SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1380

SPONSOR: Criminal Justice Committee and Senator Argenziano

SUBJECT: Stolen Property/Owner I.D.

DATE: March 3, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Fav/CS
2.			JU	
3.				
4.				
5.				
6.				

I. Summary:

Committee Substitute for Senate Bill 1380 provides that proof that a dealer who regularly deals in used property possesses stolen property upon which a name and phone number of a person other than the offeror of the property are conspicuously displayed gives rise to the inference that the dealer possessing the property knew or should have known that the property was stolen. If the name and phone number are for a business that rents property, the dealer avoids the inference by contacting the rental business, prior to accepting the property, to verify that the business owns the property and the property was not stolen from that business. If the rental business does not own the property, or the name and phone number on the property are for a person other than the rental business, the dealer avoids the inference by contacting the local law enforcement agency where the dealer is located, prior to accepting the property, to verify that the property has not been reported stolen. The bill specifies particular written record information which constitutes sufficient evidence to avoid the inference.

This CS substantially amends s. 812.022, F.S.

II. Present Situation:

Section 812.022, F.S., provides for several inferences that may be made upon the submission of certain proof.

Subsection (1) of this section provides that proof that a person presented false identification, or identification not current with respect to name, address, place of employment, or other material aspects, in connection with the leasing of personal property, or failed to return leased property within 72 hours of the termination of the leasing agreement, unless satisfactorily explained, gives rise to an inference that such property was obtained or is now used with intent to commit theft.

Subsection (2) of this section provides that proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property knew or should have known that the property had been stolen.

Subsection (3) of this section provides that proof of the purchase or sale of stolen property at a price substantially below the fair market value, unless satisfactorily explained, gives rise to an inference that the person buying or selling the property knew or should have known that the property had been stolen.

Subsection (4) of this section provides that proof of the purchase or sale of stolen property by a dealer in property, out of the regular course of business or without the usual indicia of ownership other than mere possession, unless satisfactorily explained, gives rise to an inference that the person buying or selling the property knew or should have known that it had been stolen.

Most pertinent to this analysis is s. 812.022(2), F.S. (CS/SB 1380 creates an inference relating to possession of stolen property and subsection (2) of s. 812.022, F.S., is the only subsection of that statute that provides for an inference relating to possession of stolen property.) Most of the cases discussing s. 812.022, F.S., are specifically discussing s. 812.022(2), F.S.

> Section 812.022(2) creates an evidentiary inference that "possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property ... should have known that the property had been stolen." The statutory intent is to require a person to use caution and common sense when selling property of unknown provenance rather than to ignore any danger signals. "[T]o mute the probative value of the statutory inference, the accused must offer a satisfactory explanation for having possessed the stolen item." *Jackson v. State*, 736 So.2d 77, 81 (Fla. 4th DCA 1999).

Haugabrook v. State, 827 So.2d 1065, 1068 (Fla. 2d DCA 2002).

> Possession of recently stolen property gives rise to two separate inferences: First, that the person in possession of the property stole it; and second, the person knew or should have known that the property was stolen. s. 812.022(2), Fla. Stat.; *T.S.R.* [*v. State*, 596 So.2d 755 (Fla. 5th DCA 1992)]; *Scobee v. State*, 488 So.2d 595 (Fla. 1st DCA 1986). The statutory presumption, standing alone, is sufficient to sustain the conviction. *T.S.R.* However, the possession must be unexplained or the explanation given must be unsatisfactory. *N.C. v. State*, 478 So.2d 1142 (Fla. 1st DCA 1985).
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> The reasonableness of the defendant's explanation is generally a question of fact for the jury. *Boone v. State*, 711 So.2d 594, 596 (Fla. 1st DCA 1998); *Coleman v. State*, 466 So.2d 395, 397 (Fla. 2d DCA 1985). But where a reasonable explanation for possession of recently stolen property is totally unrefuted, and there is no other evidence of guilt, the court must grant a directed verdict for the defendant. *Coleman* at 397. The initial determination that the explanation is reasonable or credible is left to the judge. If, however, the explanation is only arguably reasonable, or if there is any evidence which places it in doubt, it should be left to the jury to determine the defendant's guilt, and an

> instruction on the inference of possession of recently stolen property is proper. *Anderson v. State*, 703 So.2d 1105 (Fla. 5th DCA 1997).

