

Senate Judiciary Committee

Jennifer Horgan 271-7875

HB 331-FN, relative to a forfeiture of personal property.

Hearing Date: April 6, 2021

Time Opened: 1:06 p.m.

Time Closed: 2:37 p.m.

Members of the Committee Present: Senators Carson, Gannon, French, Whitley and Kahn

Members of the Committee Absent : None

Bill Analysis: This bill limits the conditions under which seized property may be transferred to a federal agency.

Sponsors:

Rep. Sylvia

Rep. T. Lekas

Rep. Bean

Rep. Greene

Rep. Aron

Rep. Spillane

Rep. A. Lekas

Who supports the bill: 11 people signed up in support of the bill. Full sign in sheet available upon request.

Who opposes the bill: 220 people signed up in opposition to the bill. Full sign in sheet available upon request.

Summary of testimony presented in support:

Representative Sylvia

- NH handles asset forfeiture through a criminal process rather than a civil process as is done on the federal level.
- This bill adds to NH statute by trying to plug the loopholes.
- The federal program of equitable sharing adopts seizures from the state and allows them to move through civil prosecution at the federal level.
- This bill would set a \$100,000 cash limit of cash seized.
- When a seizure is below \$100,000 it would stay in the state criminal process, requiring a criminal conviction in most cases.
- This is clear in excluding federal joint taskforce operations, so that the only seizures that would be prosecuted on the state level are those exclusively done by state officials and below \$100,000.
- Senator Gannon asked what percentage of the federal seizures go back to the district.

- In a federal civil asset forfeiture through equitable sharing 20% stays with the feds and 80% goes back to the department that seized the assets. In a state criminal asset forfeiture 45% goes to seizing agency, 45% goes to the Attorney General, and 10% goes to DHHS for drug rehabilitation services. Lee McGrath from the Institute of Justice has specific numbers.
- Senator French asked what the difference is between the federal and the state process.
 - The state process is generally a criminal process and federal is a civil process, meaning there does not need to be a connection to a crime on the federal level as it is a prosecution against the asset that has been seized.
- Senator French asked if when this is done on the federal level, an individual could lose their assets without being convicted of a crime and on the state they could not.
 - Correct. The bigger problem is that most seizures are below \$10,000 and at those levels it is cost prohibitive for a person to get a lawyer to fight for something like a \$5,000 car.
- Senator Kahn asked if this bill effects the state's criminal forfeiture process.
 - It is not, other than bypassing in some cases. One of the issues is that law enforcement is concerned about the loss of money. The policy of budgeting starts with the legislative body and we do not have executive branches funding themselves. Therefore, if we are going to budget for things police say they need then we should budget for that.
- Senator Kahn asked if this bill would affect the established distribution.
 - It will not. It just prohibits certain seizures from going through the federal process.
- Senator Kahn asked if anyone has tried to quantify the financial impact of this,
 - The last time this bill was in the Senate (HB614) it was turned into a reporting bill that would require the Attorney General to collect data on this from departments. Does not believe the Attorney General has proceeded with that yet.

Representative Judy Aron

- We need to put limits on what can and cannot be seized by law enforcement with regard to personal property.
- By setting the bar for forfeiture high and of a specific nature, we will make it more worthwhile for law enforcement to concentrate on real drug pins and high value targets, rather than those of lesser importance.
- 95% of forfeitures are below \$10,000.
- Disadvantaged members of society are hit particularly hard by these seizures.
- Need to consider those who are wrongly accused, especially when the federal government is involved.
- Need to take into consideration the poor individual who's \$5,000 car is seized by the feds and they are not convicted but can still never get their car back.
- Concerned with assets that are incorrectly seized and take forever to get back.

Lee McGrath (The Institute for Justice)

- This is a modest bill that builds on the work from the bill in 2016.

- The current practice of adoptions is inconsistent with Attorney General Session's guidelines.
- This bill focuses on roughly 12 seizures per year that constitutes \$72,000.
- The differential between the 80% from the feds and the state breakdown of 45% works out to only be \$25,000 a year.
- The work from the Committee in 2016 said the policy of NH is to charge and convict a person as a prerequisite to taking title of property through NH's civil forfeiture process.
- No one acquitted of the crime in NH loses their property in civil forfeiture.
- That is the due process difference between the state and federal level.
- In July 2017 Attorney General Sessions put out instructions that the US Attorney should not adopt cases that are less than \$5,000-\$10,000.
- The medium of those 12 adoptions is \$6,000.
- Senator French asked about the 12 cases.
 - The federal government has a system called CATs in which it reports on the number of forfeitures done under federal law. Broke down the number forfeitures under adoptions and those under joint taskforces. Over the last five years joint taskforces took in \$3.4million in 171 forfeitures. The other adoptions over three years were \$370,000 in 61 forfeitures. Annualizing that it is 12 forfeitures equaling \$72,000 a year. The federal government often does not engage in civil forfeiture. Title transfers under federal law is done through an administrative process. So the question of preponderance of the evidence is not even met.

