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300 SW TENTH AVENUE ■ SUITE 24-E ■ TOPEKA, KS 66612 ■ (785) 296-2321

MEMORANDUM

To: House Committee on Judiciary
From: Office of Revisor of Statutes
Date: February 16, 2022
Subject: Bill Brief on HB 2640

HB 2640 creates a new process for criminal forfeiture of property with a value of less than \$100,000 that is used in the commission of certain crimes.

Section 1 names the act the criminal forfeiture act and applies the act to the seizure and forfeiture of property with a value of less than \$100,000 that is used in the commission of a crime described in K.S.A. 60-4104, which contains the list of conduct and offenses giving rise to forfeiture under the Kansas standard asset seizure and forfeiture act.

Section 2 provides for definitions to be used throughout the act.

Section 3 provides that a court that has jurisdiction over a criminal case giving rise to forfeiture has jurisdiction over the related forfeiture proceeding and such proceeding shall be part of the criminal case. A hearing on the forfeiture shall be conducted after the defendant has been convicted of the crime giving rise to forfeiture.

Section 4 authorizes the court to issue an ex parte order to seize personal property. Property may be seized without a court order if the personal property is seized incident to a lawful arrest, there is probable cause to believe a delay would result in removal or destruction of the property or the personal property is the subject of a previous valid judgment of forfeiture.

Section 5 provides that real property shall not be seized without a court order. Such a court order shall not be issued unless the defendant and any other person with interest in the property is given notice and opportunity for a hearing.

Section 6 provides that no property rights exist in stolen property or contraband.

Section 7 provides that when property is seized, a law enforcement officer shall give an itemized receipt to the person from whom the property was seized.

Section 8 provides that real property that is a homestead, money in an amount of \$200 or less and motor vehicles with a market value of \$2,000 or less are not subject to seizure or forfeiture.

Section 9 prohibits a law enforcement officer from requesting a person to waive their interest in property and provides that any document purporting to waive an interest in property is void and unenforceable.

Section 10 provides that title to property subject to forfeiture vests with the state when the court issues a forfeiture judgment.

Section 11 provides that if a defendant is represented by a public defender or appointed counsel, such public defender or appointed counsel shall represent the defendant in the related forfeiture proceeding. If the defendant or an innocent owner engages in pro se representation, the prosecutor may engage in discussions with them for the purpose of resolving the claim.

Section 12 requires a prosecutor to perform a reasonable search to identify people other than the defendant with interest in the property. A prosecutor shall give notice to people identified, and the section includes language required to appear in the notice.

Section 13 provides that after property is seized, a defendant or person with interest in property may petition the court to conduct a hearing on the seizure. Such hearing shall be conducted within 30 days of the petition being filed except one 10-day extension may be granted for good cause. The section provides the list of circumstances under which property shall be returned and allows the court to return the property for the purpose of obtaining counsel if the property is not needed as evidence.

Section 14 provides that when a prosecutor seeks to forfeit property, the prosecutor shall file notice and the section provides for what is to be included in such notice. If the prosecutor does not properly file such notice, the court shall order the return of the property.

Section 15 provides that property may be forfeited if the state secures a conviction for a crime described in K.S.A. 60-4104 and establishes by a preponderance of the evidence that the property is an instrumentality of or proceeds derived from such crime. Nothing prohibits property from being forfeited as part of a plea agreement or grant of immunity or reduced punishment in exchange for testifying or assisting law enforcement or a prosecution. The conviction requirement of this section may be waived if the prosecutor shows by a preponderance of the evidence that the defendant died, was deported, abandoned the property or fled the jurisdiction.

Section 16 authorizes a defendant to petition the court to determine whether a forfeiture is unconstitutionally excessive. The court may consider (1) the seriousness of the crime, (2) the extent to which the defendant participated in the crime, (3) the extent to which the defendant participated in the crime, (4) whether the crime was completed or attempted, (5) the sentence or fine to be imposed for the crime, (6) the hardship on the defendant's livelihood if the property is a motor vehicle, and (7) an unjust hardship on the defendant's family. The court shall not consider the value of the property to the state.

Section 17 provides that property encumbered by a security interest shall not be subject to forfeiture. Such property shall be returned to the secured interest holder up to the value of the interest. If not returned, the secured interest holder may petition for the return. Such holder would be required to prove the security interest by a preponderance of the evidence and if they allege a valid interest, the prosecutor would have to establish, by a preponderance of the evidence that the interest is valid, the interest resulted from a fraudulent conveyance or the secured interest holder consented to the use of the property. If such burden is not met, the property shall be returned.

Section 18 provides that property of an innocent owner shall not be subject to forfeiture. Such property shall be returned to the innocent owner, and if it is not returned the owner may petition the court. Such petition shall include a statement that describes the innocent owner's interest in or regular use of the property, the relief sought and any additional facts supporting the claim. The court shall hold a hearing and if the prosecutor disputes the validity of the interest, the prosecutor shall establish, by a preponderance of the evidence, that the interest is valid, the innocent owner does not regularly use the property, the innocent owner has knowledge that the property was used in the crime or the innocent owner was not a bona fide purchaser without notice of defect in the title and for valuable consideration. No information provided by the innocent owner shall be used as evidence in the criminal case against the defendant. A defendant may invoke the right against self-incrimination or the marital privilege during a forfeiture proceeding.

Section 19 provides that if the prosecutor fails to meet the burden in a forfeiture proceeding, the court shall dismiss and order the return of the property. If the prosecutor does meet the required burden, the court shall enter a judgment forfeiting the property.

Section 20 provides that the court may order forfeiture of substitute property up to the value of the property that would otherwise be subject to forfeiture but is beyond the court's jurisdiction or cannot be located.

Section 21 provides that a defendant is not jointly and severally liable for forfeiture awards owed by other defendants. When ownership is unclear, a court may order each defendant to forfeit property on a pro rata basis.

Section 22 provides for appeals. If an owner's claim prevails by recovering at least half of the property, the court shall order the seizing agency or the prosecutor to pay reasonable attorney fees and costs, post-judgment interest and any interest actually paid.

Section 23 provides that if the court order the return of the property, the law enforcement agency holding the property shall return it within 5 days of the order. The owner shall not be subject to expenses of moving the property. The law enforcement agency holding the property is responsible for any damages, storage fees or related costs.

Section 24 provides that when property other than money is forfeited, the court shall order a sale of the property. The section also provides for the disposition of proceeds from that sale.

Section 25 amends K.S.A. 60-4103 to provide that the Kansas standard asset seizure and forfeiture act shall only apply to property seized with a value of more than \$100,000, and that all other seizures shall be governed by the criminal forfeiture act.