Smith v. State, 742 So.2d 352, 354 (Fla. 5th DCA 1999) (footnote omitted and bracketed cite inserted).

"The reasonableness of an accused's explanation of his possession of recently stolen property is a question of fact for the jury," but "the prosecution must demonstrate a factual basis for appellant's possession before the jury instruction may be given." *Boone v. State*, 711 So.2d 594 (Fla. 1st DCA 1998). If the prosecutor does not demonstrate the factual basis, the instruction is not warranted. Id. Further, "the instruction is proper only where the possession is personal, where it involves a distinct and conscious assertion of possession by the accused, and where the possession is exclusive." *Id*.

Regarding the meaning of "recently stolen property," "no precise definition is extant...." *N.C. v. State*, 478 So.2d 1142 (Fla. 1st DCA 1985). In *Burroughs v. State*, 221 So.2d 159 (Fla. 2d DCA 1969), the court rejected the appellant's contention that the presumption of larceny arising from unexplained possession of recently stolen property "loses strength with the passage of time, and that after four to six weeks following the theft, as in this case, it cannot be said that the property was 'recently stolen' so as to give the presumption any probative force whatsoever." The court opined:

> While we are unable to find a Florida case directly passing on all phases of this question, we have found persuasive authority in other jurisdictions on the principles involved. It seems well established in those jurisdictions that 'recently', in the context of the presumption under discussion, is not necessarily measured by the mere passage of time. Much depends upon the nature or identity of the property stolen. That is to say, its character as being negotiable or readily transferable; the ease with which it can be traced or detected as stolen property; the utility value to the thief (ready transportation, for example, as in this case); and any other factors or characteristics of such property which may operate for or against lengthy retention by the thief.

Id. (footnotes omitted).

Subsection (2) of s. 812.022(2), F.S., has withstood constitutional challenges based on violation of due process and the privilege against self-incrimination. *See Edwards v. State*, 381 So.2d 696 (Fla. 1980) ("Since there is a rational connection between the fact proven (the defendant possessed stolen goods) and the fact presumed (the defendant knew the goods were stolen), the inference created by section 812.022(2) does not violate Edwards' due process rights. Further, the statute, and the jury instruction derived from it, did not force Edwards to testify. Edwards could have attempted to explain his possession of the stolen goods by evidence other than his own testimony. Even if he had failed to present any evidence in explanation, the jury was not compelled to find him guilty. Therefore, section 812.022(2) does not violate the fifth and fourteenth amendment right to remain silent.").

III. Effect of Proposed Changes:

Committee Substitute for Senate Bill 1380 amends s. 812.022, F.S., to provide that proof that a dealer who regularly deals in used property possesses stolen property upon which a name and phone number of a person other than the offeror of the property are conspicuously displayed gives rise to the inference that the dealer possessing the property knew or should have known that the property was stolen. If the name and phone number are for a business that rents property, the dealer avoids the inference by contacting the rental business, prior to accepting the property, to verify that the business owns the property and the property was not stolen from that business. If the rental business does not own the property, or the name and phone number on the property are for a person other than the rental business, the dealer avoids the inference by contacting the local law enforcement agency where the dealer is located, prior to accepting the property, to verify that the property has not been reported stolen. The bill specifies particular written record information which constitutes sufficient evidence to avoid the inference

The CS also amends s. 812.022(2), F.S., to indicate that the new inference created by the CS is an exception to the inference in subsection (2), which also relates to possession of stolen property.

The creation of this new inference, which applies to the dealer who regularly deals in used property who possesses stolen property, raises a question as to what differentiates the dealer's possession from the dealer's "purchase" of stolen property, which is addressed in the inference in subsection (4). Dealing in stolen property, as it is addressed in but is limited by subsection (4), relates to purchasing or selling stolen property. For example, in the context of pawnshops, to "pawn" property can be to loan money, which is "a written or oral bailment of personal property as security for an engagement or debt, redeemable on certain terms and with the implied power of sale on default" or it can be a "buy-sell agreement," which is "[a]n agreement whereby a purchaser agrees to hold property for a specified period of time to allow the seller the exclusive right to repurchase the property." "A buy-sell agreement is not a loan of money." *See* s. 538.03(1)(d), F.S. Other dealers who may also regularly deal in used property include, but are not limited to, junk dealers, antique dealers, jewelers, precious metals dealers, certain garage sale operators, secondhand store owners, auction business owners, and consignment shop owners.

