

## ACT 166

H.B. NO. 1017

A Bill for an Act Relating to Asset Forfeiture.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. Section 712A-4, Hawaii Revised Statutes, is amended to read as follows:

“~~[[§712A-4]]~~ **Covered offenses.** [(1)] Offenses for which property is subject to forfeiture under this chapter are:

- (a) All offenses which specifically authorize forfeiture;
- (b) Murder, kidnapping, gambling, criminal property damage, robbery, bribery, extortion, theft, burglary, money laundering, promoting a dangerous, harmful, or detrimental drug, or commercial promotion of marijuana, which is chargeable as a felony offense under state law; [and]
- (c) The manufacture, sale, or distribution of a controlled substance in violation of chapter 329, promoting detrimental drugs or intoxicating compounds, promoting pornography, promoting pornography for minors, or promoting prostitution, which is chargeable as a felony or misdemeanor offense, but not as a petty misdemeanor, under state law[.]; and

[(2)] (d) The attempt, conspiracy, solicitation, coercion, or intimidation of another to commit any offense for which property is subject to forfeiture.”

SECTION 2. Section 712A-7, Hawaii Revised Statutes, is amended by amending subsection (3) to read as follows:

“(3) As soon as practicable after seizure for forfeiture, the seizing agency shall conduct an inventory and estimate the value of the property seized. Within twenty days after seizure for forfeiture the seizing agency shall make reasonable efforts to [provide] give notice of seizure for forfeiture in the manner provided in section 712A-8(a) or 712A-8(b) to all parties known to have an interest in the seized property.”

SECTION 3. Section 712A-8, Hawaii Revised Statutes, is amended to read as follows:

“~~[[§712A-8]]~~ **Notice of [pending forfeiture.] forfeiture proceedings.**<sup>1</sup> [Whenever notice of pending forfeiture] Unless otherwise provided, whenever notice is required under this chapter it shall be given [or provided] in one of the following ways:

- (a) If the owner’s or interest-holder’s name and current address are known:

- (i) By personal service; or
- (ii) [[By]] [mailing a copy of the notice to the address;] mail:
- (b) If the owner's or interest-holder's interest is required by law to be on record with a state or federal agency in order to perfect an interest in the property, but the person's current address is not known, by mailing a copy of the notice by certified mail to any address on the record; or
- (c) If the owner's or interest-holder's address is not known, and is not on record pursuant to [[paragraph]] (b), or if the person's interest is not known, by publication in one issue of a newspaper of general circulation in the county in which the seizure occurs."

SECTION 4. Section 712A-9, Hawaii Revised Statutes, is amended to read as follows:

“[[§712A-9]] Commencement of proceedings. (1) The prosecuting attorney shall determine whether it is probable that the property is subject to forfeiture and, if so, [may cause the initiation of administrative or judicial proceedings against the property.] shall initiate administrative or judicial proceedings against the property within forty-five days of receipt of a written request for forfeiture from a seizing agency. If, on inquiry and examination, the prosecuting attorney determines, with sole discretion, that the proceedings probably cannot be sustained or that justice does not require the institution of [such] proceedings, the prosecuting attorney shall notify the seizing agency, and as soon as practicable authorize the release of the seizure for forfeiture on the property or on any specified interests in it. A determination by the prosecuting attorney to forego initiation of proceedings shall not be a bar to initiation of proceedings against the same property based on the same circumstances at a later time.

(2) If the property sought to be forfeited is real property, including fixtures, the prosecuting attorney shall file a lis pendens with respect to the property[,] but shall not be required to pay a filing fee.”

