

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 485 Return of Weapons and Arms Following an Arrest

SPONSOR(S): Judiciary Committee, Brackett

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	18 Y, 0 N	Padgett	Hall
2) Judiciary Committee	15 Y, 0 N, As CS	Padgett	Kramer

SUMMARY ANALYSIS

Generally, a law enforcement officer is authorized to search a person incident to a lawful arrest and seize items discovered on the person arrested or within his or her immediate control if the seizure is necessary to protect the officer from attack, prevent an escape, or assure the subsequent lawful custody of the fruits of a crime or the articles used in the commission of a crime. A law enforcement agency holds seized property that is needed for the prosecution of a crime as evidence. All other seized property that is not subject to forfeiture under the Florida Contraband Forfeiture Act (FCFA) under ss. 932.701–932.7062, F.S, is either held by a law enforcement agency as “personal property” or “safekeeping property.”

Section 790.08, F.S., requires every law enforcement officer who makes an arrest under s. 790.07, F.S., which prohibits the use or attempted use of a weapon, electric weapon or device, or arms (weapon or firearm) in committing a felony, or under any other law or municipal ordinance to take possession of any weapon or firearm found upon the person arrested and deliver such weapon or firearm to the sheriff or chief of police of the jurisdiction in which the arrest was made. The sheriff or the chief of police must retain such weapon or firearm until after the trial of the person arrested.

Sections 790.08(2) and (3), F.S., require the forfeiture of a weapon or firearm if a person is convicted of violating s. 790.07, F.S., or a similar offense involving the *use or attempted use* of a weapon or firearm in committing a felony, and the return of a weapon or firearm if a person is acquitted or such charges are dismissed. The forfeiture and return requirements do *not* apply in circumstances where a weapon or firearm was seized as evidence but was not *used* in committing a felony or where a weapon or firearm is seized and held by a law enforcement agency as safekeeping property. Because there is currently no statute prescribing procedures for the return of a weapon or firearm held as safekeeping property, the specific procedures for returning such property vary by jurisdiction.

Section 933.14(3), F.S., prohibits a law enforcement agency from returning a pistol or firearm without an order of a trial court judge if such pistol or firearm has been taken by any officer with a search warrant or without a search warrant upon a view by the officer of a breach of the peace. Courts have interpreted “breach of the peace” as a generic term that includes “...*all* violations of the public peace, order, or decorum. A breach of the peace includes the violation of any law enacted to preserve peace and good order.”

CS/HB 485 amends s. 790.08, F.S., to delete the requirement for a sheriff or chief of police to retain custody of all weapons or firearms seized incident to an arrest until after the trial of the person arrested. Instead, the bill requires a law enforcement agency to return any weapons or firearms that are taken from a person following an arrest, but that are *not* seized as evidence or seized and subject to forfeiture under the FCFA upon request of the person arrested within 30 days after such request is made if he or she:

- Has been released from detention;
- Provides a form of government-issued photographic identification; and
- If requesting the return of a firearm, successfully completes a criminal history background check confirming the person is not prohibited from possessing a firearm under state or federal law, including not having any prohibition arising from an injunction, a risk protection order, or any other court order prohibiting the person from possessing a firearm.

The bill amends s. 933.14, F.S., to delete a provision requiring an order of a trial court judge to return a pistol or firearm to its owner if such pistol or firearm was taken by an officer upon a view by the officer of a breach of the peace.

The bill authorizes a sheriff or chief of police to develop reasonable procedures to ensure the timely return of weapons or firearms which are not inconsistent with the bill. The bill prohibits a sheriff or chief of police from requiring a court order to release weapons or firearms that are not seized as evidence in a criminal proceeding unless there are competing claims of ownership of such weapons or firearms.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2024.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives .

STORAGE NAME: h0485c.JDC

DATE: 2/22/2024

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Seizing Property Following an Arrest

Generally

Section 901.21, F.S., authorizes a law enforcement officer to search a person who is lawfully arrested and the area within the person's immediate presence for the purpose of:

- Protecting the officer from attack;
- Preventing the person from escaping; or
- Discovering the fruits of a crime.