Ross Connolly (Americans for Prosperity)

- This reform bill will protect citizens' property rights and require law enforcement to comply with state rules for forfeiture, preventing state and local law enforcement from taking assets for their own use without criminal proceedings or due process.
- A YouGov poll conducted in 2020 showed that 70% of Americans opposed the federal equitable sharing program.
- This must be corrected to ensure our justice system has the trust to carry out its critical business of keeping NH citizens safe.
- Senator Kahn asked if this is a matter of the timing of the forfeiture, the due process, and there is much more minimal impact than the total amounts shared by previous testifiers.
 - Correct. Removing joint taskforces was a compromise that significantly limited the scope of this bill.

Honorable Dan McGuire

- This will not cut law enforcement's funding significantly.
- Under federal equitable sharing 20% of the funds disappears to the federal government.
- Under the NH process 100% stays in NH.
- There might be some cases where the federal government would cause forfeiture to occur, but under state law it would not.
- If you are going to punish people they ought to have committed a crime first.
- NH has great forfeiture laws, and we should use them.

Honorable Joe Hannon

- The state Constitution mandates transparency and if there is money going to the federal government and then directly back to local law enforcement there is no accountability for how that money is spent.
- The purpose of the justice system is to rehabilitate, not to exterminate.
- Although drug courts are valuable, there is a lot of evidence that shows that individuals who are released after a short period of incarceration are 29 times more likely to die of an overdose related event than others.
- HB420 was very similar to this where it would take money away from the Attorney General's Office and give it instead to DHHS to actually help people.
- Money coming back to the state from the feds should be going to the General Fund to be distributed by the legislature.
- Suggests adding the language from HB420 to this bill.

Representative Max Abramson

- The federal and state Constitutions say assets should not be taken without due process of law, which means a person has a right to present their case in front of a jury.
- Believes in some instances asset forfeiture needs to be a punishment, but it has to be placed before a jury.
- A YouGov poll stated that only 26% of Americans said there should be civil forfeiture without a trial and without a criminal conviction. 67% of voters and 60% of republican voters said they would prefer a congressional candidate who was opposed to federal asset forfeiture.
- Although we are fortunate to have some of the best police in the country, there is still potential for abuse.

Summary of testimony presented in opposition:

Chief Michael Carignan (Nashua Police Department)

- The concept of drug forfeiture is to take drug dealers and punish them by taking the proceeds they make off selling drugs and putting those funds back into the criminal justice system through continued enforcement and education programs.
- The Nashua Police Department funds its drug unit strictly through asset forfeiture.
- If this bill moves forward, the department will not be able to continue to fund a drug unit.
- The Department gives \$25,000 a year to nonprofits for drug education, including the Child Advocacy Center (CAC) and Bridges.
- If the Department must narrow their budget under this, those nonprofits will lose out on those funds.
- Without a drug unit, the Department will be unable to participate in drug seizures without some other outside funding source.
- Seizing money from drug dealers enables the investigators to move up the supply chain.
- There is currently due process for every forfeiture that occurs: must prove it is drug dealing proceeds, and if the money cannot be accounted for along those lines then it does not get put into the kitty.

