

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 Appropriations Subcommittee on Criminal and Civil Justice

BILL: CS/SB 1044

INTRODUCER: Criminal Justice Committee and Senator Brandes and others

SUBJECT: Forfeiture of Contraband

DATE: February 10, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	Fav/CS
2.	Harkness	Sadberry	ACJ	Pre-meeting
3.			FP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1044 amends the Florida Contraband Forfeiture Act to require that the owner of seized property be prosecuted and convicted of or plead guilty or nolo contendere to a criminal act, without regard to whether adjudication is withheld, before the civil forfeiture of the property becomes final. Until then, the state acquires provisional title to the property upon seizure.

In addition, the bill requires that the property owner be arrested before property may be seized under the act, unless the owner and state agree that the property owner will become an active confidential informant. (Currently, there is no requirement that the owner of the seized property be arrested or convicted of a criminal act before the property may be seized and forfeited.)

Under the bill, if after a diligent effort by the seizing agency, the owner of the seized property cannot be found after three months, the property is deemed a contraband article and forfeited pursuant to the provisions of the act. If the owner is found, the agency must return the property to the owner within five days after a court finding that the owner has a bona fide security interest, is an innocent owner, or has had the criminal charges dropped or dismissed.

This bill does not have a state fiscal impact.

The bill is effective July 1, 2016.

II. Present Situation:

The Florida Contraband Forfeiture Act, ss. 932.701-932.706, F.S., prescribes procedures and guidelines for law enforcement agencies to follow when seizing, forfeiting, and disposing of property under the act.¹ Currently, under s. 932.703, F.S., any contraband article², vessel, motor vehicle, aircraft, other personal property, or real property used in violation 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 forfeited subject to the provisions of the act.³ All rights to, interest in, and title to contraband articles used in violation of the act immediately vest in the seizing law enforcement agency upon seizure.⁴

Seizure Process

Personal property may be seized at the time of the violation or subsequent to the violation based upon a law enforcement officer's determination that probable cause exists to believe the property is being used in violation of the act. The person entitled to notice (the owner, entity, bona fide lienholder, or person in possession of the property)⁵ must be given notice, at the time of seizure or within 5 days of the seizure by certified mail, of his or her right to have a court review such determination in a postseizure adversarial preliminary hearing.⁶

When a court review is desired, the person entitled to notice must request it in writing by certified mail. The agency must hold a hearing within 10 days (or as soon as practicable thereafter) after receiving the request. (Unlike personal property, seizure of real property may not occur until the person entitled to notice has the opportunity to attend a preseizure adversarial hearing at which time the court determines whether or not probable cause exists to justify the seizure.)⁷ The seizing agency must make a diligent effort to notify persons entitled to notice of the seizure.⁸ If after reviewing the evidence at the adversarial preliminary hearing, the court finds probable cause that the property was used in violation of the act, it must authorize the seizure or continued seizure of the contraband article.⁹

¹ The act provides for civil forfeiture, an action taken against the property or assets, also known as an action in rem. Civil forfeiture, unlike criminal forfeiture, does not require a nexus between the criminal activity of the property owner and the property. The constitutionality of the act was upheld by the Florida Supreme Court in *Department of Law Enforcement v. Real Property*, 588 So.2d 957 (Fla. 1991).

² "Contraband article" includes but is not limited to any real property or personal property which was used or 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 act." Section 932.701(2)(a)5. and 6., F.S.

³ Section 932.703(1), F.S.

⁴ Section 932.703(1)(c), F.S.

⁵ Interests of bona fide lienholders, property held jointly by a husband and wife, interests in property held jointly, and rental cars may not be forfeited under s. 932.703, F.S.

⁶ The court review must occur within 15 days after the notice is received. Section 932.703(2), F.S.

⁷ The hearing must occur within 10 days of the filing of the lis pendens or as soon as practicable. Section 932.703(2)(b), F.S.

⁸ Section 932.703(2), F.S.

⁹ Section 932.703(2)(c), F.S.