SECTION 5. Section 712A-10, Hawaii Revised Statutes, is amended to read as follows:

“[[§712A-10]] Administrative forfeiture. The prosecuting attorney may initiate administrative forfeiture of property other than real property, the estimated value of which is less than \$100,000, or of any vehicle or conveyance, regardless of value[, in the following manner:]. Administrative forfeiture shall be processed in the following manner:

- [(1) If the prosecuting attorney initiates administrative forfeiture, the prosecuting attorney shall provide notice of pending forfeiture by giving notice within thirty days after receiving written request for seizure for forfeiture from the seizing agency as provided in section 712A-8 to persons known to have an interest who have not previously received notice;
- (2) Administrative forfeiture shall be initiated by filing a petition with the attorney general, who may promulgate rules and regulations to effectuate the purposes of this section;
- (3) The attorney general may forfeit property administratively as follows:
  - (a) The attorney general shall provide notice of intention to forfeit property administratively by publication in a local newspaper of general circulation;

- (b) In addition, to the extent practicable the attorney general shall provide notice of intent to forfeit the property administratively to all persons known to have an interest in the property seized;
  - (c) Notice by publication or by mail shall include:
    - (i) A description of the property;
    - (ii) The estimated value of the property;
    - (iii) The date and place of seizure;
    - (iv) The violation of law alleged which authorizes forfeiture of the subject property;
    - (v) Instructions for filing a claim and cost or in pauperis bond, or a petition for remission or mitigation; and
    - (vi) Notice that the property will be forfeited to the State if a petition for remission or mitigation or a claim and cost or in pauperis bond has not been timely filed.]
- (1) The prosecuting attorney shall file a petition with the attorney general, pursuant to rules adopted by the attorney general;
  - (2) The prosecuting attorney shall give notice of pending forfeiture by making reasonable efforts to serve a copy of the petition in a manner provided in section 712A- 8(a) or 712A-8(b) on all persons known to have an interest in the property, together with instructions for filing a claim and cost or in pauperis bond, or a petition for remission or mitigation;
  - (3) The attorney general shall give notice of intention to forfeit the property administratively by publication in the manner provided in section 712A-8(c). Notice by publication shall include:
    - (a) A description of the property;
    - (b) The estimated value of the property;
    - (c) The date and place of the seizure;
    - (d) The offense for which the property is subject to forfeiture;
    - (e) Instructions for filing a claim and cost or in pauperis bond, or a petition for remission or mitigation; and
    - (f) Notice that the property will be forfeited to the State if a claim and cost or in pauperis bond or petition for remission or mitigation is not filed in substantial compliance with this section.
  - (4) Persons claiming an interest in the property may file either a petition for remission or mitigation of forfeiture, or a claim and cost or in pauperis bond, but not both, with the attorney general, within thirty days of [the final] notice by publication or receipt of written notice, whichever is earlier.
  - (5) Any person claiming seized property may seek remission or mitigation of the forfeiture by timely filing a petition with the attorney general. A petition for remission or mitigation shall not be used to challenge the sufficiency of the evidence to support the forfeiture or the actions of any government official but shall presume a valid forfeiture and ask the attorney general to invoke the executive power to pardon the property, in whole or in part. The petition shall be signed by the petitioner and sworn on oath before a notary public and shall contain the following:
    - (a) A reasonably complete description of the property;
    - (b) A statement of the interest of the petitioner in the property, as owner or interest-holder which may be supported by bills of sale, contracts, or mortgages, or other documentary evidence; and

