

## CHAPTER 4

### CHAPTER 4, LAWS 2002

#### AN ACT

RELATING TO FORFEITURE OF PROPERTY; ENACTING THE FORFEITURE ACT; PROVIDING PROCEDURES FOR THE SEIZURE, FORFEITURE AND DISPOSAL OF CERTAIN PROPERTY SUBJECT TO FORFEITURE; AMENDING, REPEALING AND ENACTING SECTIONS OF THE NMSA 1978.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--Sections 1 through 8 of this act may be cited as the "Forfeiture Act".

Section 2. PURPOSE OF ACT--APPLICABILITY.--

A. The purposes of the Forfeiture Act are:

(1) to make uniform the standards and procedures for the seizure and forfeiture of property subject to forfeiture; and

(2) to protect the constitutional rights of persons accused of a crime and of innocent persons holding interests in property subject to forfeiture.

B. The Forfeiture Act applies to:

(1) seizures, forfeitures and dispositions of property subject to forfeiture pursuant to laws that specifically apply the Forfeiture Act; and

(2) seizures, forfeitures and dispositions of property subject to forfeiture pursuant to other laws; but only to the extent that the procedures in the Forfeiture Act for seizing, forfeiting or disposing of property are consistent with any procedures specified in those laws.

Section 3. DEFINITIONS.--As used in the Forfeiture Act:

A. "conviction" or "convicted" means that a person has been found guilty of a crime in the trial court whether by a plea of guilty or nolo contendere or otherwise and whether the sentence is deferred or suspended;

B. "crime" means a violation of a criminal statute for which property of the offender is subject to seizure and forfeiture;

C. "law enforcement agency" means the employer of a law enforcement officer that has made a seizure of property pursuant to the Forfeiture Act;

D. "law enforcement officer" means a state or municipal police officer, county sheriff, deputy sheriff, conservation officer, motor transportation enforcement officer or other state employee authorized by state law to enforce criminal statutes, but "law enforcement officer" does not include correctional officers;

E. "owner" means a person who has a legal or equitable ownership interest in property;

F. "property" means tangible or intangible personal property or real property;

G. "property subject to forfeiture" means property described and declared to be subject to forfeiture by a state law outside of the Forfeiture Act; and

H. "secured party" means a person with a security or other protected interest in property, whether arising by mortgage, security agreement, lien, lease or otherwise; the purpose of which interest is to secure the payment of a debt or protect a potential debt owed to the secured party.

Section 4. SEIZURE OF PROPERTY.--Property may be seized by a law enforcement officer:

A. pursuant to an order of seizure issued by a district court based on a sworn application of a law enforcement officer from which a determination is made by the court that:

(1) there is a substantial probability that:

(a) the property is subject to forfeiture;

(b) the state will prevail on the issue of forfeiture; and

(c) failure to enter the order will result in the property being destroyed, removed from the state or otherwise made unavailable for forfeiture; and

(2) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship to the owner and other parties known to be claiming interests in the property; and

B. without a prior court order, if the property alleged to be property subject to forfeiture is not a residence or a business, when:

(1) the seizure is incident to an arrest for a crime, a search conducted pursuant to a search warrant or an inspection conducted pursuant to an administrative inspection warrant and the law enforcement officer making the arrest or executing the search or inspection warrant has probable cause to believe the property to be property subject to forfeiture and that the subject of the arrest, search warrant or inspection warrant is an owner of the property; or

(2) the law enforcement officer making the seizure has probable cause to believe the property is property subject to forfeiture and that the delay occasioned by the need to obtain a court order would frustrate the seizure.

Section 5. COMPLAINT OF FORFEITURE--SERVICE OF PROCESS.--

A. Within thirty days of making a seizure, the state shall file a complaint of forfeiture or return the property to the person from whom it was seized. A complaint of forfeiture 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) if the property was seized pursuant to an order of seizure, the sworn application of the law enforcement officer for the order, 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 state who may claim an interest in the property set forth in both the caption and in the complaint and the basis for each person's alleged interest.

B. The complaint shall be served upon the person from whom the property was seized, and, if that person is a criminal defendant, upon the person's attorney of record and upon all persons known or reasonably believed by the state to claim an interest in the property. A copy of the complaint shall also be published no less than three times in a newspaper of general

circulation in the district of the court having jurisdiction.

Section 6. COURT HEARING AND DETERMINATION.--

A. Claims to the property shall be filed by way of answer to the complaint of forfeiture and shall be filed within thirty days of the date of service of the complaint.

B. The district courts have jurisdiction over forfeiture proceedings, and venue for a forfeiture proceeding is in the same court in which venue lies for the criminal matter for which the property is alleged to be subject to forfeiture.

