 interest in the property.

128 (j) At any time following determination of forfeiture by the trier of fact, the defendant
129 may petition the court to determine whether the forfeiture is unconstitutionally excessive under
130 the Massachusetts or federal constitution. The defendant has the burden of establishing the

131 forfeiture is grossly disproportional to the seriousness of the offense by a preponderance of the
132 evidence at a hearing conducted by the court without a jury.

133 In determining whether the forfeiture of an instrumentality is unconstitutionally
134 excessive, the court may consider all relevant factors, including, but not limited to: (a) the
135 seriousness of the offense and its impact on the community, including the duration of the activity
136 and the harm caused by the defendant; (b) the extent to which the defendant participated in the
137 offense; (c) the extent to which the property was used in committing the offense; (d) the sentence
138 imposed for committing the crime subject to forfeiture; and (e) whether the offense was
139 completed or attempted.

140 In determining the value of the instrumentality subject to forfeiture, the court may
141 consider all relevant factors, including, but not limited to: (a) the fair market value of the
142 property; (b) the value of the property to the defendant including hardship to the defendant if the
143 forfeiture is realized; and (c) the hardship from the loss of a primary residence, motor vehicle or
144 other property to the defendant's family members or others if the property is forfeited. The court
145 may not consider the value of the instrumentality to the commonwealth in determining whether
146 the forfeiture of an instrumentality is constitutionally excessive.

147 (k) Property encumbered by a bona fide security interest is not subject to forfeiture. A
148 person claiming a security interest must establish by a preponderance of the evidence the validity
149 of the interest perfected under law, or a lease or rental agreement. The prosecuting authority shall
150 summarily return property to the person with a bona fide security interest.

151 If the person alleges a valid security interest but the commonwealth seeks to proceed with
152 the forfeiture against the property, the commonwealth shall prove by a preponderance of the

153 evidence that the person had actual knowledge of the underlying crime giving rise to the
154 forfeiture.

155 (l) A conveyance used by any person as a common carrier in the transaction of business
156 as a common carrier is not subject to forfeiture, unless the commonwealth proves by a
157 preponderance of the evidence that the owner or other person in charge of the conveyance had
158 actual knowledge of the underlying crime giving rise to the forfeiture.

159 A conveyance is not subject to forfeiture if the underlying crime giving rise to the
160 forfeiture was committed by a person other than the owner of the conveyance while the
161 conveyance was stolen or taken in violation of the law.

162 (m) The property of an innocent owner may not be forfeited. A person who has an
163 ownership interest in property subject to forfeiture existing at the time the illegal conduct giving
164 rise to forfeiture occurred, or who acquired an ownership interest in property subject to forfeiture
165 after the commission of a crime giving rise to forfeiture, and who claims to be an innocent owner
166 bears the burden of proving by clear and convincing evidence that the person has a legal right,
167 title, or interest in the property seized under this section.

168 If the commonwealth seeks to proceed with the forfeiture against the property, the
169 commonwealth shall prove by clear and convincing evidence that the person had actual or
170 constructive knowledge of the underlying crime giving rise to the forfeiture, or, in the case of a
171 person who acquired an ownership interest in property subject to forfeiture after the commission
172 of a crime giving rise to forfeiture, the commonwealth shall prove by clear and convincing
173 evidence that at the time the person acquired the property the person: (a) had actual or

174 constructive knowledge that the property was subject to forfeiture; or (b) was not a bona fide
175 purchaser without notice of any defect in title and for valuable consideration.

176 If the commonwealth fails to meet its burden of proof, the court shall find that the person
177 is an innocent owner and shall order the commonwealth to relinquish all claims of title to the
178 property. The defendant or convicted offender may invoke the right against self-incrimination or
179 the marital privilege during the forfeiture-related stage of the prosecution. The trier of fact at the
180 hearing may not draw an adverse inference from the invocation of the right or privilege.