- (c) Facts and circumstances sufficient to show whether the petitioner:
  - (i) Owens or holds an interest in the seized property as defined by section 712A-1;
  - (ii) Had any knowledge that the property was or would be involved in any violation of the law;
  - (iii) Had any knowledge of the particular violation which subjected the property to seizure and forfeiture;
  - (iv) Had any knowledge that the user of the property had any record, including arrests, except when the person was acquitted or the charges dismissed due to lack of evidence, for the violation which subjected the property to seizure and forfeiture or for any crime which is similar in nature.
- (6) If the attorney general, with sole discretion, determines that remission is not warranted, the attorney general may discretionarily mitigate the forfeiture where the petitioner has not met the minimum requirements for remission but where there are present other extenuating circumstances indicating that some relief should be granted to avoid extreme hardship. Mitigation may also be granted where the minimum requirements for remission have been met but the overall circumstances are such that the attorney general determines that complete relief is not warranted. Mitigation shall take the form of a money penalty imposed upon the petitioner which shall be deposited into the criminal forfeiture fund established under section 712A-16. Extenuating circumstances include:
  - (a) Language or culture barrier;
  - (b) Humanitarian factors such as youth or extreme age;
  - (c) Presence of physical or mental disease, disorder or defect;
  - (d) Limited or peripheral criminal culpability;
  - (e) Cooperation with the seizing agency or the prosecuting attorney; and
  - (f) Any contributory error on the part of government officials.
- [(5)] (7) It shall be the duty of the attorney general to inquire into the facts and circumstances [surrounding petitions] alleged in a petition for remission or mitigation of forfeiture. However, no petitioner is entitled to a hearing on the petition for remission or mitigation. Hearings, if any, shall be held at the discretion of the attorney general.
- [(6)] (8) The attorney general shall provide the seizing agency and the petitioner a written decision on each petition for remission or mitigation within sixty days of receipt of [such] the petition unless the circumstances of the case require additional time, in which case the attorney general shall notify the petitioner in writing and with specificity within the sixty day period that the circumstances of the case require additional time and further notify the petitioner of the expected decision date.
- [(7)] (9) Any person claiming seized property may [institute] seek judicial review of the seizure and proposed forfeiture by timely filing with the attorney general a claim and bond to the State in the amount of ten percent of the estimated value of the property or in the sum of \$2,500, whichever is greater, with sureties to be approved by the attorney general, upon condition that [in the case of

the forfeiture the claimant shall pay all costs and expenses of the proceedings.] if the claimant fails to prove that claimant's interest is exempt from forfeiture under section 712A-5, the claimant shall pay the State's costs and expenses, including reasonable attorneys fees incurred in connection with a judicial proceeding. In lieu of a cost bond, a claimant may file[, under penalty of perjury,] an in pauperis bond sworn on oath before a notary public. An in pauperis bond shall be in the form set out in the appendix to the rules of penal procedure. The claim shall be signed [under penalty of perjury] by the claimant and sworn on oath before a notary public and shall comply with the requirements of section 712A-12(5). Upon receipt of the claim and bond, the attorney general shall notify the prosecuting attorney who may discretionarily continue to seek forfeiture by petitioning the circuit court for forfeiture of the property [or may] within forty-five days of receipt of notice that a proper claim and bond has been filed. The prosecuting attorney may also elect to honor the claim in which case the prosecuting attorney shall notify the seizing agency and authorize the release of the seizure for forfeiture on the property or on any specified interest in it. [Any funds received by the attorney general as cost bonds shall be placed in an escrow account pending final disposition of the case.]

- [(8)] (10) If a judicial forfeiture proceeding is instituted subsequent to notice of administrative forfeiture, no duplicate or repetitive notice shall be required. The judicial proceeding, if any, shall adjudicate all timely filed claims.
- [(9)] (11) In the event [no claim and bond is timely filed,] a claim and bond has not been filed in substantial compliance with this section, or if the attorney general, with sole discretion, determines that remission or mitigation is not warranted, the attorney general shall order forfeited all property seized for forfeiture. In the event the attorney general, with sole discretion, determines that remission or mitigation is warranted, the attorney general shall notify the seizing agency and the prosecuting attorney and order the release of the seizure for forfeiture on the property or on any specified interest in it. There shall be no appeal from the attorney general's decision or order of forfeiture or remission [of] or mitigation.
- [(10)] (12)<sup>1</sup> Administrative proceedings and the adoption of rules under this section are exempt from the requirements of chapter 91, the Hawaii administrative procedure act, and are adjudicatory functions for the purposes of applicable sections of the Hawaii Revised Statutes."

SECTION 6. Section 712A-11, Hawaii Revised Statutes, is amended to read as follows:

**"[§712A-11] Judicial forfeiture proceedings; general.** (1) In any judicial or administrative proceeding pursuant to this chapter, the court, on application of the State, may enter any restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, appraisers, accountants or trustees, or take any other action to seize, secure, maintain, or preserve the availability of property subject to forfeiture under this chapter, including a warrant for its seizure, whether before or after the filing of a petition for forfeiture, complaint, or indictment.