C. The forfeiture proceeding shall be brought in the same proceeding as the criminal matter and presented to the same trier of fact; provided:

(1) the two issues shall be bifurcated;

(2) the rules of criminal procedure shall apply in the criminal matter and the rules of civil procedure shall apply in the forfeiture proceeding; and

(3) if the criminal defendant is represented by the public defender department, the chief public defender or the district public defender may authorize department representation of the defendant in the forfeiture proceeding.

D. If the state fails to prove, by clear and convincing evidence, that the person charged with the crime for which the property is alleged to be property subject to forfeiture is the owner of the property:

(1) the forfeiture proceeding shall be dismissed and the property shall be delivered to the owner, unless possession of the property is illegal; and

(2) the owner shall not be subject to any charges by the state for storage of the property or expenses incurred in the preservation of the property.

E. The court shall enter a judgment of forfeiture and the property shall be forfeited to the state if the state proves by clear and convincing evidence that:

(1) the property is subject to forfeiture;

(2) the criminal prosecution of the owner has resulted in a conviction; and

(3) the value of the property to be forfeited does not unreasonably exceed:

(a) the pecuniary gain derived or sought to be derived by the crime;

(b) the pecuniary loss caused or sought to be caused by the crime; or

(c) the value of the convicted owner's interest in the property.

Section 7. DISPOSITION OF FORFEITED PROPERTY.--

A. Unless possession of the property is illegal or a different disposition is specifically provided for by law and except as provided in Subsection C of this section, forfeited property, if it is not currency, shall be sold at public sale by the law enforcement agency in possession of the property. Forfeited currency and all sale proceeds of the sale of forfeited property shall be distributed:

(1) first, to pay reasonable expenses incurred for storage, protection and sale of the property;

(2) second, any remaining balance to pay restitution to or on behalf of victims, if any, of the crime related to the forfeiture; and

(3) third, any remaining balance to the general fund of the governing body of the seizing law enforcement agency to be used for drug abuse treatment services, for drug prevention and education programs, for other substance abuse demand-reduction initiatives or for enforcing narcotics law violations, except:

(a) for forfeitures of property arising from Chapter 17 NMSA 1978, the balance shall be deposited in the game protection fund in an amount equal to the expenditures to prosecute the forfeiture and the crime, with the net balance to be deposited in the general fund; and

(b) for forfeiture of property arising from Chapter 18, Article 6 NMSA 1978, the balance shall be used for the restoration, stabilization, protection and preservation of the affected cultural property, with the net balance to be deposited in the general fund.

B. Any property interest forfeited to the state and disposed of pursuant to the Forfeiture Act is subject to the

interest of a secured party unless, at the forfeiture proceeding, the state proves by clear and convincing evidence that the secured party knew or should have known of the crime.

C. If, at the forfeiture proceeding, the state proves, by clear and convincing evidence, that the person convicted of the crime for which the property is subject to forfeiture is a co-owner of the property but fails to prove that the other co-owner knew or should have known of the crime then, at the option of the co-owner not convicted of the crime:

(1) the co-owner not convicted of the crime may buy the forfeited interest from the law enforcement agency at a private sale for the fair market value. Proceeds received by the state from the sale shall be disposed of pursuant to Paragraphs (1) through (3) of Subsection A of this section;

(2) the law enforcement agency shall sell the entire ownership interest at a public sale pursuant to Subsection A of this section except that the proceeds shall first be used to purchase the ownership interest, at fair market value, of the co-owner not convicted of the crime; or

(3) the law enforcement agency shall sell only the forfeited interest at a public sale pursuant to Subsection A of this section and the purchaser becomes a co-owner with the co-owner not convicted of the crime.

D. The law enforcement agency shall notify all known co-owners of forfeited property that were not convicted of the crime not less than thirty days before a proposed public sale of the property. If, within the thirty days, the co-owners notify the law enforcement agency of an option made pursuant to Subsection C of this section, the law enforcement agency shall make the sale pursuant to the option selected. If no option is selected by the co-owners or if all of the co-owners not convicted of the crime cannot agree on one option, then the sale shall be made pursuant to Paragraph (3) of Subsection C of this section.

#### Section 8. SAFEKEEPING OF SEIZED PROPERTY PENDING DISPOSITION.--

A. Seized currency alleged to be subject to forfeiture shall be deposited with the clerk of the district court in an interest-bearing account.

B. Seized property other than currency or real property, not required by federal or state law to be destroyed, shall be:

- (1) placed under seal; and
- (2) removed to a place designated by the district court; or
- (3) held in the custody of a law enforcement agency.

C. Property shall be kept by the custodian in a manner to protect it from theft or damage and, if ordered by the district court, insured against those risks.

