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HOUSE BILL NO. 1991

Offered January 14, 2015

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A *BILL to amend and reenact §§ 19.2-386.1, 19.2-386.2, 19.2-386.3, 19.2-386.10, 19.2-386.29, 19.2-386.31, 19.2-386.32, 19.2-386.34, and 19.2-386.35 of the Code of Virginia, relating to forfeiture of property used in connection with the commission of crimes; conviction required; owner retains possession.*

 Patron—Morrissey

 Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-386.1, 19.2-386.2, 19.2-386.3, 19.2-386.10, 19.2-386.29, 19.2-386.31, 19.2-386.32, 19.2-386.34, and 19.2-386.35 of the Code of Virginia are amended and reenacted as follows:

§ 19.2-386.1. Commencing an action of forfeiture.

Except as otherwise specifically provided by law, whenever any property is forfeited to the Commonwealth by reason of the violation of any law, or if any statute provides for the forfeiture of any property or money, or if any property or money be seized as forfeited for a violation of any of the provisions of this Code, the Commonwealth shall follow the procedures set forth in this chapter.

An action against any property subject to seizure under the provisions of Chapter 22.2 (§ 19.2-386.15 et seq.) shall be commenced by the filing of an information in the clerk's office of the circuit court. Any information shall be filed in the name of the Commonwealth by the attorney for the Commonwealth or may be filed by the Attorney General if so requested by the attorney for the Commonwealth. Venue for an action of forfeiture shall lie in the county or city where (i) the property is located, (ii) the property is seized, or (iii) an owner of the property could be prosecuted for the illegal conduct alleged to give rise to the forfeiture. Such information shall (a) name as parties defendant all owners and lienholders then known or of record and the trustees named in any deed of trust securing such lienholder, (b) specifically describe the property, (c) set forth in general terms the grounds for forfeiture of the named property, (d) pray that the same be condemned and sold or otherwise be disposed of according to law, and (e) ask that all persons concerned or interested be notified to appear and show cause why such property should not be forfeited. In all cases, an information shall be filed within three years of the date of actual discovery by the Commonwealth of the last act giving rise to the forfeiture or the action for forfeiture will be barred. *Any action of forfeiture shall be stayed until conviction, and any property eligible for forfeiture under the provisions of any statute shall be forfeited only upon the entry of a final judgment of conviction for an offense listed in such statute and the exhaustion of all appeals. No property shall be seized until after a final judgment of conviction has been entered and the exhaustion of all appeals.*

§ 19.2-386.2. Seizure of named property.

A. When any property subject to seizure under Chapter 22.2 (§ 19.2-386.15 et seq.) or other provision under the Code has not been seized at the time *that a final judgment of conviction has been entered and all appeals have been exhausted*, an information naming that property *is may be filed*; and the clerk of the circuit court or a judge of the circuit court, upon motion of the attorney for the Commonwealth wherein the information is filed, shall issue a warrant to the sheriff or other state or local law-enforcement officer authorized to serve criminal process in the jurisdiction where the property is located, describing the property named in the complaint and authorizing its immediate seizure.

B. In all cases of seizure of real property, a notice of lis pendens shall be filed with the clerk of the circuit court of the county or city wherein the property is located and shall be indexed in the land records in the name or names of those persons whose interests appear to be affected thereby.

§ 19.2-386.3. Notice of seizure for forfeiture and notice of motion for judgment.

A. If an information has not been filed, then upon seizure of any property under Chapter 22.2 (§ 19.2-386.15 et seq.) or other provision under the Code *after a final judgment of conviction has been entered and all appeals have been exhausted*, the agency seizing the property shall forthwith notify in writing the attorney for the Commonwealth in the county or city in which the seizure occurred, who shall, within 21 days of receipt of such notice, file a notice of seizure for forfeiture with the clerk of the circuit court. Such notice of seizure for forfeiture shall specifically describe the property seized, set forth in general terms the grounds for seizure, identify the date on which the seizure occurred, and identify all owners and lien holders then known or of record, including the treasurer of the locality in which the seized property is located. The clerk shall forthwith mail by first-class mail notice of seizure for forfeiture to the last known address of all identified owners and lien holders. When property has been

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59 seized under Chapter 22.2 (§ 19.2-386.15 et seq.) or other provision under the Code prior to filing an
60 information, then an information against that property shall be filed within 90 days of the date of seizure
61 or the property shall be released to the owner or lien holder.