(2) If property is seized for forfeiture without a seizure warrant, a prior judicial order of forfeiture, or a hearing pursuant to section 712A-13, a court, on an application filed by an owner or interest-holder within fifteen days after notice of its seizure for forfeiture or actual knowledge of it, whichever is earlier, and complying with the requirements for claims in section 712A-12, may issue an order to show cause to the seizing agency, with thirty days' notice to the prosecuting attorney, for a hearing on the issue of whether probable cause for forfeiture of the applicant's interest then exists, provided that, the order to show cause shall be set aside upon the filing of a petition for either administrative or judicial forfeiture prior to the hearing, in which event forfeiture proceedings shall be in accordance with this chapter.

(3) There shall be a rebuttable presumption that any property of a person is subject to forfeiture under this chapter if the State establishes, by the standard of proof applicable to that proceeding, all of the following:

- (a) That the person has engaged in criminal conduct for which property is subject to forfeiture;
- (b) That the property was acquired by the person during the period of the criminal conduct or within a reasonable time after that period;  
and
- (c) That there was no likely source for the property other than the criminal conduct giving rise to forfeiture.

(4) A finding that property is the proceeds of criminal conduct giving rise to forfeiture does not require proof that the property is the proceeds or any particular exchange or transaction.

[(3)] (5) A defendant convicted in any criminal proceeding shall be precluded from subsequently denying the essential allegations of the criminal offense of which the defendant was convicted in any proceeding pursuant to this chapter. For the purposes of this chapter, a conviction may result from a verdict or plea, including a no contest plea, or deferred acceptance of guilty plea, or a no contest plea.

(6) An acquittal or dismissal in a criminal proceeding shall not preclude civil proceedings under this chapter.

[(4)] (7) In any judicial forfeiture proceeding pursuant to this chapter, if a defense is based on an exemption provided for in this chapter, the burden of proving the existence of the exemption is on the claimant or party raising the defense, and it is not necessary to negate the exemption in any petition, application, complaint, or indictment.

(8) For good cause shown, on motion by the prosecuting attorney, the court may stay discovery against the State in civil forfeiture proceedings prior to trial on a criminal complaint or indictment arising from the same conduct and against a claimant who is a defendant in the criminal proceeding after making provision to prevent loss to any party resulting from the delay. The stay provided by this subsection shall not be available pending appeal of any order or judgment in the criminal proceeding.

[(5)] (9) The court shall receive and consider, at any hearing held pursuant to this chapter, except the hearing on claims pursuant to sections 712A-12(4) through (8) and 712A-13(7), evidence and information which would be admissible under the rules of penal procedure relating to preliminary hearings.

[(6)] (10) All property, including all interest in such property, declared forfeited under this chapter vests in this State on the commission of the act or omission giving rise to forfeiture under this chapter together with the proceeds of the property after [such time.] the act or omission. Any [such] property or proceeds [subsequently] transferred to any person after the act or omission are

subject to forfeiture and thereafter shall be ordered forfeited unless the transferee claims and establishes in a hearing pursuant to this chapter the showings set out in section 712A-5(2).”

SECTION 7. Section 712A-12, Hawaii Revised Statutes, is amended to read as follows:

“**[§712A-12] Judicial in rem forfeiture proceedings.** (1) If a forfeiture is authorized by law, it shall be ordered by a court on an action in rem brought by the prosecuting attorney on a verified petition for forfeiture filed in the criminal or civil division of the circuit court.

(2) A civil in rem action may be brought in addition to or in lieu of the civil and criminal in personam forfeiture procedures set forth in sections 712A-13 and 712A-14 or the administrative forfeiture as set forth in section 712A-10. Judicial in rem forfeiture proceedings are in the nature of an action in rem and are governed by the rules of civil procedure whether brought in the criminal or civil division of the circuit court, unless a different procedure is provided by law.

(3) On the filing of a civil in rem action by the State in circuit court the clerk of the court in which the action is filed shall [provide, and the attorney for the State may provide, the notice of pending forfeiture required] give, and the attorney for the State may give, notice of the filing of the action in the manner provided by section 712A-8 unless the files of the clerk of the court reflect that [such] notice has previously been [made.] given.

