

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL: SB 366

INTRODUCER: Senator Altman

SUBJECT: Handbill Distribution

DATE: January 27, 2011

REVISED: 02/08/11

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	<b>Favorable</b>
2.			CM	
3.			BC	
4.				
5.				
6.				

**I. Summary:**

Currently, s. 509.144, F.S., prohibits delivering, distributing, or placing a handbill at or in a public lodging establishment without the expressed written or oral permission of the owner, manager, or agent of the owner or manager of the establishment where a sign is posted prohibiting advertising or solicitation as specified in the statute.

The bill does the following:

- Amends the definition of ‘handbill’ to indicate the term does not include communication protected by the First Amendment to the United States Constitution.
- Amends the definition of the term “without permission” to remove “oral permission.” Only written permission would indicate expressed permission.
- Increases the fine for persons who unlawfully direct another to distribute handbills from \$500 to \$1,000.
- Provides the following fines for subsequent violations of the handbill statute:
  - For a second violation, a minimum fine of \$2,000.
  - For a third or subsequent violation, a minimum fine of \$3,000.
- Provides that property (as specified in the bill) that was used as an instrumentality in the commission of a person’s third or subsequent violation of the handbill distribution statute is subject to seizure and forfeiture.
- Adds another exception to the general rule that officers must witness a misdemeanor offense in order to make a warrantless arrest by authorizing an officer to arrest a person without a warrant:

- If there is probable cause to believe that a violation of s. 509.144, F.S., has been committed; and
- Where the owner or manager of the public lodging establishment in which the violation occurred signs an affidavit containing information that supports the probable cause determination.
- Provides that the terms and provisions of the act do not affect or impede provisions of s. 790.251, F.S. (rights to keep and bear arms in motor vehicles for self-defense and other lawful purposes), or any other protection or right guaranteed by the Second Amendment to the United States Constitution.

The effective date of the bill is October 1, 2011.

This bill substantially amends the following sections of the Florida Statutes: 509.144, 901.15, and 932.701.

## II. Present Situation:

### Unlawful Handbilling

Section 509.144(2), F.S., provides that any individual, agent, contractor, or volunteer who is acting on behalf of an individual, business, company, or food service establishment and who, without permission,<sup>1</sup> delivers, distributes, or places, or attempts to deliver, distribute, or place, a handbill<sup>2</sup> at or in a public lodging establishment<sup>3</sup> commits a first degree misdemeanor.<sup>4</sup>

Section 509.144(3), F.S., provides that any person who, without permission, directs another person to deliver, distribute, or place, or attempts to deliver, distribute, or place, a handbill at or in a public lodging establishment commits a first degree misdemeanor. Any person sentenced under this subsection shall be ordered to pay a minimum fine of \$500 in addition to any other penalty imposed by the court.

While the statute does restrict handbilling, which could potentially involve protected speech or commercial speech, Senate professional staff did not find any case challenging the statute. It appears that in order to determine that restrictions on handbilling at a public lodging establishment implicate constitutional protections involving speech or political activity, a court would have to determine that a public lodging establishment, which is generally open only to paying patrons, is really the “functional equivalent” of a “town center.”

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<sup>1</sup> Section 509.144(1)(b), F.S., defines “without permission” to mean “without the expressed written or oral permission of the owner, manager, or agent of the owner or manager of the public lodging establishment where a sign is posted prohibiting advertising or solicitation in the manner provided in subsection (4).” Subsection (4) of s. 509.144, F.S., provides that a public lodging establishment that intends to prohibit advertising or solicitation, as described in the statute, must comply with specified requirements in this subsection regarding posting and accessibility of the sign.

<sup>2</sup> Section 509.144(1)(a), F.S., defines “handbill” to mean “a flier, leaflet, pamphlet, or other written material that advertises, promotes, or informs persons about an individual, business, company, or food service establishment, but shall not include employee communications permissible under the National Labor Relations Act.”

<sup>3</sup> Section 509.144(1)(c), F.S., defines “at or in a public lodging establishment” to mean “any property under the sole ownership or control of a public lodging establishment.”

<sup>4</sup> A first degree misdemeanor is punishable by up to 1 year in a county jail, a fine up to \$1,000, or both. ss. 775.082 and 775.083, F.S.

In *Publix Supermarkets, Inc. v. Tallahasseeans for Practical Law Enforcement*, a case which involved a citizen and political action committee soliciting signatures for a political petition on the private property of a Publix supermarket in Tallahassee, the Second Judicial Circuit Court held that “there is no right under the First Amendment to the United States Constitution to engage in free speech or other political activity on private property without the property owner’s permission.”<sup>5</sup> The circuit court noted U.S. Supreme Court cases which held that protections of the First Amendment “[cannot] be invoked in the absence of State action,”<sup>6</sup> but the circuit court found “no evidence of governmental control” over the Publix supermarket property.<sup>7</sup> While the circuit court indicated it was aware of cases which found “something analogous to ‘State action’ by concluding that large malls have, in some cases, become the functional equivalent of ‘town centers’ where people gather to socialize,”<sup>8</sup> the circuit court:

could not find any decisions holding that a smaller shopping center or a free standing supermarket is the functional equivalent of a “town center.” Indeed, every decision reviewed by the Court involving a supermarket has held that individuals have no constitutional right to solicit, or to engage in free speech or political activity over the store owner’s objection.<sup>9</sup>

### **Florida Contraband Forfeiture Act**

Sections 932.701 – 932.706, F.S., otherwise known as “The Florida Contraband Forfeiture Act,” provide that any contraband article, vessel, motor vehicle, aircraft, other personal property, or real property used in violation of any provision of the Act, or in, upon, or by means of which any violation of the Act has taken or is taking place, may be seized and shall be forfeited subject to the provisions of the Act.

