

1 HOUSE BILL 284

2 **52ND LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2016**

3 INTRODUCED BY

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10 AN ACT

11 RELATING TO FORFEITURE; REVISING PROCEDURES RELATED TO THE
12 RETURN OF SEIZED PROPERTY FOR DEFENDANTS' USE IN HIRING LEGAL
13 COUNSEL; REVISING CERTAIN DEADLINES IN FORFEITURE PROCEEDINGS;
14 LIMITING FACTORS CONSIDERED TO ESTABLISH THE VALUE OF FORFEITED
15 PROPERTY; REMOVING ABANDONED PROPERTY FROM PROCEDURES RELATED
16 TO FORFEITED PROPERTY; PROVIDING THAT INNOCENT OWNERS AND
17 SECURED PARTIES DO NOT NEED ACTUAL KNOWLEDGE OF THE CRIME
18 RELATED TO SEIZED PROPERTY; REVISING DISTRIBUTIONS OF PROCEEDS
19 FROM THE SALE OF FORFEITED PROPERTY AND FORFEITED CURRENCY;
20 MAKING AN APPROPRIATION.

21
22 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

23 SECTION 1. Section 31-27-3 NMSA 1978 (being Laws 2002,
24 Chapter 4, Section 3, as amended) is amended to read:

25 "31-27-3. DEFINITIONS.--As used in the Forfeiture Act:

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~~[A. "abandoned property":~~

~~(1) means personal property the rights to which and the control of which an owner has intentionally relinquished; and~~

~~(2) does not mean real property;~~

~~B. "actual knowledge" means a direct and clear awareness of information, a fact or a condition;~~

~~G.]~~ A. "contraband" means goods that may not be lawfully imported, exported or possessed, including drugs that are listed in Schedule I, II, III, IV or V of the Controlled Substances Act and that are possessed without a valid prescription;

~~[D.]~~ B. "conveyance" means a device used for transportation and:

(1) includes a motor vehicle, trailer, snowmobile, airplane, vessel and any equipment attached to the conveyance; but

(2) does not include property that is stolen or taken in violation of a law;

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

~~[F.]~~ D. "crime" means a violation of a criminal statute for which property of the offender is subject to

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1 seizure and forfeiture;

2 [G.] E. "instrumentality" means all property that
3 is otherwise lawful to possess that is used in the furtherance
4 or commission of an offense to which forfeiture applies and
5 includes land, a building, a container, a conveyance,
6 equipment, materials, a product, a computer, computer software,
7 a telecommunications device, a firearm, ammunition, a tool,
8 money, a security and a negotiable instrument and other devices
9 used for exchange of property;

10 [H.] F. "law enforcement agency" means the employer
11 of a law enforcement officer [~~that~~] who is authorized to seize
12 or has seized property pursuant to the Forfeiture Act;

13 [I.] G. "law enforcement officer" means:

14 (1) a state or municipal police officer,
15 county sheriff, deputy sheriff, conservation officer, motor
16 transportation enforcement officer or other state employee
17 authorized by state law to enforce criminal statutes; but

18 (2) does not mean a correctional officer;

19 [J.] H. "owner" means a person who has a legal or
20 equitable ownership interest in property;

21 [K.] I. "property" means tangible or intangible
22 personal property or real property;

23 [L.] J. "property subject to forfeiture" means
24 property or an instrumentality [~~described and~~] declared to be
25 subject to forfeiture by the Forfeiture Act or a state law

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1 outside of the Forfeiture Act; and

2 [M-] K. "secured party" means a person with a
3 security or other protected interest in property, whether the
4 interest arose by mortgage, security agreement, lien, lease or
5 otherwise; the purpose of which interest is to secure the
6 payment of a debt or protect a potential debt owed to the
7 secured party."

8 SECTION 2. Section 31-27-4.1 NMSA 1978 (being Laws 2015,
9 Chapter 152, Section 5) is amended to read:

10 "31-27-4.1. RECEIPT FOR SEIZED PROPERTY--REPLEVIN
11 HEARING.--

12 A. When a law enforcement officer seizes property
13 [~~that is~~] subject to forfeiture, the officer shall provide an
14 itemized receipt to the person possessing the property or, in
15 the absence of a person to whom the receipt could be given,
16 shall leave the receipt in the place where the property was
17 found, if possible.

18 B. Following the seizure of property, the defendant
19 in the related criminal matter or another person who claims an
20 interest in seized property may, at any time before [~~sixty~~]
21 ninety days prior to a related criminal trial, claim an
22 interest in seized property by a motion [~~to~~] requesting the
23 court to issue a writ of replevin. A motion filed pursuant to
24 this section shall include facts to support the person's
25 alleged interest in the seized property.

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1 C. A person who makes a timely motion pursuant to
2 this section shall have a right to a hearing on the motion
3 before the resolution of any related criminal matter or
4 forfeiture proceeding and within thirty days of the date on
5 which the motion is filed.