62 B. Except as to corporations, all parties defendant shall be served, in accordance with § 8.01-296,
63 with a copy of the information and a notice to appear prior to any motion for default judgment on the
64 information. The notice shall contain a statement warning the party defendant that his interest in the
65 property shall be subject to forfeiture to the Commonwealth unless within 30 days after service on him
66 of the notice, or before the date set forth in the order of publication with respect to the notice, an
67 answer under oath is filed in the proceeding setting forth (i) the nature of the defendant's claim, (ii) the
68 exact right, title or character of the ownership or interest in the property and the evidence thereof, and
69 (iii) the reason, cause, exemption or defense he may have against the forfeiture of his interest in the
70 property, including but not limited to the exemptions set forth in § 19.2-386.8. Service upon
71 corporations shall be made in accordance with § 8.01-299 or subdivision 1 or 2 of § 8.01-301; however,
72 if such service cannot be thus made, it shall be made by publication in accordance with § 8.01-317.

73 **§ 19.2-386.10. Trial.**

74 A. A party defendant who fails to appear as provided in § 19.2-386.9 shall be in default. The
75 forfeiture shall be deemed established as to the interest of any party in default upon entry of judgment
76 as provided in § 19.2-386.11. Within twenty-one days after entry of judgment, any party defendant
77 against whom judgment has been so entered may petition the Department of Criminal Justice Services
78 for remission of his interest in the forfeited property. For good cause shown and upon proof that the
79 party defendant's interest in the property is exempt under subdivision 2, 3 or 4 of § 19.2-386.8, the
80 Department of Criminal Justice Services shall grant the petition and direct the state treasury to either (i)
81 remit to the party defendant an amount not exceeding the party defendant's interest in the proceeds of
82 sale of the forfeited property after deducting expenses incurred and payable pursuant to subsection B of
83 § 19.2-386.12 or (ii) convey clear and absolute title to the forfeited property in extinguishment of such
84 interest.

85 If any party defendant appears in accordance with § 19.2-386.9, the court shall proceed to trial of
86 the case, unless trial by jury is demanded by the Commonwealth or any party defendant. At trial, the
87 Commonwealth has the burden of proving that the property is subject to forfeiture under this chapter.
88 Upon such a showing by the Commonwealth, the claimant has the burden of proving that the claimant's
89 interest in the property is exempt under subdivision 2, 3 or 4 of § 19.2-386.8. The proof of all issues
90 shall be by a preponderance of the evidence.

91 B. The information and trial thereon shall be independent of any criminal proceeding against any
92 party or other person for violation of law. ~~However, upon motion and for good cause shown, the court~~
93 ~~may stay a forfeiture proceeding that is related to any indictment or information.~~

94 **§ 19.2-386.29. Forfeiture of certain weapons used in commission of criminal offense.**

95 All pistols, shotguns, rifles, dirks, bowie knives, switchblade knives, ballistic knives, razors,
96 slingshots, brass or metal knucks, blackjacks, stun weapons, and other weapons used by any person in
97 the commission of a criminal offense, shall, ~~upon conviction of such person,~~ be forfeited to the
98 Commonwealth by order of the court trying the case. The court shall dispose of such weapons as it
99 deems proper by entry of an order of record. Such disposition may include the destruction of the
100 weapons or, subject to any registration requirements of federal law, sale of the firearms to a licensed
101 dealer in such firearms in accordance with the provisions of Chapter 22.1 (§ 19.2-386.1 et seq.)
102 regarding sale of property forfeited to the Commonwealth.

103 The court may authorize the seizing law-enforcement agency to use the weapon for a period of time
104 as specified in the order. When the seizing agency ceases to so use the weapon, it shall be disposed of
105 as otherwise provided in this section.

106 However, upon petition to the court and notice to the attorney for the Commonwealth, the court,
107 upon good cause shown, shall return any such weapon to its lawful owner after conclusion of all
108 relevant proceedings if such owner (i) did not know and had no reason to know of the conduct giving
109 rise to the forfeiture and (ii) is not otherwise prohibited by law from possessing the weapon. The owner
110 shall acknowledge in a sworn affidavit to be filed with the record in the case or cases that he has
111 retaken possession of the weapon involved.