Section 932.701(2)(a), F.S., defines the term “contraband article” to include:

- Any controlled substance as defined in chapter 893 or any substance, device, paraphernalia, or currency or other means of exchange that was used, was attempted to be used, or was intended to be used in violation of any provision of chapter 893, if the totality of the facts presented by the state is clearly sufficient to meet the state’s burden of establishing probable cause to believe that a nexus exists between the article seized and the narcotics activity,

<sup>5</sup> 2005 WL 3673662, at p. 3 (Fla.Cir.Ct. 2005) (not reported in So.2d) (citations omitted).

<sup>6</sup> *Id.*, at p. 3 (citing cases).

<sup>7</sup> *Id.*, at p. 3.

<sup>8</sup> *Id.*, at p. 4 (citing cases).

<sup>9</sup> *Id.*, at p. 4. In another Florida case, which involved a person collecting signatures on the property of a shopping mall in order to get his name on a ballot for a political office, the Circuit Court of Bay County held that Art. I, § 5, Fla. Const., which contains protections similar to those afforded under the First Amendment, “prohibits a private owner of a ‘quasi-public’ place from using state trespass laws to exclude peaceful political activity.” *Wood v. State*, 2003 WL 1955433, p. 3 (Fla.Cir.Ct. 2003) (not reported in So.2d). The court stated that “[c]ourts in this state have recognized this generally accepted principle that malls and other shopping centers are still private property, but have a ‘quasi-public’ nature.” *Id.* However, the only case cited in support of its holding is *State v. Woods*, 624 So.2d 739 (Fla. 5th DCA 1993), *review denied*, 639 So.2d 629 (Fla.1994), which had nothing to do with protected speech or political activity but rather involved a policy of a police department that limited access to a shopping mall in a manner not authorized by the state trespass law. The Florida Supreme Court case quoted by the 5th DCA in regards to the ‘quasi-public’ nature of the mall, *Corn v. State*, 332 So.2d 4 (Fla.1976), did not involve protected speech or political activity but rather involved an equal protection challenge to the trespass law.

whether or not the use of the contraband article can be traced to a specific narcotics transaction.

- Any gambling paraphernalia, lottery tickets, money, currency, or other means of exchange which was used, was attempted, or intended to be used in violation of the gambling laws of the state.
- Any equipment, liquid or solid, which was being used, is being used, was attempted to be used, or intended to be used in violation of the beverage or tobacco laws of the state.
- Any motor fuel upon which the motor fuel tax has not been paid as required by law.
- Any personal property, including, but not limited to, any vessel, aircraft, item, object, tool, substance, device, weapon, machine, vehicle of any kind, money, securities, books, records, research, negotiable instruments, or currency, which was used or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, whether or not comprising an element of the felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.
- Any real property, including any right, title, leasehold, or other interest in the whole of any lot or tract of land, which was used, is being used, or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.
- Any personal property, including, but not limited to, equipment, money, securities, books, records, research, negotiable instruments, currency, or any vessel, aircraft, item, object, tool, substance, device, weapon, machine, or vehicle of any kind in the possession of or belonging to any person who takes aquaculture products in violation of s. 812.014(2)(c), F.S.
- Any motor vehicle offered for sale in violation of s. 320.28, F.S.
- Any motor vehicle used during the course of committing an offense in violation of s. 322.34(9)(a), F.S.
- Any photograph, film, or other recorded image, including an image recorded on videotape, a compact disc, digital tape, or fixed disk, that is recorded in violation of s. 810.145, F.S., and is possessed for the purpose of amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person.
- Any real property, including any right, title, leasehold, or other interest in the whole of any lot or tract of land, which is acquired by proceeds obtained as a result of Medicaid fraud under s. 409.920, F.S., or s. 409.9201, F.S.; any personal property, including, but not limited to, equipment, money, securities, books, records, research, negotiable instruments, or currency; or any vessel, aircraft, item, object, tool, substance, device, weapon, machine, or vehicle of any kind in the possession of or belonging to any person which is acquired by proceeds obtained as a result of Medicaid fraud under s. 409.920, F.S., or s. 409.9201, F.S.

The current definition of the term “contraband article” does not include property that was used as an instrumentality in the commission of a violation of s. 509.144, F.S., relating to handbill distribution.

