

## 2021 South Dakota Legislature

**Senate Bill 164****AMENDMENT 164A FOR THE INTRODUCED BILL**

This bill has been extensively amended (hoghoused) and may no longer be consistent with the original intention of the sponsor.

1 **An Act to ~~provide for a formal~~ modify the process ~~criminal for civil~~ forfeiture.**

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

3 **Section 1.** That § 23A-49-9 be AMENDED.

4 **23A-49-9. Time--Proceedings--Jurisdiction.**

5 If a seizure pursuant to § 23A-49-7 or subdivisions 23A-49-8(1), (3), or (4) occurs,  
6 ~~the attorney general shall institute, no proceeding pursuant to § 23A-49-14 or 23A-49-15~~  
7 ~~may be brought prior to a judgment of conviction being entered for the related criminal~~  
8 ~~offense and must be brought within sixty days of the seizure, the proceedings pursuant~~  
9 ~~to § 23A-49-14 or 23A-49-15 judgment of conviction being entered.~~ The court that has  
10 jurisdiction for the related criminal offense has sole jurisdiction over any proceeding  
11 pursuant to § 23A-49-14 or 23A-49-15.

12 Nothing in this section prevents property from being forfeited by agreement of the  
13 property owner as part of a plea agreement or grant of immunity or reduced punishment,  
14 with or without the filing of a criminal charge.

15 The court may waive the conviction requirement, if:

16 (1) The property owner has died;

17 (2) The property owner was deported by the U.S. government;

18 (3) The property owner abandoned the property;

19 (4) The property owner fled the jurisdiction;

20 (5) The property owner has waived, in writing, any ownership interest in the property;

21 or

22 (6) The property seized is cash in excess of twenty thousand dollars which was seized  
23 pursuant to subdivisions 34-20B-70(6) or 34-20B-70(7).

**Section 2.** That § 34-20B-70 be AMENDED.

**34-20B-70. Property subject to forfeiture.**

The following are subject to forfeiture pursuant to chapter 23A-49 and no property right exists in them:

- (1) All controlled drugs and substances and marijuana which have been manufactured, distributed, dispensed, or acquired in violation of the provisions of this chapter or chapter 22-42;
- (2) All raw materials, products, and equipment of any kind which are used or intended for use, in manufacturing, compounding, or processing, ~~importing, or exporting~~ any controlled drug or substance or marijuana in excess of one-half pound in violation of the provisions of this chapter or chapter 22-42;
- (3) All property which is used, or intended for use, as a container for property described in subdivisions (1) and (2);
- (4) All conveyances including aircraft, vehicles, or vessels, ~~which transport, possess, or conceal, or~~ which are used, or intended for use, to transport, ~~or in any manner facilitate the transportation, sale, receipt, unlawful distribution or possession, or concealment of~~ with the intent to distribute marijuana in excess of one-half pound or any quantity of any other property described in subdivision (1) or (2), ~~except as provided in §§ 34-20B-71 to 34-20B-73, inclusive. This subdivision includes those instances in which a conveyance transports, possesses or conceals marijuana or a controlled substance as described herein without the necessity of showing that the conveyance is specifically being used to transport, possess, or conceal or facilitate the transportation, possession, or concealment of marijuana or a controlled substance in aid of any other offense;~~
- (5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this chapter;
- (6) Any funds or other things of value used for the purposes of unlawfully purchasing, attempting to purchase, distributing, or attempting to distribute any controlled drug or substance ~~or marijuana in an amount intended for distribution and not for personal use, and marijuana in excess of one-half pound; or~~
- (7) Any assets, interest, profits, income, and proceeds acquired or derived from the unlawful purchase, attempted purchase, distribution, or attempted distribution of any controlled drug or substance ~~or marijuana in an amount intended for distribution and not for personal use, and marijuana in excess of one-half pound.~~

Property described in subdivision (1) shall be deemed contraband and shall be summarily forfeited to the state, property described in subdivisions (2), (3), (5), (6), and (7) is subject to forfeiture under the terms of § 23A-49-14, and property described in subdivision (4) is subject to forfeiture under the terms of § 23A-49-15.