- The Department is audited every year on every forfeiture fund regarding how it comes in and what the Department does with it.
- Senator Whitley asked what the resulting lost revenue would be from this bill.
 - Varies from year to year. Some years it is \$45,000 and some years it is \$20,000.
- Senator Whitley asked what proportion goes to nonprofits.
 - \$25,000 goes to the local nonprofits. Over the last couple years, the CAC and Bridges each got \$10,000. The Department also gives to the Youth Council.
- Senator Kahn asked if the Attorney General provides any grant funding to assist case investigations.
 - No. Bigger cities like Nashua and Manchester have their own drug units, which are self-funded. The 45% that goes to the Attorney General is used to fund smaller towns that cannot fund their own taskforces.
- Senator Kahn asked if this is done in conjunction with the state.
 - Correct. Has officers in federal taskforces as well. In each state investigation the Department works in conjunction with the Attorney General's Office. A lot of cases will start local, but then end up being cross border, turning into a much larger investigation.
- Senator Kahn asked if because of the impact on the community, regardless of the funding, will the Department continue to pursue these efforts.
 - Disagrees. The Department's budget this year is already \$735,000 under the previous year. To add another more cuts exasperates that. This bill would absolutely impact the Department's ability to do street level drug investigations. In street level investigations, officers will often arrest the drug users and in 99% of the time they do not put them in prison, but instead require they get into a substance misuse program.
- Senator Gannon asked if seizures tried at a state criminal level court it must be tried beyond a reasonable doubt and on the federal civil level is only the preponderance of the evidence standard.
 - That's correct.
- Senator Gannon asked if it would be much harder to get convictions on the state level.
 - Correct.

Lt. John Cunningham (Manchester Police Department) (provided written testimony)

- If passed this bill would have a negative and lasting impact on the ability to operate Manchester's drug unit effectively.
- The passage of this will have a statewide impact.
- Manchester is a source city of statewide drug distribution and is a supply line for cross border drug traffickers.
- Manchester Police has seven taskforce officers assigned to federal agencies.
- Manchester's investigations result in legal seizures of assets from drug traffickers.
- This bill bars local agencies from entering into an adoptive forfeiture process with federal agencies.

- It is common for Manchester to conduct investigations into offenders who initially might not be considered high level drug traffickers and therefore those investigations do not include federal partners at the onset.
- Cannot always predict the seriousness of the drug trafficker until the investigation is well underway or even at the final stages.
- The seriousness of the offender is not based on the amount of cash seized.
- Majority of seizures are under \$100,000.
- Although NH has made a strong effort to combat the opioid epidemic, still seeing a sharp rise in fentanyl and crystal methamphetamine.
- Decreasing funding will result in a rise in crime with drug traffickers and users taking advantage of decreased enforcement efforts.
- This bill could shift the burden of drug enforcement from drug traffickers to taxpayers.
- Senator French asked how much Manchester would lose under this bill.
 - Varies from year to year. Since 2018 the Department has received \$330,000 from asset forfeiture funding through the feds.
- Senator French asked how much the police budget is.
 - The annual budget is \$28 million.
- Senator Kahn asked if the forfeiture money funds a position.
 - That \$330,000 comes directly back to law enforcement of operations.

Lt. Joshua Albert (Nashua Police Department)

- There is a high level of due process in the equitable sharing program.
- The facts of the case must be presented to a federal judge who decides whether the case should move forward.
- The federal program is fairly well vetted and has strict guidelines.
- Avenues of arrest and prosecution are not always available.
- In some cases the civil asset forfeiture is a particular mechanism due in large part to the ever-increasing sophistication of criminals.
- Criminals will hide assets in unwitting third parties or in shell corporations.
- Civil asset forfeiture allows law enforcement to seize assets they know to be of illegal drug proceeds.
- Nashua has five federal taskforce officers they partner with.
- Sometimes a case will begin on the federal level and then a federal prosecutor may not see the merits, which result in losing the state mechanism.
- Law enforcement needs the ability to adapt in cases.
- Senator Gannon asked if when a federal prosecutor is looking at a case they have already sworn to uphold the law, so they will not make something up or they would lose their license.
 - Correct. Every prosecutor has discretion in every case. A case may meet the weight limits or drug nexus of what a federal prosecutor is looking for, but there are times when that prosecutor may not want to prosecute. There are times at the state level, if an individual pleads to a lesser charge then that seized property is no longer able to be forfeited.
- Senator Gannon asked if the federal prosecutor wants to move forward with a case, do they then take it to a federal magistrate to find probable cause.
 - Correct. Probable cause has to be shown to seize the property.

- Senator Gannon asked if after the federal magistrate finds probable cause is there a hearing where the case has to be found beyond a reasonable doubt.
 - In the civil process under the federal guidelines, the burden of proof is raised to the preponderance of the evidence. At every stage both parties can represent their facts and position.