6 D. At least ten days before a hearing on a motion
7 filed pursuant to this section, the state shall file an answer
8 or responsive motion that shows probable cause for the seizure.

9 E. A court shall grant a claimant's motion if the
10 court finds that:

11 (1) it is likely that the final judgment will
12 require the state to return ~~[the]~~ property that was seized
13 without a court order to the claimant;

14 (2) the property is not reasonably required to
15 be held for investigatory reasons; or

16 (3) the property is the only reasonable means
17 for a defendant to pay for legal representation in a related
18 criminal or forfeiture proceeding and the defendant made a
19 prima facie showing that the property was not used in the
20 furtherance or commission of a crime.

21 F. In its discretion, the court may order the
22 return of funds or property sufficient for a defendant to
23 obtain legal counsel but less than the total amount seized [~~and~~
24 ~~it may~~]. If the court makes such an order, it shall require an
25 accounting. An accounting report held before the resolution of

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1 the relevant criminal and forfeiture proceedings shall be held
2 in camera. If the court finds in the state's favor in both the
3 criminal and forfeiture proceedings, the court shall:

4 (1) disclose the accounting report;

5 (2) hear arguments by the parties as to what
6 portion of the funds or property should be paid to the
7 defendant's counsel and what portion should be forfeited; and

8 (3) issue an order on how the funds or
9 property shall be distributed.

10 G. In lieu of ordering the issuance of [~~the~~] a writ
11 of replevin, a court may order:

12 (1) the state to give security or written
13 assurance for satisfaction of any judgment, including damages,
14 that may be rendered in a related forfeiture action; or

15 (2) any other relief the court deems to be
16 just."

17 **SECTION 3.** Section 31-27-6 NMSA 1978 (being Laws 2002,
18 Chapter 4, Section 6, as amended) is amended to read:

19 "31-27-6. FORFEITURE PROCEEDINGS--DETERMINATION--
20 SUBSTITUTION OF PROPERTY--CONSTITUTIONALITY--APPEAL.--

21 A. A person who claims an interest in seized
22 property shall file an answer to the complaint of forfeiture
23 within thirty days of the date of service of the complaint.
24 The answer shall include facts to support the claimant's
25 alleged interest in the property.

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1 B. The district courts have jurisdiction over
2 forfeiture proceedings, and venue for a forfeiture proceeding
3 is in the same court in which venue lies for the criminal
4 matter related to the seized property.

5 C. The forfeiture proceeding shall begin after the
6 conclusion of the trial for the related criminal matter in an
7 ancillary proceeding that relates to a defendant's property
8 before the same judge and jury, if applicable, and the court,
9 and the jury, if applicable, may consider the forfeiture of
10 property seized from other persons at the same time or in a
11 later proceeding. If the criminal defendant in the related
12 criminal matter is represented by the public defender
13 department, the chief public defender or the district public
14 defender may authorize department representation of the
15 defendant in the forfeiture proceeding.

16 D. Discovery conducted in an ancillary forfeiture
17 proceeding is subject to the rules of criminal procedure.

18 E. An ancillary forfeiture proceeding that relates
19 to the forfeiture of property valued at less than twenty
20 thousand dollars (\$20,000) shall be held before a judge only.

21 F. If the state fails to prove, by clear and
22 convincing evidence, that a person whose property is alleged to
23 be subject to forfeiture is an owner of the property:

24 (1) the forfeiture proceeding shall be
25 dismissed and the property shall be delivered to the owner,

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1 unless the owner's possession of the property is illegal; and

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

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

8 (1) the seized property is subject to
9 forfeiture;

10 (2) the criminal prosecution of the owner of
11 the seized property resulted in a conviction; and

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

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

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

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

20 H. A court shall not accept a plea agreement or
21 other arrangement by which a defendant contributes or donates
22 property to a person, charity or other organization in full or
23 partial fulfillment of responsibility established in the
24 court's proceeding.

25 I. Following a person's conviction, the state may

1 make a motion for forfeiture of substitute property owned by
2 the person that is equal to but does not exceed the value of
3 property that is subject to forfeiture but that the state is
4 unable to seize. The court shall order the forfeiture of
5 substitute property only if the state proves by a preponderance
6 of the evidence that the person intentionally transferred, sold
7 or deposited property with a third party to avoid the court's
8 jurisdiction and the forfeiture of the property.

9 J. A person is not jointly and severally liable for
10 orders for forfeiture of another person's property. When
11 ownership of property is unclear, a court may order each person
12 to forfeit the person's property on a pro rata basis or by
13 another means the court deems equitable.

14 K. ~~[At any time]~~ Within thirty days following the
15 conclusion of a forfeiture proceeding, the person whose
16 property was forfeited may petition the court to determine
17 whether the forfeiture was unconstitutionally excessive
18 pursuant to the state or federal constitution.