Forfeiture Proceedings

If the person entitled to notice does not request an adversarial preliminary hearing, the seizing law enforcement agency must promptly proceed against the contraband article. It does so by filing a complaint in the civil division of the circuit court within 45 days after the seizure, requesting the court to issue a judgment of forfeiture. The Florida Rules of Civil Procedure apply to forfeiture proceedings under the act.¹⁰ The court must enter an order showing a finding of probable cause before a complaint can be served upon the claimant.¹¹ A claimant contesting the forfeiture has 20 days after receiving the complaint and the probable cause finding to file any responsive pleadings.¹²

Under the act, the civil forfeiture trial must be decided by a jury unless that right is waived by the claimant.¹³ At trial, the seizing agency must prove that the contraband article was being used in violation of the act by clear and convincing evidence. Property may not be forfeited under the act unless the seizing agency shows by the preponderance of the evidence that the owner or any co-owner knew or should have known after reasonable inquiry, that the property was being used in criminal activity. Bona fide lienholders must have actual knowledge. The act also provides that it is an affirmative defense to forfeiture that the nexus between the property and the underlying violation was incidental or entirely accidental.¹⁴

The act also authorizes the claimant and the seizing law enforcement agency to settle the forfeiture action prior to the conclusion of the forfeiture proceeding. A settlement agreement must be reviewed by the court or a mediator (unless the claimant signs a written waiver). If the claimant is not represented by an attorney, the agreement must specify that the claimant has freely and voluntarily agreed to the settlement without the benefit of counsel.¹⁵

If the court orders that the property be forfeited to the seizing law enforcement agency, the final order of forfeiture perfects in the agency right, title, and interest in and to the property, subject only to the rights and interests of bona fide lienholders, and relates back to the date of seizure.¹⁶

The act requires the seizing agency to pay claimants the reasonable loss of value of the property or loss of income when the claimant prevails. It prohibits the agency from assessing fees and costs against a successful claimant. The seizing agency is also required to pay reasonable attorney's fees and costs up to \$1,000 if the claimant prevails at the adversarial preliminary hearing.¹⁷

¹⁰ Section 932.701(2)(c) and (d), and 932.704(2), F.S.

¹¹ A "claimant" is any party who has proprietary interest in the seized property who has standing to challenge the forfeiture, including owners, registered owners, bona fide lienholders, and title-holders. Section 932.701(2)(h), F.S.

¹² Section 932.704(5), F.S.

¹³ *Id.*

¹⁴ Section 932.703, F.S.

¹⁵ Section 932.704, F.S.

¹⁶ Section 932.704(8), F.S.

¹⁷ Section 932.704(9) and (10), F.S.

Guidelines and Training Procedures

The act also requires the Florida Department of Law Enforcement (FDLE), in consultation with the Florida Sheriffs Association and the Florida Police Chiefs Association, to develop guidelines and training procedures to be used by state and local law enforcement agencies and state attorneys in implementing the civil forfeiture law.¹⁸ For instance, each agency that seizes property must periodically review its seizures, settlements, and forfeiture proceedings to determine whether they comply with the act and the adopted guidelines. The determination of whether an agency will file a forfeiture action must be the sole responsibility of the head of the agency or his or her designee. The determination of whether to seize currency must be made by supervisory personnel. The agency's legal counsel must be notified as soon as possible.¹⁹

Section 932.706, F.S., requires the Criminal Justice Standards and Training Commission to develop a standardized course of training which is designed to develop proficiency in the seizure and forfeiture of property under the act. The curriculum must include racial and ethnic sensitivity, search and seizure case law, the use of drug-courier profiles, and the use of an order to stop based on a pretext.

