SENATE DOCKET, NO. 2388 FILED ON: 1/20/2023

SENATE . . . . . No. 1052

The Commonwealth of Massachusetts

PRESENTED BY:

Liz Miranda

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:
Liz Miranda	*Second Suffolk*

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SENATE . . . . . No. 1052

By Ms. Miranda, a petition (accompanied by bill, Senate, No. 1052) of Liz Miranda for legislation relative to criminal forfeiture. The Judiciary.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. *965* OF 2021-2022.]

The Commonwealth of Massachusetts

In the One Hundred and Ninety-Third General Court
(2023-2024)

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:-

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

"Actual knowledge", direct and clear awareness of information, a fact, or a condition.

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

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

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

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

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

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

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

(b) (1) When a person is convicted of violating a law subject to forfeiture, the court, consistent with this section, may order the person to forfeit: (i) Proceeds the person derived from

the commission of the crime; (ii) Property directly traceable to proceeds derived from the commission of the crime; and (iii) Instrumentalities the person used in the commission of the crime.

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

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

(c) Property may be forfeited if:

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

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

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

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

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

(1) died;

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

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

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

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

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

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

(e) 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.

(f) (1) At the request of the commonwealth at any time, a court may issue an ex parte preliminary 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 the laws of the commonwealth and court rules.

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

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

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

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

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

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

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

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

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

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

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

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

(i) At any time following determination of forfeiture by the trier of fact, the defendant may petition the court to determine whether the forfeiture is unconstitutionally excessive under the Massachusetts or federal constitution. The defendant has the burden of establishing the forfeiture is grossly disproportional to the seriousness of the offense by a preponderance of the evidence at a hearing conducted by the court without a jury.

In determining whether the forfeiture of an instrumentality is unconstitutionally excessive, the court may consider all relevant factors, including, but not limited to: (a) the

seriousness of the offense and its impact on the community, including the duration of the activity and the harm caused by the defendant; (b) the extent to which the defendant participated in the offense; (c) the extent to which the property was used in committing the offense; (d) the sentence imposed for committing the crime subject to forfeiture; and (e) whether the offense was completed or attempted.

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

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

If the person alleges a valid security interest but the commonwealth seeks to proceed with the forfeiture against the property, the commonwealth shall prove by a preponderance of the evidence that the person had actual knowledge of the underlying crime giving rise to the forfeiture.

(k) A conveyance used by any person as a common carrier in the transaction of business as a common carrier is not subject to forfeiture, unless the commonwealth proves by a

preponderance of the evidence that the owner or other person in charge of the conveyance had actual knowledge of the underlying crime giving rise to the forfeiture.

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

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

If the commonwealth seeks to proceed with the forfeiture against the property, the commonwealth shall prove by clear and convincing evidence that the person had actual or constructive knowledge of the underlying crime giving rise to the forfeiture, or, in the case of a person who acquired an ownership interest in property subject to forfeiture after the commission of a crime giving rise to forfeiture, the commonwealth shall prove by clear and convincing evidence that at the time the person acquired the property the person: (a) had actual or constructive knowledge that the property was subject to forfeiture; or (b) was not a bona fide purchaser without notice of any defect in title and for valuable consideration.

If the commonwealth fails to meet its burden of proof, the court shall find that the person is an innocent owner and shall order the commonwealth to relinquish all claims of title to the property. The defendant or convicted offender may invoke the right against self-incrimination or

the marital privilege during the forfeiture-related stage of the prosecution. The trier of fact at the hearing may not draw an adverse inference from the invocation of the right or privilege.

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

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

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

(2) Forfeited property received from another jurisdiction, including the federal government, shall be transferred to the treasurer, sold by the treasurer or designee, and deposited in the general fund. Proceeds from the sale of forfeited property received from another jurisdiction, including the federal government, must be transferred to the treasurer and deposited in the general fund.

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

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

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

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