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HOUSE BILL NO. 900

Offered January 10, 2018

Prefiled January 9, 2018

A BILL to amend and reenact §§ 18.2-251.02, 19.2-386.1, 19.2-386.10, 19.2-386.11, 19.2-386.12, 19.2-386.14, 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; finding of guilt required; disposition of forfeited property used in connection with the commission of drug crimes.

Patrons—Freitas, Cole, LaRock, Hugo and Pogge

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-251.02, 19.2-386.1, 19.2-386.10, 19.2-386.11, 19.2-386.12, 19.2-386.14, 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:

§ 18.2-251.02. Drug Offender Assessment and Treatment Fund.

There is hereby established in the state treasury the Drug Offender Assessment and Treatment Fund, which shall consist of moneys received from (i) fees imposed on certain drug offense convictions pursuant to § 16.1-69.48:3 and subdivisions A 10 and A 11 of § 17.1-275 and § 16.1-69.48:3 and (ii) property subject to forfeiture pursuant to § 19.2-386.22 that has been forfeited in accordance with the procedures of Chapter 22.1 (§ 19.2-386.1 et seq.) of Title 19.2. All interest derived from the deposit and investment of moneys in the Fund shall be credited to the Fund. Any moneys not appropriated by the General Assembly shall remain in the Drug Offender Assessment and Treatment Fund and shall not be transferred or revert to the general fund at the end of any fiscal year. All moneys in the Fund shall be subject to annual appropriation by the General Assembly to the Department of Corrections, the Department of Juvenile Justice, and the Commission on VASAP to implement and operate the offender substance abuse screening and assessment program; the Department of Criminal Justice Services for the support of community-based probation and local pretrial services agencies; and the Office of the Executive Secretary of the Supreme Court of Virginia for the support of drug treatment court programs.

§ 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 commenced under this section shall be stayed until the court in which the owner of the property is being prosecuted for an offense authorizing the forfeiture finds the owner guilty of any offense that authorizes forfeiture of such property, and any property eligible for forfeiture under the provisions of any statute shall be forfeited only upon such finding of the owner's guilt, regardless of whether the owner has been sentenced. If no such finding is made by the court, all property seized shall be released from seizure no later than 21 days from the date the stay terminates. However, property that has been seized may be forfeited pursuant to the procedures set forth in this chapter even though no finding of guilt is made if (1) the owner of the property is a fugitive from justice, (2) there is no identifiable owner of the property, (3) the property has been abandoned, (4) the owner denied ownership of the property during the prosecution for the offense, (5) the owner of the property agrees to the forfeiture, (6) such forfeiture is ordered by a court pursuant to a lawful plea

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59 agreement, or (7) the owner of the property has not submitted a written demand for the return of the
60 property with the law-enforcement agency that seized the property within 21 days from the date the stay
61 terminates.

62 **§ 19.2-386.10. Forfeiture; default judgment; remission; trial.**

63 A. A party defendant who fails to appear as provided in § 19.2-386.9 shall be in default. The
64 forfeiture shall be deemed established as to the interest of any party in default upon entry of judgment
65 as provided in § 19.2-386.11. Within 21 days after entry of judgment, any party defendant against
66 whom judgment has been so entered may petition the ~~Department of Criminal Justice Services~~ court for
67 remission of his interest in the forfeited property. For good cause shown and upon proof by a
68 preponderance of the evidence that the party defendant's interest in the property is exempt under
69 subdivision 2, 3, or 4 of § 19.2-386.8, the ~~Department of Criminal Justice Services~~ court shall grant the
70 petition and direct the state treasury to either (i) remit to the party defendant an amount not exceeding
71 the party defendant's interest in the proceeds of sale of the forfeited property after deducting expenses
72 incurred and payable pursuant to subsection B of § 19.2-386.12 or (ii) convey clear and absolute title to
73 the forfeited property in extinguishment of such interest.

74 If any party defendant appears in accordance with § 19.2-386.9, the court shall proceed to trial of
75 the case, unless trial by jury is demanded by the Commonwealth or any party defendant. At trial, the
76 Commonwealth has the burden of proving by clear and convincing evidence that the property is subject
77 to forfeiture under this chapter. Upon such a showing by the Commonwealth, the claimant has the
78 burden of proving by a preponderance of the evidence that the claimant's interest in the property is
79 exempt under subdivision 2, 3, or 4 of § 19.2-386.8.