Section 9. Section 17-2-20.1 NMSA 1978 (being Laws 1979, Chapter 321, Section 1, as amended) is amended to read:

"17-2-20.1. SEIZURE AND FORFEITURE--PROPERTY SUBJECT.--

A. All firearms and bows and arrows may be subject to seizure and forfeiture when used as instrumentalities in the commission of the following crimes:

- (1) illegal possession or transportation of big game during closed season;
- (2) taking big game during closed season;
- (3) attempting to take big game by the use of spotlight or artificial light; and
- (4) exceeding the bag limit on any big game species during open season.

B. Any motor vehicle shall be subject to seizure and forfeiture when operated in violation of the provisions of Section 17-2-31 NMSA 1978, regarding hunting by spotlight.

C. The provisions of the Forfeiture Act apply to the seizure, forfeiture and disposal of property subject to forfeiture pursuant to Subsections A and B of this section."

Section 10. Section 18-6-9.3 NMSA 1978 (being Laws 1993, Chapter 176, Section 11) is amended to read:

"18-6-9.3. CULTURAL PROPERTY--FORFEITURE OF INSTRUMENTS.--Any instrument, vehicle, tool or equipment used or intended to be used to violate the provisions of the Cultural Properties Act is subject to forfeiture, and the provisions of the Forfeiture Act apply to the seizure, forfeiture and disposal of such property."

Section 11. Section 30-3-8.1 NMSA 1978 (being Laws 1993, Chapter 78, Section 2) is amended to read:

"30-3-8.1. SEIZURE AND FORFEITURE OF MOTOR VEHICLE--  
PROCEDURE.--

A. A motor vehicle shall be subject to seizure and forfeiture when the vehicle is used or intended for use in the commission of the offense of shooting at or from a motor vehicle pursuant to Subsection B of Section 30-3-8 NMSA 1978.

B. The provisions of the Forfeiture Act apply to the seizure, forfeiture and disposal of a motor vehicle subject to forfeiture pursuant to Subsection A of this section."

Section 12. Section 30-7-2.3 NMSA 1978 (being Laws 1994, Chapter 22, Section 3) is amended to read:

"30-7-2.3. SEIZURE AND FORFEITURE OF A HANDGUN POSSESSED OR TRANSPORTED BY A PERSON IN VIOLATION OF UNLAWFUL POSSESSION OF A HANDGUN BY A PERSON.--

A. A handgun is subject to seizure and forfeiture by a law enforcement agency when the handgun is possessed or transported by a person in violation of the offense of unlawful possession of a handgun by a person.

B. The provisions of the Forfeiture Act apply to the seizure, forfeiture and disposal of a handgun subject to forfeiture pursuant to Subsection A of this section."

Section 13. Section 30-16B-9 NMSA 1978 (being Laws 1991, Chapter 112, Section 9) is amended to read:

"30-16B-9. FORFEITURE--PROCEDURE.--The provisions of the Forfeiture Act apply to the seizure, forfeiture and disposal of property subject to forfeiture under the Unauthorized Recording Act."

Section 14. Section 30-19-10 NMSA 1978 (being Laws 1963, Chapter 303, Section 19-10) is amended to read:

"30-19-10. FORFEITURE OF EQUIPMENT.--Any gambling device or other equipment of any type used in gambling is subject to forfeiture, and the provisions of the Forfeiture Act apply to the seizure, forfeiture and disposal of such property."

Section 15. Section 30-31-35 NMSA 1978 (being Laws 1972, Chapter 84, Section 34, as amended) is amended to read:



"30-31-35. FORFEITURE--PROCEDURE.--The provisions of the Forfeiture Act apply to the seizure, forfeiture and disposal of property subject to forfeiture and disposal under the Controlled Substances Act."

Section 16. Section 30-31A-10 NMSA 1978 (being Laws 1983, Chapter 148, Section 10) is amended to read:

"30-31A-10. FORFEITURE--PROCEDURE.--The provisions of the Forfeiture Act apply to the seizure, forfeiture and disposal of property subject to forfeiture and disposal under the Imitation Controlled Substances Act."

Section 17. Section 30-42-4 NMSA 1978 (being Laws 1980, Chapter 40, Section 4) is amended to read:

"30-42-4. PROHIBITED ACTIVITIES--PENALTIES.--

A. It is unlawful for any person who has received any proceeds derived, directly or indirectly, from a pattern of racketeering activity in which the person has participated, to use or invest, directly or indirectly, any part of the proceeds or the proceeds derived from the investment or use thereof in the acquisition of any interest in, or the establishment or operation of, any enterprise. Whoever violates this subsection is guilty of a second degree felony.

B. It is unlawful for any person to engage in a pattern of racketeering activity in order to acquire or maintain, directly or indirectly, any interest in or control of any enterprise. Whoever violates this subsection is guilty of a second degree felony.

C. It is unlawful for any person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs by engaging in a pattern of racketeering activity. Whoever violates this subsection is guilty of a second degree felony.