A law enforcement officer conducting such a lawful search without a warrant may seize all instruments, articles, or things discovered on the person arrested or within the person's immediate control, the seizure of which is reasonably necessary for the purpose of:

- Protecting the officer from attack;
- Preventing the escape of the arrested person; or
- Assuring subsequent lawful custody of the fruits of a crime or of the articles used in the commission of a crime.

A law enforcement agency holds seized property that is needed for the prosecution of a crime as evidence.¹ All other seized property that is not contraband is either held by a law enforcement agency as "personal property" or "safekeeping property."²

Weapons, Electric Weapons or Devices, or Arms

Section 790.08, F.S.,³ requires every law enforcement officer who makes an arrest under s. 790.07, F.S.,⁴ or under any other law or municipal ordinance to take possession of any weapons,⁵ electric weapons or devices,⁶ or arms mentioned in s. 790.07, F.S.,⁷ (weapons or firearms) found upon the person arrested and deliver such weapons or firearms⁸ to the sheriff or chief of police of the jurisdiction

¹ Broward County Sheriff's Office, *Evidence Unit*, <https://www.sheriff.org/LE/Pages/Evidence-and-Property-Unit.aspx> (last visited Feb. 21, 2023). Nassau County Sheriff's Office, *Property & Evidence*, <https://nassauso.com/administrative-services/property-evidence/> (last visited Feb. 21, 2023).

² *Id.* Personal property includes items such as a wallet, keys, or watch. All other non-evidentiary items seized from a person at the time of arrest, such as weapons or firearms, are generally held by a law enforcement agency as safekeeping property.

³ Section 790.08, F.S., does not apply to a municipality in a county that has home rule under the Florida Constitution. S. 790.08(7), F.S. These counties include Duval, Monroe, Miami-Dade, and Hillsborough. 95-82 Fla. Op. Att'y Gen. (1995).

⁴ Section 790.07, F.S., prohibits a person from displaying, using, threatening, or attempting to use:

- Any weapon or electric weapon or device or carrying a concealed weapon while committing or attempting to commit any felony or while under indictment; or
- A firearm while committing or attempting to commit any felony.

A violation involving a weapon or electric weapon or device is a third degree felony, punishable by up to five years imprisonment and a \$5,000 fine. Ss. 775.082, 775.083, or 775.084. A violation involving a firearm is a second degree felony, punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082, 775.083, or 775.084.

⁵ "Weapon" means any dirk, knife, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocketknife, plastic knife, or blunt-bladed table knife. S. 790.001(20), F.S.

⁶ "Electric weapon or device" means any device which, through the application or use of electrical current, is designed, redesigned, used, or intended to be used for offensive or defensive purposes, the destruction of life, or the infliction of injury. S. 790.001(7), F.S.

⁷ The term "arms" is not defined in ch. 790, F.S., or in s. 790.07, F.S. However, from the context of s. 790.07, F.S., the term "arms" appears to mean a firearm. See *infra*, note 4. For purposes of this analysis, the terms "arms" and "firearms" are interchangeable.

⁸ "Firearm" means any weapon, including a starter gun, which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a crime. S. 790.001(9), F.S.

in which the arrest was made.⁹ The sheriff or the chief of police must retain such weapons or firearms until after the trial of the person arrested.¹⁰

Return of Seized Property Held by a Law Enforcement Agency

Weapons or Firearms Held as Evidence

Section 790.08(1), F.S., requires a sheriff or chief of police to retain a seized weapon or firearm until after the trial of the person arrested.¹¹ If a person arrested is convicted of violating s. 790.07, F.S., a similar offense under any municipal ordinance, or any other offense involving the *use or attempted use* of a weapon or firearm, such weapon or firearm is forfeited to the state.¹² If a person arrested is acquitted of such an offense or the charges against a person are dismissed, the weapon or firearm seized must be returned to the person.¹³ If a person fails to claim a weapon or firearm within 60 days of his or her acquittal or the dismissal of charges, the weapon or firearm must be delivered to the sheriff of the county in which the person was arrested.¹⁴ If a person fails to claim a weapon or firearm within six months from the date it was delivered to the sheriff, such weapon or firearm is forfeited to the state.¹⁵

