



**WISCONSIN LEGISLATIVE COUNCIL
AMENDMENT MEMO**

2017 Senate Bill 61

**Senate Substitute
Amendment 2 and Senate
Amendment 1 to Senate
Substitute Amendment 2**

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2017 SENATE BILL 61

2017 Senate Bill 61 makes various changes to the asset forfeiture statutes under the Controlled Substances Act, which govern the forfeiture of property seized in connection with a drug-related crime, and under the sentencing laws, which govern the forfeiture of property seized in connection with other, non-drug-related, crimes.

The specific provisions that are modified by Senate Substitute Amendment 2 and Senate Amendment 1 to the substitute amendment are described below. The descriptions apply to both types of forfeiture proceedings, unless otherwise indicated.

SENATE SUBSTITUTE AMENDMENT 2 AND SENATE AMENDMENT 1 TO SENATE SUBSTITUTE AMENDMENT 2

Criminal Charge and Conviction

Current law allows, but does not require, a forfeiture proceeding to be adjourned until after the adjudication of any charges for a crime that was the basis for the seizure of the property.

The bill revises this discretion to instead require that a forfeiture proceeding be adjourned until the defendant is convicted for a crime that was the basis for the seizure of the property. The bill also specifies that the conviction requirement may be waived in certain circumstances, including if the defendant has died, been deported, been granted immunity, or fled the jurisdiction after being arrested, charged, and released on bail.

The substitute amendment revises the circumstances in which the conviction requirement may be waived: it removes the qualification on having fled the jurisdiction only

after being arrested, charged, and released on bail; and it adds two additional circumstances, including when the property has been unclaimed for at least nine months after it was seized, and when the property is contraband.

The substitute amendment also adds a requirement that a charge must be filed within six months after the property was seized, though the time may be extended if warranted.

Pretrial Hearing for Return of Seized Property

Current law allows a person to apply for the return of property that was seized by a law enforcement agency. If an application is filed, the court must hold a hearing to determine ownership. With certain exceptions, if ownership is proven, the property must be returned if it is not needed for evidence or all proceedings in which it might be required have been completed.

The bill creates a separate right to a pretrial hearing process for the return of property. Under a specified pretrial timeline, a person must establish the validity of the alleged interest in the property, and the state must show probable cause for the seizure. If those requirements are shown, the property must be returned if it is likely that the final judgment will require return of the property, or if the property is the only reasonable means to pay for legal representation. In either circumstance, the property must not be needed for evidence.

The substitute amendment maintains the right, under the bill, to a pretrial hearing process for the return of property, but, rather than creating a separate process from current law, the substitute amendment adds a specified pretrial timeline to the process under current law. Under the substitute amendment, with certain exceptions, if ownership is proven, the property must be returned under circumstances identified in a mix of current law and the bill: (1) it is likely that the final judgment will require return of the property and the property is not needed for evidence; (2) the property is the only reasonable means to pay for legal representation, the property is not likely to be needed for victim compensation, restitution, or fines, and the property is not needed for evidence; or (3) all proceedings in which the property might be required have been completed.

Both **the bill** and **the substitute amendment** require that, if the property is returned after a pretrial hearing, the court must order the person not to sell, transfer, assign, or otherwise encumber the property until the forfeiture proceedings are complete, and to surrender the property for forfeiture proceedings if the person is subsequently convicted.

Return of Property in Instances of Acquittal or Dismissal of Charges

Current law does not specifically require a court to return property if there is an acquittal or dismissal of charges for the offense that was the basis for the forfeiture. As noted above, current law allows a person to apply for the return of property, and one circumstance in which the application may be granted is if all proceedings in which it might be required have been completed.

The bill requires a court to order the return of any property within 30 days of acquittal or dismissal of charges for the offense that was the basis for the forfeiture.

The **substitute amendment** maintains this requirement, and specifies that a court must also order the return of any property if the six-month charging deadline and any extensions have expired.

Innocent Owner Protections

Current law specifies that forfeiture actions must be made with “due provision” for the rights of innocent persons. Identified persons include a common carrier, vehicle owner, or holder of a security interest in a vehicle, when the vehicle was used without the person’s knowledge or consent for the illegal conduct.

The bill expressly prohibits the property of an innocent owner from being forfeited and provides a mechanism by which property may be returned to the person. The person must prove the ownership interest, and, to proceed with the forfeiture, the state must prove that the person had actual or constructive knowledge of the underlying crime.

The substitute amendment maintains this provision, and specifies that a person who claims to be an innocent owner may petition the court at any time for the return of the seized property.