Relevant to the bill, there are indications that forfeitures may or do occur in some misdemeanor cases. For example, one Florida court has indicated (in dicta) that the definition of “contraband article” in s. 932.701(2)(a), F.S., would apparently apply to the seizure of “money as suspected contraband connected with narcotics activity, regardless of whether the crimes constitute

felonies.”<sup>10</sup> Additionally, the Florida Supreme Court has held that the Contraband Forfeiture Act “does not preempt to the Legislature the field of vehicle seizure and forfeiture, much less impoundment, for misdemeanor offenses.”<sup>11</sup> Therefore, a municipality may adopt “an ordinance that authorizes the seizure and impoundment of vehicles used in the commission of certain misdemeanors.”<sup>12</sup>

### **Warrantless Arrest**

Section 901.15, F.S., sets forth the instances in which a law enforcement officer can arrest a person without a warrant. For misdemeanor offenses, the general rule is that law enforcement officers must witness the occurrence of the offense in order to make an arrest without a warrant. If the officer does not witness the offense, the officer must obtain an arrest warrant.

In certain instances the Legislature has deemed particular misdemeanor offenses to be of such a nature that they should be exceptions to the above rule. Some examples include violations of injunctions for protection in domestic violence, repeat violence, sexual violence, and dating violence situations; violations of pretrial release conditions in domestic and dating violence cases; misdemeanor battery; and criminal mischief or graffiti-related offenses. For these offenses, an officer does not have to witness the crime in order to make a warrantless arrest – the officer only needs to have probable cause to believe the person committed the crime.

Relevant to the bill, there are currently exceptions to the requirement for an arrest warrant for some non-violent misdemeanor crimes, e.g., criminal mischief and graffiti-related offenses.

### **III. Effect of Proposed Changes:**

Currently, s. 509.144, F.S., prohibits delivering, distributing, or placing a handbill at or in a public lodging establishment without the expressed written or oral permission of the owner, manager, or agent of the owner or manager of the establishment where a sign is posted prohibiting advertising or solicitation as specified in the statute.

The bill amends s. 509.144, F.S., as follows:

- Modifies the definition of ‘handbill’ to indicate that the term does not include communication protected by the First Amendment to the United States Constitution.
- Modifies the definition of the term “without permission” to remove “oral permission.” Thus, a person who distributes handbills must have the written permission of the public lodging establishment’s owner or manager.
- Increases the fine for persons who unlawfully direct another to distribute handbills from \$500 to \$1,000.
- Provides the following fines for subsequent violations of the handbill statute:
  - For a second violation, a minimum fine of \$2,000.
  - For a third or subsequent violation, a minimum fine of \$3,000.

<sup>10</sup> *Shuler v. State*, 984 So.2d 1274, 1275 (Fla. 2d DCA 2008) (footnote omitted).

<sup>11</sup> *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1246 (Fla.2006).

<sup>12</sup> *Id.*

- Provides for seizure and forfeiture of any personal property, including, but not limited to, any vehicle of any kind, item, object, tool, device, weapon, machine, money, securities, books, or records, which was used or was attempted to be used as an instrumentality in the commission of, or aiding and abetting in the commission of, a person's third or subsequent violation of s. 509.144, F.S., whether or not comprising an element of the offense.

The bill amends s. 901.15, F.S., to add another exception to the general rule that officers must witness a misdemeanor offense in order to make a warrantless arrest. Specifically, the bill provides that an officer may arrest a person without a warrant:

- If there is probable cause to believe that a violation of s. 509.144, F.S., has been committed; and
- Where the owner or manager of the public lodging establishment in which the violation occurred signs an affidavit containing information that supports the probable cause determination.

The bill also amends the definition of the term "contraband article" in s. 932.701, F.S., to indicate the term also includes the property specified in s. 509.144, F.S., which is subject to seizure and forfeiture.

The bill also provides that the terms and provisions of the act do not affect or impede provisions of s. 790.251, F.S. (rights to keep and bear arms in motor vehicles for self-defense and other lawful purposes), or any other protection or right guaranteed by the Second Amendment to the United States Constitution.

The effective date of the bill is October 1, 2011.

#### **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:**

Under Florida law, in order for restrictions on handbilling at a public lodging establishment to implicate constitutional protections involving speech or political activity, a court likely would have to determine that a public lodging establishment,

which is generally open only to paying patrons, is the “functional equivalent” of a “town center.”<sup>13</sup>

The bill amends paragraph 1(a) of s. 509.144, F.S., to specify that a ‘handbill’ does not include communication protected by the First Amendment to the United States Constitution. As a result, if a court or law were to hold that sliding pizza delivery pamphlets under hotel room doors without permission is constitutionally protected free speech, the bill’s provisions would not apply to such activity.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, has not met to determine the prison bed impact of the bill. However, the bill does not create any new felony or reclassify an existing misdemeanor to a felony, so it appears there should not be any state prison bed impact. It is unknown at this time if the provisions relevant to warrantless arrest and forfeiture would result in more prosecutions and convictions for the current misdemeanor offenses.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

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<sup>13</sup> See *Supermarkets, Inc. v. Tallahasseeans for Practical Law Enforcement*, 2005 WL 3673662 (Fla.Cir.Ct. 2005) (not reported in So.2d); *supra* at Present Situation, Unlawful Handbilling.

B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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