The forfeiture and return requirements in s. 790.08(2) and (3), F.S., do *not* apply if a person is arrested for committing an offense in which a weapon or firearm is seized and held as evidence but was not *used* in committing a felony (e.g. unlawfully carrying a concealed firearm in violation of s. 790.01(3), F.S.)¹⁶ In such circumstances, the return of such a weapon or firearm is governed by s. 705.105, F.S., which generally provides for the disposition of unclaimed evidence following the conclusion of a criminal proceeding.¹⁷

Weapons or Firearms Held as Safekeeping Property

Similarly, the forfeiture and return requirements in s. 790.08(2) and (3), F.S., do *not* apply to a weapon or firearm seized incident to an arrest that is held as safekeeping property and not needed as evidence since the weapon or firearm was neither *used* in committing a felony nor related to the crime for which the person was arrested (e.g. a person is arrested for driving with a suspended license and is lawfully carrying a concealed firearm at the time of his or her arrest). Because there is currently no statute providing for the return of a weapon or firearm held as safekeeping property, the specific procedures for returning such property may vary by jurisdiction.¹⁸ Certain general procedures, such as requiring a person to produce photo identification and complete a background check prior to the release of a firearm, appear universal.¹⁹ However, the specifics of such procedures, such as the proof of ownership required to claim property, the time required to complete a background check, and the need for judicial

⁹ S. 790.08(1), F.S.

¹⁰ *Id.*

¹¹ It appears, in practice, that the requirement in s. 790.08(1), F.S., to retain a weapon or firearm until after the trial of the person arrested applies only to a weapon or firearm that is seized as evidence. See *infra* note 21.

¹² S. 790.08(2), F.S.

¹³ S. 790.08(3), F.S.

¹⁴ If the weapon, electric weapon or device, or firearm was delivered to the sheriff immediately following a person's arrest, no transfer is necessary. *Id.*

¹⁵ S. 790.08(5), F.S.

¹⁶ See *Darman v. State*, 774 So. 2d 798 (Fla. 4th DCA 2000).

¹⁷ Under s. 705.105, F.S., title to unclaimed evidence or unclaimed tangible personal property lawfully seized pursuant to a lawful investigation in the custody of the court or clerk of the court from a criminal proceeding or seized as evidence by and in the custody of a law enforcement agency vests permanently in the law enforcement agency 60 days after the conclusion of the proceeding. S. 705.105(1), F.S.

¹⁸ Brevard County Sheriff's Office, *Evidence Unit*, <https://www.brevardsheriff.com/home/commands-services/administrative-services-command/evidence-unit/> (last visited Feb. 21, 2023). Broward County Sheriff's Office, *Evidence Unit*, <https://www.sheriff.org/LE/Pages/Evidence-and-Property-Unit.aspx> (last visited Feb. 21, 2023). Escambia County Sheriff's Office, *Evidence Unit*, <https://www.escambiaso.com/departments/specialized-units/evidence-unit/> (last visited Feb. 21, 2023). Hillsborough County Sheriff's Office, *Return of Property*, <https://www.teamhcs.com/Section/d8e5482d-66a8-44bf-9ac6-8913eca8da4c/Property-and-Evidence#:~:text=Return%20of%20Property&text=You%20must%20bring%20the%20original,be%20presented%20to%20claim%20property> (last visited Feb. 21, 2023). Nassau County Sheriff's Office, *Property & Evidence*, <https://nassauso.com/administrative-services/property-evidence/> (last visited Feb. 21, 2023). Pinellas County Sheriff's Office, *Property & Evidence*, <https://pcsoweb.com/property-evidence> (last visited Feb. 21, 2023).

¹⁹ *Id.*

approval prior to releasing a weapon or firearm, may vary.²⁰ The lack of any standardized procedures across jurisdictions for returning a weapon or firearm that is held as safekeeping property may cause confusion and delay in returning a weapon or firearm to its owner. In addition, in those jurisdictions that require a court order to release a weapon or firearm, the owner of the weapon or firearm may incur the added expense of hiring an attorney to file a motion for the return of his or her property with the court.