There appears to be some support in case law that the possession inference in subsection (2) applies to dealers, even as subsection (4) may also apply. For example, in *Thompson v. State*, 480 So.2d 179 (Fla. 3rd DCA 1985), the appellant, a flea market dealer, had purchased stolen property from a fellow flea market dealer and was convicted of grand theft and dealing in stolen property. One of the appellant's arguments, which the court rejected, was that evidence was insufficient to sustain the convictions for grand theft and dealing in stolen property. The court opined that "proof of defendant's possession of property recently stolen was sufficient to give rise to an inference that he stole the property. *See* s. 812.022(2), Fla.Stat. (1983). The proof that defendant purchased or sold stolen property as a dealer in such property, out of the regular course of business and without the usual indicia of ownership other than mere possession, was sufficient to give rise to an inference that he knew the property purchased or sold to be stolen. *See* s. 812.022(4), Fla.Stat. (1983)." *Id.* at 181. *See Coleman v. State*, 466 So.2d 395 (Fla. 2d DCA 1985) (application of s. 812.0022(2), F.S., to junk dealer).

However, if subsection (2) currently applies to the dealer who regularly deals in used property, this will no longer be the case as the CS indicates that the new inference is an exception to subsection (2).

The act takes effect July 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

> A presumption is an evidentiary device that enables the trier-of-fact to presume the existence of an element of the crime from a basic fact already proven beyond a reasonable doubt. The vast majority of presumptions are given to the jury during the instructions on the law at the close of the evidence.

Santiago Defuentes v. Dugger, 923 F.2d 801, 804 (11th Cir.1991), quoted in *Tatum v. State*, 857 So. 2d 331, 336 (Fla. 2d DCA 2003).

> Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime--that is, an 'ultimate' or 'elemental' fact--from the existence of one or more 'evidentiary' or 'basic' facts."

County Court of Ulster County, New York v. Allen, 442 U.S. 140, 156, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), quoted in *Tatum*, 857 So. 2d at 336 n. 6.

Rebuttable presumptions (or permissive inferences) are constitutionally permissible in criminal cases; mandatory rebuttable presumptions are not. The Florida Supreme Court has explained the difference between the two:

> A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. *See Francis v. Franklin*, 471 U.S. 307, 314 n. 2, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *County Court v. Allen*, 442 U.S. 140, 157, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979) ("[A mandatory presumption] tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut

> the presumed connection between the two facts."). In contrast, a permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion. *See Francis v. Franklin*, 471 U.S. at 314, 105 S.Ct. 1965.
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> A mandatory *rebuttable* presumption requires the jury to find the presumed element once the State has proven the predicate facts giving rise to the presumption, unless the defendant persuades the jury that such a finding is unwarranted. *See id.* at 314 n. 2, 105 S.Ct. 1965; *Sandstrom v. Montana*, 442 U.S. 510, 517-18, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Mandatory presumptions violate the Due Process Clause if they relieve the state of the burden of persuasion on an element of an offense. *See Francis v. Franklin*, 471 U.S. at 314, 105 S.Ct. 1965; *Marcolini v. State*, 673 So.2d 3, 4 (Fla.1996).
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> In assessing the constitutionality of such presumptions, the United States Supreme Court "has generally examined the presumption on its face to determine the extent to which the basic and elemental facts coincide." *County Court v. Allen*, 442 U.S. at 158, 99 S.Ct. 2213. As the Supreme Court explained in *Leary v. United States*, 395 U.S. 6, 36, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."

State v. Brake, 796 So.2d 522, 529 (Fla. 2001).

The new inference does not appear to require that the trier-of-fact infer the presumed fact (the dealer knew or should have known that the property was stolen) if the State proves certain predicate facts (the dealer possessed stolen property), nor does the new inference appear to be couched in any mandatory language.

As to "whether the presumed fact is more likely than not to flow from the proved fact on which it is made to depend," *Leary v. United States*, 395 U.S. at 36, the language relevant to the new inference(s) appears to be similar to the inference language in subsection (2). The difference between the two relates more to how the inference can be avoided.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

To the extent the inference aids prosecutors in obtaining convictions, there could be an increase in the number of convictions, but prison bed impact, if any, is not determinable from this posited outcome.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.