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

83 **§ 19.2-386.11. Judgment of condemnation; destruction.**

84 A. If the forfeiture is established, the judgment shall be that the property be condemned as forfeited
85 to the Commonwealth subject to any remission granted under subsection A of § 19.2-386.10 and further
86 that the same be sold, unless (i) a sale thereof has been already made under § 19.2-386.7, (ii) the court
87 determines that the property forfeited is of such minimal value that the sale would not be in the best
88 interest of the Commonwealth or (iii) the court finds that the property may be subject to return to a
89 participating agency. If the court finds that the property may be subject to return to an agency
90 participating in the seizure in accordance with subsection C of ~~§ 19.2-386.14~~, the order shall provide for
91 storage of the property until the determination to return it is made or, if return is not made, for sale of
92 the property as provided in this section and § 19.2-386.12. If sale has been made, the judgment shall be
93 against the proceeds of sale, subject to the rights of any lien holder whose interest is not forfeited. If the
94 property condemned has been delivered to the claimant under § 19.2-386.6, further judgment shall be
95 against the obligors in the bond for the penalty thereof, to be discharged by the payment of the
96 appraised value of the property, upon which judgment, process of execution shall be awarded and the
97 clerk shall endorse thereon, "No security is to be taken."

98 B. Forfeited cash and negotiable instruments shall be disposed of pursuant to the provisions of
99 § 19.2-386.12.

100 C. Contraband, the sale or possession of which is unlawful, weapons and property not sold because
101 of the minimal value thereof, may be ordered destroyed by the court.

102 **§ 19.2-386.12. Sale of forfeited property.**

103 A. Any sale of forfeited property shall be made for cash, after due advertisement. The sale shall be
104 by public sale or other commercially feasible means authorized by the court in the order of forfeiture
105 and shall vest in the purchaser a clear and absolute title to the property sold subject to the rights of any
106 lien holder whose interest is not forfeited. The proceeds of sale, and whatever may be realized on any
107 bond given under § 19.2-386.6, and any money forfeited shall be paid over to into the state treasury into
108 a special fund of the Department of Criminal Justice Services and credited to either the Literary Fund
109 or the Drug Offender Assessment and Treatment Fund in accordance with § 19.2-386.14.

110 B. In all cases of forfeiture under this section, the actual expenses incident to the custody,
111 preservation, and management of the seized property prior to forfeiture, the actual expenses incident to
112 normal legal proceedings to perfect the Commonwealth's interest in the seized property through
113 forfeiture, and the actual expenses incident to the sale thereof, including commissions, shall be taxed as
114 costs and shall be paid to the person or persons who incurred these costs out of the net proceeds from
115 the sale of such property. If there are no proceeds, the actual expenses shall be paid by the
116 Commonwealth from the Criminal Fund. Actual expenses in excess of the available net proceeds shall
117 be paid by the Commonwealth from the Criminal Fund. The party or parties in interest to any forfeiture
118 proceeding commenced under this section shall be entitled to reasonable attorney's fees and costs if the
119 forfeiture proceeding is terminated in favor of such party or parties. Such fees and costs shall be paid by
120 the Commonwealth from the Criminal Fund.

The residue, if any, shall be paid and disbursed as provided in subsection A of § 19.2-386.10 and § 19.2-386.14 and regulations promulgated by the Criminal Justice Services Board.

§ 19.2-386.14. Disposition of forfeited assets.

A. All cash, negotiable instruments, and proceeds from a sale conducted pursuant to § 19.2-386.7 or 19.2-386.12, after deduction of expenses, fees, and costs as provided in § 19.2-386.12, shall, as soon after entry of the forfeiture as is practicable, be distributed in a manner consistent with this chapter and Article VIII, Section 8 of the Constitution of Virginia.

A1. ~~All~~ *For property used in connection with the manufacture, sale, or distribution of controlled substances or marijuana that is subject to forfeiture pursuant to § 19.2-386.22, all* cash, negotiable instruments, and proceeds from a sale conducted pursuant to § 19.2-386.7 or 19.2-386.12, after deduction of expenses, fees, and costs as provided in § 19.2-386.12, shall, as soon after entry of the forfeiture as is practicable, be paid ~~over to~~ *into* the state treasury ~~into a special fund of the Department of Criminal Justice Services and credited to the Drug Offender Assessment and Treatment Fund for~~ distribution in accordance with this section. The forfeited property and proceeds, less 10 percent, shall be made available to federal, state and local agencies to promote law enforcement in accordance with this section and regulations adopted by the Criminal Justice Services Board to implement the asset-sharing program.