Major Christopher Bashaw (Rockingham County Sherriff's Office/Sheriffs Association)

- Has never seen any examples of abuses of asset forfeiture that have occurred in NH.
- This would devastate the ability to run county wide drug taskforces.
- NH's asset sharing formula does not provide the county with enough funds to effectively pursue drug dealers.
- As a result, generally pursue the federal adoption process.
- Under this bill, unless additional funding is provided for drug enforcement, law enforcement will not be able to effectively do their jobs.
- In approximately 95% of cases there are no assets to be seized beyond a few hundred dollars, and most of that is tied up in court for lengthy periods of time as buy money evidence.
- This bill would prevent NH law enforcement from bringing in federal officers as the case grows, as it would be seen as a circumvention of this bill.
- Not chasing the money but the money that does come back is vital in further drug investigations.
- When a taskforce receives a seizure amount, law enforcement has an obligation to make sure the supporting agencies receive a portion of the forfeiture depending on their efforts.
- If the sheriff's office receives a \$50,000 asset share, they have to also try to make whole all the partnering agencies that put up their time, assets and resources for the case.
- The federal process has mechanisms in place to allow defendants the ability to make the prosecutors prove there is a criminal nexus to the forfeitures.
- Concerned that the Attorney General's Office is not prepared and does not have the resources to manage the influx of cases this could result in.
- Senator Gannon asked about the concern of those who are wrongly accused not being able to get assets back.
 - Has heard stories of these federal seizures that happen in other parts of the country. NH law enforcement holds themselves to a higher standard. Has yet to see a specific example that speaks to this happening in NH. Has heard testimony concerning seizures of less than \$10,000 for those who are indigent, so is confused why this bill sets the limit at \$100,000.
- Senator Kahn asked if the county sheriffs know what the fiscal impact of this would be.
 - Did not put a comprehensive package on this. These cases fluctuate. Filled out a case on this last week and it would have been looking at a 25% difference in assets returned to the partnering agencies if this bill was in effect.
- Senator Kahn if the different ratios helps guide partnering agencies.

- It absolutely has an impact because law enforcement understands what resources are going to be available in each case. When partnering with the federal government, they bring a lot more assets and resources.

Chief Bryfonski (Association of Chiefs of Police/Bedford Police Department)

- The US Attorney General’s Manual states *“when property is seized as part of an ongoing federal criminal investigation and the criminal defendants are being prosecuted in federal court, as a general rule, the federal seizing agency should commence an administrative forfeiture proceeding or forfeiture should be pursued civilly or criminally in federal court, regardless of whether the property was seized by a federal, state, or local law enforcement agency. Conversely, when a state or local agency has seized property as part of an ongoing state criminal investigation and the criminal defendants are being prosecuted in state court, any forfeiture action should generally be pursued in state court assuming that state law authorizes the forfeiture.”*
- It is the policy of the US Attorney’s Office in NH to require a state prosecution.
- The notion that property is being seized by people who are not being criminal prosecuted is patently false.
- Shared statistics regarding overdose deaths in NH.
- In addition to requiring a criminal prosecution, in the federal process there is a petition for remission or mitigation where anyone who has property that has been seized can petition the government for remission or mitigation of that seizure.
- When property is seized as proceeds or for facilitating drug trafficking and that property is transferred to the government, that is usually done as part of a plea bargain.
- All departments account for this money.
- This is dealing with drug traffickers and not an innocent car owner who lent their car to someone for the day.
- Senator Gannon asked how much money this means on average to Bedford.
 - It depends. Probably less than \$20,000 annually. Bedford is a town that is not necessarily as plagued by this issue as other cities, so it may not represent a serious issue for Bedford, it does for other towns.

Joy Barrett (Granite State Children Alliance)

- The Nashua Police Department provides funding to the CAC through the DAG program, and those funds supports the family support specialist position.
- These federal forfeitures allow local law enforcement to receive funds that can then be put back into their community.
- This bill will reduce the amount of funds going to local communities and instead direct it to the General Fund.
- This will reduce or eliminate municipalities’ ability to allocate drug forfeiture money to local programs that serve the needs of the community.
- Senator Whitley asked if Nashua is the only CAC that receives funds from this.
 - The Granite State Children’s Alliance operates four centers. The Nashua center is the only one receiving DAG funding through the police department. Without those funds would be unable to have that position at the center.

- Senator Whitley asked if this type community reinvestment is unique to NH.
 - It does happen in other states. There are different funding strategies for different CACs, from being state funded to those that are nonprofits.
- Senator Whitley asked if it is true that services for children and support services for families is critically under funded in NH, so any sort of funding is desperately needed.
 - There is an obvious need for funding for services around NH, especially for CACs working with victims of crime. There is certainly much more that could be done if funding was available.

Senator Kahn requested a letter from the Attorney General's Office on this program.

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Date Hearing Report completed: April 9, 2021