**Section 3.** That § 23A-49-20 be AMENDED.

**23A-49-20. Attorney general's disposition of forfeited property.**

If property is forfeited under this chapter, the attorney general may:

- (1) Retain the property for official use;
- (2) Sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public, provided that the proceeds be disposed of for payment of all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs. All money seized or remaining proceeds from the sale of any forfeited property shall be paid into the following funds:
  - (a) If seized pursuant to a violation of chapters 34-20B or 22-42, proceeds shall go to the drug control fund;
  - (b) If seized pursuant to a violation of chapters 22-24A, 22-23, 22-19A, 22-24B, 43-43B, or 23A-27, proceeds shall be used to reimburse the actual costs of the criminal investigation and prosecution, and any amount over those costs shall be used to satisfy any civil judgments received by the victims. All remaining proceeds shall be paid to the South Dakota internet crimes against children fund; and
  - (c) If not otherwise specified by this chapter, proceeds shall go to the general fund; or
- (3) If property is seized pursuant to a violation of chapters 34-20B or 22-42, the attorney general may forward it to the Division of Criminal Investigation for disposition. Such disposition may include delivery for medical or scientific use to any federal or state agency under regulations of the United States attorney general.  
However, in its discretion, a court may order any proceeds, or portion thereof, under subdivision (2) be applied to an award of restitution or a county lien for court-appointed counsel for the civil forfeiture action or the related criminal offense.

**Section 4.** That § 23A-40-6 be AMENDED.

**23A-40-6. Arrest or detention without formal charge--Assignment of counsel--Certification of indigency required.**

In any criminal investigation or in any criminal action or action for revocation of suspended sentence or probation in the circuit or magistrate court or in a final proceeding to revoke a parole, or any proceeding pursuant to § 23A-49-14 or 23A-49-15, if it is satisfactorily shown that the defendant or detained person does not have sufficient money, credit, or property to employ counsel and pay for the necessary expenses of his representation, the judge of the circuit court or the magistrate shall, upon the request of the defendant, assign, at any time following arrest or commencement of detention without formal charges, counsel for his representation, who shall appear for and defend the accused upon the charge against him, or take other proper legal action to protect the rights of the person detained without formal charge.

In each case, the indigent person, subject to the penalties for perjury, shall certify in writing or by other record such material factors relating to his ability to pay as the court prescribes.

**Section 5.** That a NEW SECTION be added:

**23A-49-21. Property--Exempt.**

Notwithstanding any other provision of law, the following property is exempt from forfeiture pursuant to this chapter:

- (1) Homesteaded real property;
- (2) U.S. currency totaling one thousand dollars or less; and
- (3) A motor vehicle of less than five thousand dollars in fair market value.

**Section 6.** That a NEW SECTION be added:

**23A-44-22. Post-seizure hearing.**

Following seizure, a defendant or any other person with an interest in the property has a right to a prompt post-seizure hearing. A person with an interest in the property may petition the court for a hearing.

At the court's discretion, the court may hold a prompt post-seizure hearing as a separate hearing. A party, by agreement or for good cause, may move for one extension of no more than ten days. Any motion may be supported by affidavits or other submissions.

The court may order the return of property if it finds, by preponderance of the evidence, any of the following:

- 1 (1) The seizure was invalid;  
2 (2) A criminal charge has not been filed, no extension of the filing period is available,  
3 and no exception under § 23A-49-9 applies;  
4 (3) The property is not reasonably required to be held as evidence; or  
5 (4) The final judgment likely will be in favor of the defendant or any other person with  
6 an interest in the property.  
7 The provisions of this section do not apply to contraband.

8 **Section 7.** That a NEW SECTION be added:

9 **23A-49-23. Proportionality.**

10 The defendant may petition the court to determine, whether the forfeiture is  
11 unconstitutionally excessive under the state or federal constitution. The defendant has the  
12 burden of establishing the forfeiture is unconstitutionally excessive by a preponderance of  
13 the evidence.

14 In determining whether the forfeiture is unconstitutionally excessive, the court may  
15 consider all relevant factors including:

- 16 (1) The seriousness of the crime and its impact on the community, including the  
17 duration of the activity and harm caused by the defendant;  
18 (2) The extent to which the defendant participated in the crime;  
19 (3) The extent to which the property was used in committing the crime;  
20 (4) The sentence imposed for committing the crime;  
21 (5) Whether the crime was completed or attempted;  
22 (6) The hardship to the defendant if the forfeiture is realized and if the forfeiture would  
23 deprive the defendant of the defendant's livelihood; and  
24 (7) The hardship from the loss of property to the defendant's family members or others  
25 if the property is forfeited.

26 In determining the value of the instrumentality subject to forfeiture, the court may  
27 consider all relevant factors related to the fair market value of the property. The court  
28 may not consider the value of the property to the state in determining whether the  
29 forfeiture is unconstitutionally excessive.

30 **Section 8.** That §§ 23A-49-16 to 23A-49-18 be REPEALED.