Disposition of Forfeited Property

Current law specifies that, **for drug-related crimes**, a law enforcement agency generally may choose whether to retain the forfeited property for official use or sell it and retain 50% of the proceeds for forfeiture expenses with the other 50% to be deposited in the state school fund. **For non-drug-related** crimes, property must be sold, with the same disposition of proceeds, but if the property is a vehicle, the agency may choose whether to retain the vehicle for official use or sell it with the required disposition of proceeds. If the property is money from a drug-related crime, the agency may retain 70% if the forfeited amount is \$2,000 or less, and 50% of any forfeited amount over \$2,000. If the property is money from a non-drug-related crime, 100% must be deposited in the school fund.

The bill specifies that **for both drug and non-drug related crimes**, 100% of money and 100% of sale proceeds must be deposited in the state school fund. No option is given to retain property for official use.

The substitute amendment revises this provision to instead specify that **for both drug and non-drug-related crimes**, a law enforcement agency must sell forfeited property and may retain up to 50% of the proceeds for its publicly reported actual forfeiture expenses with the balance to be deposited in the state school fund. For either type of crime, if the property is a vehicle, the agency may choose to retain the vehicle for official use, for a period up to one year; by the end of that period, the agency must either sell the vehicle with the required disposition of proceeds, or, in order to further retain the vehicle, deposit 30% of its value in the school fund.

The substitute amendment also specifies that, if the property is money, **for a drug-related crime**, the agency may retain up to 50% for its publicly reported actual forfeiture expenses. **For a non-drug-related crime**, the agency must deposit 100% in the state school fund.

Federal Asset Forfeiture Proceedings

Current law does not restrict a law enforcement agency from sharing or transferring seized property under a federal forfeiture proceeding. Seized property that is shared in this manner is subject to federal rules.

The bill specifies that an agreement may be entered into to share or transfer seized property for a federal forfeiture proceeding only if the property includes more than \$50,000 of U.S. currency or if the property may be forfeited only under federal law.

The substitute amendment revises this provision to generally allow sharing or transferring of seized property under a federal forfeiture proceeding, with certain conditions. Specifically, if seized property is shared or transferred, the agency must publicly report its actual forfeiture expenses. Also, if there has been no federal or state criminal conviction, the agency may accept proceeds only if the defendant has died, been deported, received immunity, or fled the jurisdiction, or if the property has been unclaimed for at least nine months.

Proportionality to the Crime

The Eighth Amendment to the U.S. Constitution prohibits government imposition of excessive fines. Under this provision, Wisconsin courts apply a multi-factor “proportionality test,” articulated by the U.S. Supreme Court. Under that test, the amount of the forfeiture must bear some relationship to the gravity of the offense it is designed to punish. The four factors are the nature of the offense, the purpose for enacting the statute, the fine commonly imposed upon similarly situated offenders, and the harm resulting from the defendant’s conduct. [*U.S. v. Bajakajian*, 524 U.S. 321 (1998); *State v. Boyd*, 2000 WI App 208.]

The bill specifies that a court may not order the forfeiture of property if the court finds either that the forfeiture is grossly disproportional to the underlying crime or that the forfeiture is unconstitutionally excessive. The bill includes a detailed list of eight factors that must be considered in that determination, such as the seriousness of the offense and its impact on the community, the extent to which the person participated in the underlying crime, and the extent to which the property was used in committing the crime.

The substitute amendment retains the prohibition on ordering the forfeiture of property if the court finds that the forfeiture is grossly disproportional or unconstitutionally excessive. However, it replaces the list of eight factors that a court must consider with a list of four factors that correspond to the factors established in case law.

Attorney Fees

Current law does not specifically provides for attorney fees in forfeiture proceedings.

The bill provides that a person who prevails in an action to return property subject to forfeiture must be awarded reasonable attorney fees by the state. For this purpose, the bill specifies that a person “prevails” if they recover more than 50%, by value, of the money or other property that is claimed.

The **substitute amendment** maintains, without revision, the provisions of the bill relating to attorney fees.

Senate Amendment 1 to the substitute amendment removes the requirement to award reasonable attorney fees, and instead specifies that reasonable attorney fees may be awarded if the court finds that the agency or prosecuting attorney has arbitrarily and capriciously pursued the forfeiture action.

BILL HISTORY

Senate Substitute Amendment 2 was offered by Senators Craig and Nass on September 6, 2017. On September 7, 2017, the Senate Committee on Labor and Regulatory Reform voted to recommend adoption of the substitute amendment and passage of the bill, as amended, on votes of Ayes, 3; Noes, 2.

Senate Amendment 1 to Senate Substitute Amendment 2 was offered by Senator Craig on February 5, 2018. On February 20, 2018, the Senate adopted Senate Amendment 1 to Senate Substitute Amendment 2, and Senate Substitute Amendment 2, as amended, on voice votes, and passed the bill, as amended, on a vote of Ayes, 22; Noes, 10.

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