Pistol or Firearm Taken by a Search Warrant or Upon a View of the Breach of the Peace

Section 933.14(3), F.S., prohibits a law enforcement agency from returning any pistol or firearm without an order of a trial court judge if such pistol or firearm has been taken by any officer:

- With a search warrant; or
- Without a search warrant upon a view by the officer of a breach of the peace.

Courts have interpreted “breach of the peace” as a generic term that includes “... *all* violations of the public peace, order, or decorum. A breach of the peace includes the violation of any law enacted to preserve peace and good order.”²¹ As such, a pistol or firearm seized by a law enforcement officer pursuant to an arrest for a variety of criminal offenses may not be returned to its owner without an order of a trial court judge.

Florida Contraband Forfeiture Act

Seizure

The Florida Contraband Forfeiture Act (FCFA)²² authorizes a law enforcement agency to seize a contraband article, vessel, motor vehicle, aircraft, other personal property, or real property used in violation of the FCFA, or in, upon, or by means of which any violation of the FCFA has taken or is taking place.²³ A “contraband article” includes:

- A controlled substance as defined in ch. 893, F.S., or a substance, device, paraphernalia, or currency or other means of exchange that was used, attempted, or intended to be used in violation of ch. 893, F.S.;
- Gambling paraphernalia, lottery tickets, money, currency, or other means of exchange which was used, attempted, or intended to be used in violation of Florida gambling laws;
- Equipment, liquid or solid, which was used, attempted, or intended to be used, in violation of Florida beverage or tobacco laws;
- Motor fuel upon which the motor fuel tax has not been paid;
- Personal property that was used or attempted to be used as an instrumentality in, or to aid or abet the commission of, any felony, or which is acquired by proceeds obtained from a violation of the Act;
- Real property that was used or attempted to be used as an instrumentality in, or to aid or abet the commission of, any felony, or which is acquired by proceeds from a violation of the Act;
- Any personal property in the possession of or belonging to any person who takes aquaculture products in violation of s. 812.014(2)(c), F.S.;
- A motor vehicle offered for sale in violation of s. 320.28, F.S.;
- A motor vehicle used in the course of committing a violation of s. 322.34(9)(a), F.S.;
- Photographs, films, or other recorded images, recorded in violation of s. 810.145, F.S., and possessed for amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person;
- Real property which is acquired by the proceeds of Medicaid fraud under ss. 409.920, F.S., or 409.9201, F.S.;
- Personal property in the possession of, or belonging to, any person which is acquired by the proceeds of Medicaid fraud under ss. 409.920, F.S., or 409.9201, F.S.; and

²⁰ *Id.*

²¹ *Dougan v. Bradshaw*, 198 So. 3d 878 (Fla. 4th DCA 2016).

²² See ss. 932.701–932.7062, F.S.

²³ S. 932.703(1)(a), F.S.

- Personal property that is used or attempted to be used as an instrumentality in the commission of, or in aiding and abetting in the commission of, a person's third or subsequent violation of s. 509.144, F.S.

Property may only be seized if the owner of the property is arrested for a criminal offense that forms the basis for determining that the property is a contraband article, or if one of the following circumstances apply:

- The owner of the property cannot be identified after a diligent search, or the person in possession of the property denies ownership and the owner of the property cannot be identified by means that are available to the employee or agent of the seizing agency at the time of the seizure;
- The owner of the property is a fugitive from justice or is deceased;
- An individual who does not own the property is arrested for a criminal offense that forms the basis for determining that the property is a contraband article and the owner of the property had actual knowledge of the criminal activity;
- The owner of the property agrees to be a confidential informant; or
- The property is a monetary instrument.²⁴

If a law enforcement agency seizes property, the agency must apply to a court for an order determining whether probable cause exists for the seizure of the property within 10 days of such seizure.²⁵ If a court finds that probable cause exists for the seizure and determines that the owner was arrested for a qualifying offense or an arrest exception applies, the law enforcement agency may initiate a forfeiture proceeding.²⁶

Forfeiture

A seizing law enforcement must promptly initiate forfeiture proceedings by filing a complaint in the circuit court in the jurisdiction where the seizure or offense occurred.²⁷ Upon proof beyond a reasonable doubt that the contraband article was used in violation of the FCFA, the court must order the seized property forfeited to the seizing law enforcement agency.²⁸ After the property is forfeited to the seizing law enforcement agency, the agency may:

- Retain the property for the agency's use;
- Sell the property; or
- Salvage, trade or transfer the property to any public or nonprofit organization.²⁹

If the seizing law enforcement agency is a county or municipal law enforcement agency, the proceeds from a forfeiture must be deposited into a trust fund established by the county or municipality, and such proceeds may be used for school resource officer, crime prevention, safe neighborhood, drug abuse education and prevention programs, or may be used for other law enforcement purposes *except* for meeting the normal operating expenses of the agency.³⁰ If the seizing agency is a state agency, the proceeds are deposited into the General Revenue Fund unless such agency has a dedicated trust fund created by statute to accept proceeds from a forfeiture.³¹

If the seizing law enforcement agency fails to prove such seized property was used in violation of the FCFA beyond a reasonable doubt and the seizing law enforcement agency declines to appeal, the

²⁴ "Monetary instrument" means coin or currency of the United States or any other country; a traveler's check; a personal check; a bank check; a cashier's check; a money order; a bank draft of any country; an investment security or negotiable instrument in bearer form or in other form such that title passes upon delivery; a prepaid or stored value card or other device that is the equivalent of money and can be used to obtain cash, property, or services; or gold, silver, or platinum bullion or coins. S. 932.703(1)(a)5., F.S.

²⁵ S. 932.703(2)(a), F.S.

²⁶ S. 932.703(2)(b), F.S.

²⁷ S. 932.704(4), F.S.

²⁸ S. 932.704(8), F.S.

²⁹ S. 932.7055(1), F.S.

³⁰ S. 932.7055(5)(a), F.S.

³¹ S. 932.7055(6), F.S.

property must be immediately released to the person entitled to possession of the property, as determined by the court.³²

Effect of Proposed Changes

CS/HB 485 amends s. 790.08, F.S., to delete the requirement for a sheriff or chief of police to retain custody of all weapons or firearms seized incident to an arrest until after the trial of the person arrested. Instead, the bill requires a law enforcement agency to return any weapons or firearms that are taken from a person following an arrest, but that are *not* seized as evidence or seized and subject to forfeiture under the FCFA in ss. 932.701–932.7062, F.S., upon request of the person arrested within 30 days after such request is made if he or she:

- Has been released from detention;
- Provides a form of government-issued photographic identification; and
- If requesting the return of a firearm, successfully completes a criminal history background check confirming the person is not prohibited from possessing a firearm under state or federal law, including not having any prohibition arising from an injunction, a risk protection order, or any other court order prohibiting the person from possessing a firearm.

The bill authorizes a sheriff or chief of police to develop reasonable procedures to ensure the timely return of weapons or firearms which are not inconsistent with the bill. The bill prohibits a sheriff or chief of police from requiring a court order to release weapons or firearms that are not seized as evidence in a criminal proceeding unless there are competing claims of ownership of such weapons or firearms.

The bill amends s. 933.14, F.S., to delete a provision requiring an order of a trial court judge to return a pistol or firearm to its owner if such pistol or firearm was taken by an officer upon a view by the officer of a breach of the peace.

The bill provides an effective date of July 1, 2024.

B. SECTION DIRECTORY:

Section 1: Amends s. 790.08, F.S., relating to taking possession of weapons and arms; reports; disposition; custody.

Section 2: Amends s. 933.14, F.S., relating to return of property taken under search warrant.

Section 3: Provides an effective date of July 1, 2024.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On February 21, 2024, the Judiciary Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Exempted any weapons, electric weapons or devices, or arms that are seized and subject to forfeiture under the FCFA in ss. 932.701–932.7062, F.S., from the return requirements in the bill.
- Required a law enforcement agency to return weapons, electric weapons or devices, or arms that are subject to the return requirements of the bill within 30 days after such request is made if the person requesting such weapons, electric weapons or devices, or arms meets specified conditions.
- Deleted a provision that prohibits a pistol or firearm from being returned to its owner without an order of a trial court judge if such pistol or firearm was taken by any officer upon a view of a breach of the peace.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.