(4) An owner of or interest-holder in the property may file a claim against the property, within thirty days after the notice, for a hearing to adjudicate the validity of the claimed interest in the property. The hearings shall be held by the court without a jury.

(5) The claims shall be signed by the claimant and [notarized under penalty of perjury] sworn on oath before a notary public and shall set forth all the following:

- (a) The name of the claimant;
- (b) The address at which the claimant will accept future mailings from the court or the prosecuting attorney [for the State];
- (c) The nature and extent of the claimant’s interest in the property;
- (d) The time, transferor and circumstances of the claimant’s acquisition of the interest in the property;
- (e) The specific provisions of this chapter relied on in asserting that the property seized for forfeiture is not subject to forfeiture;
- (f) [All facts] Facts supporting each [such] assertion that the property is not subject to forfeiture;
- (g) Any additional facts supporting the claimant’s claim; and
- (h) The precise relief sought.

Copies of the claim shall be mailed to the seizing agency and to the prosecuting attorney. [No extension of time for the filing of a claim may be granted.] One extension of thirty days for filing of the claim may be granted upon a written request demonstrating good cause provided that the request is received within the thirty day period for filing of a claim.

(6) The hearing on the claim, to the extent practicable and consistent with the interest of justice, shall be held within sixty days after the filing of the petition. The court may consolidate the hearing on the claim with a hearing on any other claim concerning the same property.

(7) At the hearing, the claimant may testify, present evidence and witnesses on the claimant’s behalf, and cross-examine witnesses who appear at the

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hearing. The State may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing.

(8) The State has the initial burden of showing the existence of probable cause for seizure of the property. On such a showing by the State, the claimant has the burden of showing by a preponderance of the evidence that the claimant's interest in the property is not subject to forfeiture.

(9) In accordance with its findings at the hearing, the court shall order an interest in property returned or conveyed to the claimant, if any, who has established by a preponderance of the evidence that the claimant's interest is not subject to forfeiture. The court shall order all other property, including all interests in the property, forfeited to the State and proceed pursuant to sections 712A-15 and 712A-16."

SECTION 8. Section 712A-16, Hawaii Revised Statutes, is amended by amending subsection (4) to read as follows:

"(4) There is established in the department of the attorney general a revolving fund to be known as the criminal forfeiture fund, hereinafter referred to as the "fund" in which shall be deposited one-half of the proceeds of a forfeiture[.] and any penalties paid pursuant to section 712A-10(6). All moneys in the fund shall be expended by [[the[]] attorney general and are hereby appropriated for the following purposes:

- (a) The payment of any expenses necessary to seize, detain, appraise, inventory, safeguard, maintain, advertise, or sell property seized, detained, or forfeited pursuant [[to[]] this chapter or of any other necessary expenses incident to the seizure, detention, or forfeiture of such property and such contract services and payments to reimburse any federal, state, or county agency for any expenditures made to perform the foregoing functions;
- (b) The payment of awards for information or assistance leading to a civil or criminal proceeding [under this chapter];
- (c) The payment of supplemental sums to state and county agencies for law enforcement purposes; and
- (d) The payment of expenses arising in connection with programs for training and education of law enforcement officers."

SECTION 9. Chapter 134, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

**"§134- Forfeiture of firearms, ammunition, deadly or dangerous weapons, and switchblade knives; when.** All firearms, ammunition, deadly or dangerous weapons, and switchblade knives possessed, used in violation of this chapter or the Hawaii penal code shall be forfeited to the State according to the provisions of chapter 712A and shall be destroyed or, if not destroyed, transferred to the chief of police of the county in which the violation took place for use by and under control of the police department."

SECTION 10. Section 134-12, Hawaii Revised Statutes, is repealed.

SECTION 11. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.



SECTION 12. Statutory material to be repealed is bracketed. New statutory material is underscored.<sup>2</sup>

SECTION 13. This Act shall take effect upon its approval.

(Approved May 23, 1991.)

**Notes**

1. So in original.
2. Edited pursuant to HRS §23G-16.5.