19 L. At a non-jury hearing on the petition, the
20 petitioner has the burden of establishing by a preponderance of
21 the evidence that the forfeiture was grossly disproportional to
22 the seriousness of the criminal offense for which the person
23 was convicted.

24 M. In determining whether the forfeiture is
25 unconstitutionally excessive, the court may consider all

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1 relevant factors, including:

2 (1) the seriousness of the criminal offense
3 and its impact on the community, the duration of the criminal
4 activity and the harm caused by the defendant;

5 (2) the extent to which the defendant
6 participated in the offense;

7 (3) the extent to which the property was used
8 in committing the offense;

9 (4) the sentence imposed for the commission of
10 the crime that relates to the property that is subject to
11 forfeiture; and

12 (5) whether the criminal offense was completed
13 or attempted.

14 N. In determining the value of the property subject
15 to forfeiture, the court may consider relevant factors,
16 including the [~~(1)~~] fair market value of the property

17 [~~(2) value of the property to the defendant,~~
18 ~~including hardship that the defendant will suffer if the~~
19 ~~forfeiture is realized; and~~

20 [~~(3) hardship from the loss of a primary~~
21 ~~residence, motor vehicle or other property to the defendant's~~
22 ~~family members or others if the property is forfeited].~~

23 O. The court shall not consider the value of the
24 property to the state when it determines whether the forfeiture
25 of property is constitutionally excessive.

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1 P. A party to a forfeiture proceeding may appeal a
2 district court's decision regarding the seizure, forfeiture and
3 distribution of property pursuant to the Forfeiture Act."

4 SECTION 4. Section 31-27-7 NMSA 1978 (being Laws 2002,
5 Chapter 4, Section 7, as amended) is amended to read:

6 "31-27-7. TITLE TO SEIZED PROPERTY--DISPOSITION OF
7 FORFEITED PROPERTY AND PROCEEDS.--

8 A. The state acquires provisional title to seized
9 property at the time the property was used or acquired in
10 connection with an offense that subjects the property to
11 forfeiture. Provisional title authorizes the state to hold and
12 protect the property. Title to the property shall vest with
13 the state when a trier of fact renders a final forfeiture
14 verdict and the title relates back to the time when the state
15 acquired provisional title; provided that the title is subject
16 to claims by third parties that are adjudicated pursuant to the
17 Forfeiture Act.

18 B. Unless possession of the property is illegal or
19 a different disposition is specifically provided for by law and
20 except as provided in this section, forfeited property that is
21 not currency shall be delivered [~~along with any abandoned~~
22 ~~property~~] to the state treasurer for disposition at a public
23 auction. Forfeited currency and all [~~sale~~] proceeds of the
24 sale of forfeited [~~or abandoned~~] property shall be distributed
25 as follows:

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1 (1) first, to pay any reasonable expenses
2 related to the investigation, seizure, storage, protection and
3 transfer of the property;

4 (2) second, to pay any reasonable expenses
5 incurred by the state treasurer's office to dispose of the
6 property;

7 (3) third, to reimburse law enforcement
8 agencies for any costs incurred to prepare reports required by
9 the provisions of Subsection A of Section 31-27-9 NMSA 1978;
10 and

11 (4) finally, any remaining balance shall be
12 deposited in the general fund.

13 C. Proceeds from the sale of forfeited property
14 received by the state from another jurisdiction [~~shall~~] may be
15 deposited in the general fund of the governing body of the law
16 enforcement agency that seized the property, and the proceeds
17 shall be used for drug abuse prevention and education programs
18 and treatment services, for other substance abuse or demand
19 reduction initiatives or for the enforcement of drug-related
20 laws.

21 D. A property interest forfeited to the state
22 pursuant to the Forfeiture Act is subject to the interest of a
23 secured party unless, in the forfeiture proceeding, the state
24 proves by clear and convincing evidence that the secured party
25 [~~had actual knowledge~~] knew or should have known of the crime

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1 that relates to the seizure of the property."

2 SECTION 5. Section 31-27-7.1 NMSA 1978 (being Laws 2015,
3 Chapter 152, Section 9) is amended to read:

4 "31-27-7.1. INNOCENT OWNERS.--

5 A. The property of an innocent owner, as provided
6 in this section, shall not be forfeited.

7 B. A person who claims to be an innocent owner has
8 the burden of production to show that the person:

9 (1) holds a legal right, title or interest in
10 the property seized; and

11 (2) held an ownership interest in the seized
12 property at the time the illegal conduct that gave rise to the
13 seizure of the property occurred or was a bona fide purchaser
14 for fair value.