181 (n) (1) At any time when unclaimed property or contraband held for evidentiary purposes
182 is no longer needed for that purpose, the court may order it be delivered to the state treasurer
183 within 30 days, or, in the case of contraband, be destroyed within 30 days. If the forfeiture is
184 granted, the court shall order the property be delivered to the treasurer within 30 days. All
185 abandoned property shall be delivered to the treasurer within 30 days.

186 The treasurer shall dispose of all non-currency forfeited and abandoned property at public
187 auction. The auction proceeds and forfeited currency shall first be used to pay all outstanding
188 recorded liens on the forfeited property, then to comply with an order of the court to pay
189 reasonable non-personnel expenses, with all remaining funds to be deposited into the general
190 fund.

191 Upon motion, the court may order that a portion of the currency seized or proceeds from
192 public auction be used to pay reasonable non-personnel expenses of the seizure, storage, and
193 maintenance of custody of any forfeited items.

194 (2) Forfeited property received from another jurisdiction, including the federal
195 government, shall be transferred to the treasurer, sold by the treasurer or designee, and deposited

196 in the general fund. Proceeds from the sale of forfeited property received from another
197 jurisdiction, including the federal government, must be transferred to the treasurer and deposited
198 in the general fund.

199 If federal law prohibits compliance with this subsection, state and local law enforcement
200 agencies shall be prohibited from seeking or accepting forfeited property or proceeds from the
201 federal government.

202 (3) No law enforcement agency may retain forfeited or abandoned property for its own
203 use or sell it directly or indirectly to any employee of the agency, to a person related to an
204 employee by blood or marriage, or to another law enforcement agency.

205 (o) On an annual basis, each law enforcement agency shall report to the attorney general
206 the following information about seizures and forfeitures completed by the agency under this
207 section and federal forfeiture law: (1) the total number of seizures of currency; (2) the total
208 number of seizures and the number of items in each class of property seized including vehicles,
209 houses, and other types of property seized; (3) the market value of each class of property seized
210 including currency, vehicles, houses, and other types of property seized; (4) the total number of
211 occurrences of each class of crime underlying the forfeitures including controlled substances,
212 driving while intoxicated, and other crimes; and (5) any additional information as directed by the
213 attorney general.

214 The attorney general shall develop a uniform protocol for the annual submission of
215 forfeiture data by law enforcement agencies. If a law enforcement agency fails to file a report
216 within 30 days after it is due, the attorney general may compel compliance.

217 Each law enforcement agency shall file with the attorney general separate reports for
218 forfeitures completed under this section and under federal forfeiture law. A null report shall be
219 filed by a law enforcement agency that did not engage in seizures or forfeitures during the
220 reporting period. The attorney general shall compile the submissions and issue an aggregate
221 report of all forfeitures in the state.

222 By April 1 of each year, the attorney general shall make available on its website the
223 reports submitted by each law enforcement agency and its aggregate report.

224 (p) The law enforcement agency that holds the property shall return property to the owner
225 within a reasonable period of time not to exceed five days after: (1) the court finds that the owner
226 had a bona fide security interest; (2) the court finds that the owner was an innocent owner; (3)
227 the acquittal of or dismissal of the owner of the criminal charge that is the basis of the forfeiture
228 proceedings; or (4) the disposal of the criminal charge that is the basis of the forfeiture
229 proceedings by nolle prosequi.

230 The law enforcement agency that holds the property is responsible for any damages,
231 storage fees and related costs applicable to property returned under this subsection.

232 (q) A law enforcement agency or prosecuting authority may not enter into an agreement
233 to transfer or refer seized property to a federal agency directly, indirectly, by adoption, through
234 an intergovernmental joint taskforce or by other means for the purposes of forfeiture litigation
235 and instead must refer the seized property to the local district attorney or the attorney general for
236 forfeiture litigation under this section unless the seized property includes U.S. currency in excess
237 of $50,000. Nothing in this subsection shall be construed to limit or prohibit Massachusetts law

238 enforcement agencies from collaborating with a federal agency to seize contraband and property

239 that law enforcement has probable cause to believe is the proceeds or instruments of a crime.