Disposition of Forfeited Property

Section 932.7055, F.S., provides for the disposition of liens and forfeited property under the act. The seizing agency may do any of the following when a final judgment of forfeiture is granted:

- Retain the property for the agency's use;
- Sell the property at a public auction or by sealed bid to the highest bidder; or
- Salvage, trade, or transfer the property to any public or nonprofit organization.²⁰

If the property has a lien attached and the agency sells the property, the proceeds of the sale are to be distributed in this order:

- Payment of the balance due on any lien preserved by the court in the forfeiture proceedings.
- Payment of the cost incurred by the seizing agency in connection with the storage, maintenance, security, and forfeiture of such property.
- Payment of court costs incurred in the forfeiture proceeding.²¹

The proceeds which remain after all liens and debts against the forfeited property are paid are then deposited into a special law enforcement trust fund and may be used to fund school resource officers, crime prevention, safe neighborhood, drug abuse education and prevention programs, or other law enforcement purposes, including defraying the cost of protracted or complex investigations, providing additional equipment or expertise, purchasing automated external defibrillators for law enforcement vehicles, and providing matching funds to obtain federal grants. These proceeds and interest may not be used to meet normal operation expenses.²²

¹⁸ Section 932.704(11), F.S.

¹⁹ *Id.*

²⁰ Section 932.7055(1), F.S.

²¹ Sections 932.7055(3) and (4), F.S.

²² Section 932.7055(5), F.S.

Additionally, any local law enforcement agency that acquires at least \$15,000 under the act within a fiscal year must expend or donate no less than 15 percent of these proceeds for the support or operation of any drug treatment, drug abuse education, drug prevention, crime prevention, safe neighborhood, or school resource officer program. The agency has discretion to determine which program receives the funds.²³

An agency or organization, other than the seizing agency, that wishes to receive such funds shall apply to the sheriff or chief of police for an appropriation. If the agency or organization receives funding under the act, it must provide an accounting, indicating that the funds were only used for the above stated purposes.²⁴

If the seizing agency is a local law enforcement agency, the proceeds are deposited into a special law enforcement trust fund established by the governing body of a county or municipality. The funds may be appropriated only to the sheriff's office by the board of county commissioners or to the police department by the governing body of the municipality when the sheriff or police chief has certified that the request for funds will be used in compliance with the act.²⁵

If the seizing agency is a state agency, the remaining proceeds are deposited into the General Revenue Fund, except that the following agencies have their own forfeiture trust fund:

- FDLE;
- Division of Alcoholic Beverages and Tobacco;
- Department of Highway Safety and Motor Vehicles;
- Fish and Wildlife Conservation Commission;
- State Attorney Offices;
- School Board Security Agencies;
- State University System Police Departments;
- Department of Agriculture and Consumer Services;
- Department of Military Affairs;
- Medicaid Fraud Control Unit of the Department of Legal Affairs;
- Division of State Fire Marshal of the Department of Financial Services; and
- Division of Insurance Fraud of the Department of Financial Services.²⁶

III. Effect of Proposed Changes:

The bill amends s. 932.703, F.S., to require that the owner of seized property be prosecuted and convicted of or plead guilty or nolo contendere to a criminal act, without regard to whether adjudication is withheld, before the civil forfeiture of the property becomes final. Final forfeiture occurs when title or other indicia of ownership passes to the state. Until then, the state acquires provisional title to the property upon seizure.

²³ Section 932.7055(5)(c)3., F.S.

²⁴ Section 932.7055(5)(c), F.S.

²⁵ Section 932.7055(5), F.S.

²⁶ Section 932.7055(6), F.S.

In addition, the bill requires the property owner be arrested before property may be seized under the act. (Currently, there is no requirement that the owner of seized property be arrested or convicted of a criminal act before the property may be seized and forfeited.)

Property may also be seized in lieu of an arrest if the property owner agrees with the state to become a confidential informant, actively participate in gathering criminal intelligence or investigative information for an active criminal investigation. If criminal charges are not brought against the property owner, the property must be returned to the owner at the end of the criminal investigation.

Under the bill, if after a diligent effort by the seizing agency, the owner of the seized property cannot be found after 3 months, the property is deemed a contraband article and forfeited pursuant to the provisions of the act. If the owner is found, the agency will be required to return the property to the owner within 5 days after one of the following:

- A court finding that the owner has a bona fide security interest in the property;
- A court finding that the owner is an innocent owner;
- An acquittal or dismissal of the criminal charge against the owner that was the basis of the forfeiture proceedings; or
- A disposal of the criminal charge that was the basis of the forfeiture proceedings by nolle prosequi.