D. It is unlawful for any person to conspire to violate any of the provisions of Subsections A through C of this section. Whoever violates this subsection is guilty of a third degree felony.

E. Whoever violates Subsection A, B, C or D of this section in addition to the prescribed penalties shall forfeit to the state of New Mexico:

(1) any interest acquired or maintained in violation of the Racketeering Act; and

(2) any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over any enterprise that he has established, operated, controlled, conducted or participated in the conduct of in violation of the Racketeering Act.

F. The provisions of the Forfeiture Act apply to the seizure, forfeiture and disposal of property described in Subsection E of this section."

Section 18. Section 30-45-7 NMSA 1978 (being Laws 1989, Chapter 215, Section 7) is amended to read:

"30-45-7. FORFEITURE OF PROPERTY.--

A. The following are subject to forfeiture:

(1) all computer property, equipment or products of any kind that have been used, manufactured, acquired or distributed in violation of the Computer Crimes Act;

(2) all materials, products and equipment of any kind that are used or intended for use in manufacturing, using, accessing, altering, disrupting, copying, concealing, destroying, transferring, delivering, importing or exporting any computer property or computer service in violation of the Computer Crimes Act;

(3) all books, records and research products and materials involving formulas, microfilm, tapes and data that are used or intended for use in violation of the Computer Crimes Act;

(4) all conveyances, including aircraft, vehicles or vessels, that are used or intended for use to transport or in any manner to facilitate the transportation of property described in this subsection for the purpose of violating the Computer Crimes Act;

(5) all property, real, personal or mixed, that has been used or intended for use, maintained or acquired in violation of the Computer Crimes Act; and

(6) all money or proceeds that constitute an instrumentality or derive from a violation of the Computer Crimes Act.

B. The provisions of the Forfeiture Act apply to the

seizure, forfeiture and disposal of property subject to forfeiture pursuant to Subsection A of this section."

Section 19. Section 60-7A-4.1 NMSA 1978 (being Laws 1985, Chapter 179, Section 1, as amended) is amended to read:

"60-7A-4.1. UNLAWFUL SALE OF ALCOHOLIC BEVERAGES--CRIMINAL PENALTY--FORFEITURE.--

A. It is unlawful for any person to sell or attempt to sell alcoholic beverages at any place other than a licensed premises or as otherwise provided by the Liquor Control Act.

B. Any person who violates the provisions of Subsection A of this section is guilty of a fourth degree felony.

C. Any conveyance used or intended to be used for the purpose of unlawful sale of alcoholic beverages or money which is the fruit or instrumentality of the crime is subject to forfeiture, and the provisions of the Forfeiture Act apply to the seizure, forfeiture and disposal of such property."

Section 20. Section 60-7A-5 NMSA 1978 (being Laws 1981, Chapter 39, Section 51, as amended) is amended to read:

"60-7A-5. MANUFACTURE, SALE OR POSSESSION FOR SALE WHEN NOT PERMITTED BY LIQUOR CONTROL ACT--CRIMINAL PENALTY--FORFEITURE.--

A. It is unlawful for any person to manufacture for the purpose of sale, possess for the purpose of sale, offer for sale or sell any alcoholic beverages in the state except under the terms and conditions of the Liquor Control Act.

B. Any person who violates the provisions of Subsection A of this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Any conveyance used or intended to be used for the unlawful manufacture or sale of alcoholic beverages or any money that is the fruit or instrumentality of unlawful manufacture or sale of alcoholic beverages is subject to forfeiture, and the provisions of the Forfeiture Act apply to the seizure, forfeiture and disposal of such property."

Section 21. Section 60-7A-6 NMSA 1978 (being Laws 1981, Chapter 39, Section 52, as amended) is amended to read:

"60-7A-6. POSSESSION OF LIQUOR MANUFACTURED OR SHIPPED IN VIOLATION OF LAW--FOURTH DEGREE FELONY--PENALTY--FORFEITURE.--

A. It is unlawful for any person to have in his possession with the intent to sell or resell any alcoholic beverages which to that person's knowledge have been manufactured or transported into this state in violation of the laws of this state.

B. Any person who violates the provisions of Subsection A of this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Any conveyance used or intended to be used for the unlawful manufacture or transportation of alcoholic beverages or any money that is the fruit or instrumentality of unlawful manufacture or transportation of alcoholic beverages is subject to forfeiture, and the provisions of the Forfeiture Act apply to the seizure, forfeiture and disposal of such property."

Section 22. REPEAL.--Section 17-2-20.2 NMSA 1978 (being Laws 1979, Chapter 321, Section 2) is repealed.

Section 23. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2002.

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SENATE FINANCE COMMITTEE SUBSTITUTE FOR  
SENATE BILL 5, AS AMENDED