15 C. The state shall immediately return property to
16 an established innocent owner who has an interest in
17 homesteaded property, a motor vehicle valued at less than ten
18 thousand dollars (\$10,000) or a conveyance that is encumbered
19 by a security interest that was perfected pursuant to state law
20 or that is subject to a lease or rental agreement, unless the
21 secured party or lessor [~~had actual knowledge~~] knew or should
22 have known of the criminal act upon which the forfeiture was
23 based.

24 D. If a person establishes that the person is an
25 innocent owner pursuant to Subsection B of this section

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1 [31-27-7.1 NMSA 1978] and the state pursues a forfeiture
2 proceeding with respect to that person's property, other than
3 property described in Subsection D of Section 31-27-7 NMSA
4 1978, to successfully forfeit the property, the state shall
5 prove by clear and convincing evidence that the innocent owner
6 [~~had actual knowledge~~] knew or should have known of the
7 underlying crime giving rise to the forfeiture.

8 E. A person who acquired an ownership interest in
9 property subject to forfeiture after the commission of a crime
10 that gave rise to the forfeiture and who claims to be an
11 innocent owner has the burden of production to show that the
12 person has legal right, title or interest in the property
13 seized under this section.

14 F. If a person establishes that the person is an
15 innocent owner as provided in Subsection B of this section and
16 the state pursues a forfeiture proceeding against the person's
17 property, to successfully forfeit the property, the state shall
18 prove by clear and convincing evidence that at the time the
19 person acquired the property, the person:

20 (1) [~~had actual knowledge~~] knew or should have
21 known that the property was subject to forfeiture; or

22 (2) was not a bona fide purchaser who was
23 without notice of any defect in title and who gave valuable
24 consideration.

25 G. If the state fails to meet its burdens as

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1 provided in Subsections C and D of this section, the court
2 shall find that the person is an innocent owner and shall order
3 the state to relinquish all claims of title to the innocent
4 owner's property."

5 SECTION 6. Section 31-27-8 NMSA 1978 (being Laws 2002,
6 Chapter 4, Section 8, as amended) is amended to read:

7 "31-27-8. SAFEKEEPING OF SEIZED PROPERTY PENDING
8 DISPOSITION [~~SELLING OR RETAINING SEIZED PROPERTY~~
9 ~~PROHIBITED~~].--

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

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

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

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

24 [~~D. A law enforcement agency shall not retain~~
25 ~~forfeited or abandoned property.~~]"

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1 SECTION 7. Section 31-27-9 NMSA 1978 (being Laws 2015,
2 Chapter 152, Section 11) is amended to read:

3 "31-27-9. REPORTING.--

4 A. Every law enforcement agency shall prepare an
5 annual report of the agency's seizures and forfeitures
6 conducted pursuant to the Forfeiture Act, and seizures and
7 forfeitures conducted pursuant to federal forfeiture law, and
8 the report shall include:

9 (1) the total number of seizures of currency
10 and the total amount of currency seized in each seizure;

11 (2) the total number of seizures of property
12 and the number and types of items seized in each seizure;

13 (3) the market value of each item of property
14 seized; ~~and~~

15 (4) the total number of occurrences of each
16 class of crime that resulted in the agency's seizure of
17 property;

18 (5) the costs incurred by the agency for
19 storage, maintenance and transportation of seized property; and

20 (6) any costs incurred by the agency to
21 prepare its report in accordance with this subsection.

22 B. A law enforcement agency shall submit its annual
23 reports to the department of public safety and to the district
24 attorney's office in the agency's district. An agency that did
25 not engage in seizure or forfeiture pursuant to the Forfeiture

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1 Act or federal forfeiture law, or both, shall report that fact
2 in its annual report.

3 C. The department of public safety shall compile
4 the reports submitted by each law enforcement agency and issue
5 an aggregate report of all forfeitures in the state.

6 D. By April 1 of each year, the department of
7 public safety shall publish on its [~~web site~~] website the
8 department's aggregate report and individual law enforcement
9 agency reports submitted for the previous year."

10 SECTION 8. Section 31-27-11 NMSA 1978 (being Laws 2015,
11 Chapter 152, Section 13) is amended to read:

12 "31-27-11. TRANSFER OF FORFEITABLE PROPERTY TO THE
13 FEDERAL GOVERNMENT.--[A.] A law enforcement agency shall not
14 directly or indirectly transfer seized property to a federal
15 law enforcement authority or other federal agency unless:

16 [~~(1)~~] A. the value of the seized property exceeds
17 [~~fifty thousand dollars (\$50,000)~~] twenty-five thousand dollars
18 (\$25,000), excluding the potential value of the sale of
19 contraband; [~~and~~

20 ~~(2)~~] B. the law enforcement agency determines that
21 the criminal conduct that gave rise to the seizure is
22 interstate in nature and sufficiently complex to justify the
23 transfer of the property; [~~or~~

24 ~~(3)~~] C. the seized property may only be forfeited
25 under federal law; or