The bill also provides that the seizing agency is responsible for any damage, storage fee, and related cost applicable to the property.

The bill is effective July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Requiring an arrest and criminal conviction under CS/SB 1044 may result in a reduction of property being seized by and forfeited to law enforcement agencies.

C. Government Sector Impact:

This bill does not have a state fiscal impact; however, the bill may reduce the number of seizures and forfeitures under the act because of the criminal nexus requirement thereby reducing revenue to seizing law enforcement agencies.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Office of Program Policy Analysis and Government Accountability (OPPAGA) recently reviewed Florida's current civil asset forfeiture practices by local law enforcement agencies and released its findings in a report entitled *Civil Asset Forfeiture in Florida: Policies and Practices*.²⁷ Some of the findings in the report included the following:

- There is no current requirement for law enforcement agencies to report seizures and forfeitures under the act and without statewide information, the Legislature does not know the extent of civil asset forfeiture practices in Florida.²⁸
- Vehicles and currency were the most commonly seized assets, related primarily to drug offenses.²⁹
- An arrest was made in conjunction with most seizures during Fiscal Year 2013-2014.³⁰
- Many assets were returned to the owners, either in whole or in part.³¹
- Sixteen percent of seizure actions were contested by an adversarial hearing request, and 1% resulted in a civil trial.³²
- Responding agencies reported spending over \$12 million in forfeited assets during Fiscal Year 2013-2014.³³

Also included in the report were the following options that could be considered by the Legislature when making changes to the Florida Contraband Forfeiture Act:

²⁷ Office of Program Policy Analysis and Gov't Accountability, Florida Legislature, Report No. 15-10 (November 2015), <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/1510rpt.pdf> (last visited Jan. 15, 2016).

²⁸ *Id.* at 11.

²⁹ *Id.* at 4.

³⁰ *Id.* at 5. Responding agencies gave the following examples of when an arrest is not possible to make at the time of seizure: an arrest is premature because the officer was unable to positively identify the owner of the cash and illegal drugs; an arrest is premature during an ongoing economic crime investigation but the seizure of currency is ripe; and an arrest is premature when owners of property subject to seizure are willing to give information on higher level crimes leading to later related arrests.

³¹ *Id.* at 7 and 8.

³² *Id.* at 7.

³³ *Id.* at 9. Responding agencies indicated they used forfeiture money primarily for supporting substance abuse and crime prevention programs, buying additional equipment, defraying costs of complex investigations, providing additional expertise, providing matching funds to obtain federal grants, and buying automatic external defibrillators. *Id.* at 10.

- Require law enforcement agencies to report seizure actions and forfeitures to the state at least annually;³⁴
- Require a criminal conviction before forfeiture;³⁵
- Increase the evidentiary standard of proof from clear and convincing to beyond a reasonable doubt;³⁶ and
- Restrict the use of civil asset forfeiture proceeds.³⁷

The bill codifies the option of requiring a criminal conviction before final forfeiture.

VIII. Statutes Affected:

This bill substantially amends section 932.703, Florida Statutes.

The bill makes technical and conforming changes to sections 322.34 and 403.413, Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

CS by Criminal Justice on January 25, 2016:

- Requires that a property owner be arrested before the property may be seized, unless the owner and state agree that the property owner will become a confidential informant.
- Requires that the property be returned to the confidential informant if charges are not brought against him or her at the conclusion of the criminal investigation.
- Clarifies that forfeiture is final when the property owner is convicted of or pleads guilty or nolo contendere to a criminal offense, without regard to whether adjudication is withheld.

B. Amendments:

None.

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

³⁴ Thirty-three states have some sort of reporting requirement. *Id.* at 11.

³⁵ Several states, including Minnesota, Montana, Nevada, New Mexico, and North Carolina have this requirement. *Id.* at 12.

³⁶ Florida is one of 11 states that has a clear and convincing proof standard, which is higher than most other states. Nebraska, North Carolina, and Wisconsin use the criminal standard of proof, beyond a reasonable doubt. *Id.* at 12.

³⁷ *Id.* at 13.