112 **§ 19.2-386.31. Seizure and forfeiture of property used in connection with the exploitation and**
113 **solicitation of children.**

114 All audio and visual equipment, electronic equipment, devices and other personal property used in
115 connection with the possession, production, distribution, publication, sale, possession with intent to
116 distribute or making of child pornography that constitutes a violation of § 18.2-374.1 or 18.2-374.1:1, or
117 in connection with the solicitation of a person less than 18 years of age that constitutes a violation of
118 § 18.2-374.3 shall be subject to lawful seizure by a law-enforcement officer and shall be subject to
119 forfeiture to the Commonwealth pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.). The Commonwealth
120 shall file an information and notice of seizure in accordance with the procedures in Chapter 22.1

(§ 19.2-386.1 et seq.); however, any forfeiture action shall be stayed until conviction of the person whose property is subject to forfeiture. Upon his conviction, the court may dispose of the issue of forfeiture or may continue the civil case allowing the defendant time to answer, at the court's discretion.

§ 19.2-386.32. Seizure and forfeiture of property used in connection with the abduction of children.

All moneys and other property, real and personal, owned by a person and used to further the abduction of a child in violation of § 18.2-47, 18.2-48, or 18.2-48.1 are subject to lawful seizure by a law-enforcement officer and are subject to forfeiture to the Commonwealth pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.) by order of the court in which a conviction under § 18.2-47, 18.2-48, or 18.2-48.1 is obtained.

§ 19.2-386.34. Forfeiture of vehicle used in a felony violation of § 18.2-266.

The vehicle solely owned and operated by the accused during the commission of a felony violation of § 18.2-266 shall be subject to seizure and forfeiture. After an arrest upon a felony violation of § 18.2-266, the vehicle may be forfeited to the Commonwealth pursuant to the procedures set forth in Chapter 22.1 (§ 19.2-386.1 et seq.). Any seizure shall be stayed until conviction and the exhaustion of all appeals at which time, if the information has been filed, the Commonwealth shall give notice of seizure to all appropriate parties pursuant to § 19.2-386.3.

An immediate family member of the owner of any motor vehicle for which an information has been filed under this section who was not the driver at the time of the violation may petition the court in which such information was filed for the release of the motor vehicle. If the immediate family member proves by a preponderance of the evidence that his immediate family has only one motor vehicle and will suffer a substantial hardship if that motor vehicle is seized and forfeited, the court, in its discretion, may release the vehicle.

In the event the vehicle was sold to a bona fide purchaser subsequent to the arrest but prior to seizure in order to avoid seizure and forfeiture, the Commonwealth shall have a right of action against the seller for the proceeds of the sale.

§ 19.2-386.35. Seizure of property used in connection with certain offenses.

All money, equipment, motor vehicles, and other personal and real property of any kind or character together with any interest or profits derived from the investment of such proceeds or other property that (i) was used in connection with the commission of, or in an attempt to commit, a violation of subsection B of § 18.2-47, § 18.2-48 or 18.2-59, subsection B of § 18.2-346, or § 18.2-347, 18.2-348, 18.2-349, 18.2-355, 18.2-356, 18.2-357, 40.1-29, 40.1-100.2, or 40.1-103; (ii) is traceable to the proceeds of some form of activity that violates subsection B of § 18.2-47, § 18.2-48 or 18.2-59, subsection B of § 18.2-346, or § 18.2-347, 18.2-348, 18.2-349, 18.2-355, 18.2-356, 18.2-357, 40.1-29, 40.1-100.2, or 40.1-103; or (iii) was used to or intended to be used to promote some form of activity that violates subsection B of § 18.2-47, § 18.2-48 or 18.2-59, subsection B of § 18.2-346, or § 18.2-347, 18.2-348, 18.2-349, 18.2-355, 18.2-356, 18.2-357, 40.1-29, 40.1-100.2, or 40.1-103 is subject to lawful seizure by a law-enforcement officer and subject to forfeiture to the Commonwealth pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.). Any forfeiture action under this section shall be stayed until conviction, and property eligible for forfeiture pursuant to this section shall be forfeited only upon the entry of a final judgment of conviction for an offense listed in this section; if no such judgment is entered, all property seized pursuant to this section shall be released from seizure.

Real property shall not be subject to seizure unless the minimum prescribed punishment for the violation is a term of imprisonment of not less than five years.

All seizures and forfeitures under this section shall be governed by Chapter 22.1 (§ 19.2-386.1 et seq.), and the procedures specified therein shall apply, mutatis mutandis, to all forfeitures under this section.