The 10 percent retained by the Department shall be held in a nonreverting fund, known as the Asset Sharing Administrative Fund. Administrative costs incurred by the Department to manage and operate the asset-sharing program shall be paid from the Fund. Any amounts remaining in the Fund after payment of these costs shall be used to promote state or local law-enforcement activities. Distributions from the Fund for these activities shall be based upon need and shall be made from time to time in accordance with regulations promulgated by the Board ~~the provisions of § 18.2-251.02. For all other property subject to forfeiture, all cash, negotiable instruments, and proceeds from a sale conducted pursuant to § 19.2-386.7 or 19.2-386.12, after deduction of expenses, fees, and costs as provided in § 19.2-386.12, shall, as soon after entry of the forfeiture as is practicable, be paid into the state treasury and credited to the Literary Fund.~~

B. Any federal, state or local agency or office that directly participated in the investigation or other law-enforcement activity which led, directly or indirectly, to the seizure and forfeiture shall be eligible for, and may petition the Department for, return of the forfeited asset or an equitable share of the net proceeds, based upon the degree of participation in the law-enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law-enforcement effort with respect to the violation of law on which the forfeiture is based. Upon finding that the petitioning agency is eligible for distribution and that all participating agencies agree on the equitable share of each, the Department shall distribute each share directly to the appropriate treasury of the participating agency.

If all eligible participating agencies cannot agree on the equitable shares of the net proceeds, the shares shall be determined by the Criminal Justice Services Board in accordance with regulations which shall specify the criteria to be used by the Board in assessing the degree of participation in the law-enforcement effort resulting in the forfeiture. *All cash, negotiable instruments, or proceeds from sales received by any state or local agency pursuant to federal law authorizing the sharing of forfeited property seized by a federal agency with a state or local agency shall, as soon after receipt by the state or local agency as is practicable, be paid into the state treasury and credited to the Drug Offender Assessment and Treatment Fund for distribution in accordance with the provisions of § 18.2-251.02.*

C. After the order of forfeiture is entered concerning any motor vehicle, boat, aircraft, or other tangible personal property, any seizing agency may (i) petition the Department for return of the property that is not subject to a grant or pending petition for remission or (ii) request the circuit court to order the property destroyed. Where all the participating agencies agree upon the equitable distribution of the tangible personal property, the Department shall return the property to those agencies upon finding that (a) the agency meets the criteria for distribution as set forth in subsection B and (b) the agency has a clear and reasonable law-enforcement need for the forfeited property.

If all eligible participating agencies cannot agree on the distribution of the property, distribution shall be determined by the Criminal Justice Services Board as in subsection B, taking into consideration the clear and reasonable law-enforcement needs for the property which the agencies may have. In order to equitably distribute tangible personal property, the Criminal Justice Services Board may require the agency receiving the property to reimburse the Department in cash for the difference between the fair market value of the forfeited property and the agency's equitable share as determined by the Criminal Justice Services Board.

If a seizing agency has received property for its use pursuant to this section, when the agency disposes of the property (1) by sale, the proceeds shall be distributed as set forth in this section; or (2) by destruction pursuant to a court order, the agency shall do so in a manner consistent with this section.

D. All forfeited property, including its proceeds or cash equivalent, received by a participating state

182 or local agency pursuant to this section shall be used to promote law enforcement but shall not be used
183 to supplant existing programs or funds. The Board shall promulgate regulations establishing an audit
184 procedure to ensure compliance with this section.

185 E. On or after July 1, 2012, but before July 1, 2014, local seizing agencies may contribute cash
186 funds and proceeds from forfeited property to the Virginia Public Safety Foundation to support the
187 construction of the Commonwealth Public Safety Memorial. Any funds contributed by seizing agencies
188 shall be contributed only after an internal analysis to determine that such contributions will not
189 negatively impact law enforcement training or operations.

190 F. The Department Comptroller shall report annually on or before December 31 to the Governor and
191 the General Assembly (i) the amount of all cash, negotiable instruments, and proceeds from sales
192 conducted pursuant to § 19.2-386.7 or 19.2-386.12 that were forfeited to the Commonwealth, including
193 the amount of all forfeitures distributed credited to the Literary Fund, and (ii) the amount of all cash,
194 negotiable instruments, or proceeds from sales received by any state or local agency pursuant to federal
195 law authorizing the sharing of forfeited property seized by a federal agency with a state or local agency
196 paid into the state treasury and credited to the Drug Offender Assessment and Treatment Fund. Such
197 report shall also detail the amount distributed by the Department to each federal, state, or local agency
198 or office pursuant to this section, and the amount each state or local agency or office received from
199 federal asset forfeiture proceedings. The Department shall ensure that such report is available to the
200 public. The Comptroller shall establish and maintain a searchable electronic database that shall be
201 available to the public through the Comptroller's official website. Such database shall contain the
202 following information regarding all property seized and forfeited:

- 203 1. The name of the agency seizing the property;
- 204 2. The date of the seizure;
- 205 3. A description of the seized property;
- 206 4. The criminal offense alleged authorizing the seizure;
- 207 5. The outcome of any criminal proceedings against the person from whom the property was seized;
- 208 6. The disposition of the seized property;
- 209 7. The date of the disposition of the seized property;
- 210 8. If the seized property was forfeited, the value of the property forfeited;
- 211 9. The actual expenses incident to the custody, preservation, and management of the seized property
212 prior to forfeiture;
- 213 10. The actual expenses incident to the legal proceedings for forfeiture; and
- 214 11. The actual expenses incident to the sale of the seized property.

215 **§ 19.2-386.31. Seizure and forfeiture of property used in connection with the exploitation and**
216 **solicitation of children.**

217 All audio and visual equipment, electronic equipment, devices and other personal property used in
218 connection with the possession, production, distribution, publication, sale, possession with intent to
219 distribute or making of child pornography that constitutes a violation of § 18.2-374.1 or 18.2-374.1:1, or
220 in connection with the solicitation of a person less than 18 years of age that constitutes a violation of
221 § 18.2-374.3 shall be subject to lawful seizure by a law-enforcement officer and shall be subject to
222 forfeiture to the Commonwealth pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.). The Commonwealth
223 shall file an information and notice of seizure in accordance with the procedures in Chapter 22.1
224 (§ 19.2-386.1 et seq.); however, any forfeiture action shall be stayed until conviction of the person
225 whose property is subject to forfeiture. Upon his conviction, the court may dispose of the issue of
226 forfeiture or may continue the civil case allowing the defendant time to answer, at the court's discretion.

227 **§ 19.2-386.32. Seizure and forfeiture of property used in connection with the abduction of**
228 **children.**

229 All moneys and other property, real and personal, owned by a person and used to further the
230 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
231 law-enforcement officer and are subject to forfeiture to the Commonwealth pursuant to Chapter 22.1
232 (§ 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
233 is obtained.

234 **§ 19.2-386.34. Forfeiture of vehicle used in a felony violation of § 18.2-266.**

235 The vehicle solely owned and operated by the accused during the commission of a felony violation
236 of § 18.2-266 shall be subject to seizure and forfeiture. After an arrest upon a felony violation of
237 § 18.2-266, the vehicle may be forfeited to the Commonwealth pursuant to the procedures set forth in
238 Chapter 22.1 (§ 19.2-386.1 et seq.). Any seizure shall be stayed until conviction and the exhaustion of
239 all appeals at which time, if the information has been filed, the Commonwealth shall give notice of
240 seizure to all appropriate parties pursuant to § 19.2-386.3.

241 An immediate family member of the owner of any motor vehicle for which an information has been
242 filed under this section who was not the driver at the time of the violation may petition the court in
243 which such information was filed for the release of the motor vehicle. If the immediate family member

244 proves by a preponderance of the evidence that his immediate family has only one motor vehicle and
245 will suffer a substantial hardship if that motor vehicle is seized and forfeited, the court, in its discretion,
246 may release the vehicle.

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

250 **§ 19.2-386.35. Seizure of property used in connection with certain offenses.**

251 All money, equipment, motor vehicles, and other personal and real property of any kind or character
252 together with any interest or profits derived from the investment of such proceeds or other property that
253 (i) was used in connection with the commission of, or in an attempt to commit, a violation of subsection
254 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,
255 18.2-355, 18.2-356, 18.2-357, 18.2-357.1, 40.1-29, 40.1-100.2, or 40.1-103; (ii) is traceable to the
256 proceeds of some form of activity that violates subsection B of § 18.2-47, § 18.2-48 or 18.2-59,
257 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,
258 40.1-100.2, or 40.1-103; or (iii) was used to or intended to be used to promote some form of activity
259 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,
260 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
261 seizure by a law-enforcement officer and subject to forfeiture to the Commonwealth pursuant to Chapter
262 22.1 (§ 19.2-386.1 et seq.). ~~Any forfeiture action under this section shall be stayed until conviction, and~~
263 ~~property eligible for forfeiture pursuant to this section shall be forfeited only upon the entry of a final~~
264 ~~judgment of conviction for an offense listed in this section; if no such judgment is entered, all property~~
265 ~~seized pursuant to this section shall be released from seizure.~~

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

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