

**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.)

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Prepared By: The Professional Staff of the Criminal Justice Committee

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BILL: SB 2318

INTRODUCER: Senator Storms

SUBJECT: Property Forfeiture

DATE: April 1, 2010

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	<b>Favorable</b>
2.	_____	_____	JU	_____
3.	_____	_____	JA	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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**I. Summary:**

Senate Bill 2318 defines “prosecuting authority” in the Florida Racketeer Influenced and Corrupt Organization (RICO) Act to mean the Attorney General, any state attorney, or the statewide prosecutor. The bill also defines “proceeds” to include gross receipts from a criminal enterprise in the money laundering statutes.

Senate Bill 2318 amends several money laundering statutes, including s. 896.101, F.S., s. 560.125, F.S., and s. 655.50, F.S., to remove the requirement that violations of these statutes must occur over a 12 month period which allows prosecutors to make charging decisions based on a longer or shorter period of criminal conduct. It also removes the minimum threshold of \$300 from the enumerated third degree felony offense.

This bill also amends s. 896.101(10), F.S., relating to investigative subpoenas, to allow financial institutions, licensed money services businesses, or any person who has been subpoenaed under this subsection to provide information about the existence and contents of the subpoena and the investigation to the attorney he or she has consulted. It also provides a \$5,000 fine for each violation of the nondisclosure provision.

The bill creates a criminal forfeiture provision in the RICO statute. Current law allows for a separate civil forfeiture proceeding but does not create a mechanism for the forfeiture proceeding to occur within the criminal case. Creating a criminal forfeiture procedure within the RICO statute will allow the forfeiture proceeding to be tried at the same time as the criminal case.

This bill substantially amends the following sections of the Florida Statutes: 895.02896.101, 560.125, 665.50, 923.03, and 921.0022. It also creates sections 895.025 and 895.041 of the Florida Statutes.

## II. Present Situation:

### RICO

The Florida RICO Act provides for civil remedies, including forfeiture of real or personal property used or derived from a violation under this chapter. Although criminal penalties are provided under ch. 895, F.S., there is presently no provision for criminal forfeiture. There is also no definition of “prosecuting authority” under the RICO Act. The Act does define an “investigative agency” to mean the Department of Legal Affairs, the Office of Statewide Prosecution, and the office of state attorney.<sup>1</sup>

### Defining “Proceeds”

Currently, Florida Control of Money Laundering in Financial Institutions Act, the Florida Control of Money Laundering in Money Services Business Act, and the Florida Money Laundering Act<sup>2</sup> use the term “proceeds” but do not define that term. For example, s. 560.123, F.S., requires money services businesses<sup>3</sup> to maintain certain records<sup>4</sup> to deter the use of a money service business to conceal the “proceeds” of criminal activity. Section 896.101, F.S., prohibits a person knowing that the “proceeds” represent some form of unlawful activity, from conducting a financial transaction with the intent of carrying on some unlawful activity.

Congress recently enacted a law defining “proceeds” to mean gross receipts from criminal activity.<sup>5</sup> This law was enacted after the United States Supreme Court, in a plurality opinion, found that “proceeds” meant profits derived from criminal activity rather than gross receipts from criminal activity in this limited case involving an illegal lottery operation.<sup>6</sup>

### Penalties for Money Laundering and Money Services Violations

Chapter 560, F.S., sets forth Florida’s Money Transmitters’ Code. A Florida court explained the purpose of ch. 560, F.S.:

One of the purposes of this code, among others, is “[t]he deterrence of the use of money transmitters as a vehicle for money laundering.” s. 560.102(2)(d), Fla. Stat. (1995). To further this goal, the code requires any money transmitter operating in the state to register with the Florida [Office of Financial Regulation]. *See* s. 560.122, Fla. Stat. (1995).

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<sup>1</sup> Section 895.02(7), F.S.

<sup>2</sup> *See* s. 655.50, 560.125, and 896.101, F.S.

<sup>3</sup> *See* s. 560.103(18), F.S. (defining money services business as “any person located in or doing business in this state, from this state, or into this state from locations outside this state or country who acts as a payment instrument seller, foreign currency exchanger, check casher, or money transmitter”).

<sup>4</sup> Records that are required to be maintained include a record of each financial transaction which has a value of greater than \$10,000.

<sup>5</sup> *See* Fraud Enforcement and Recovery Act of 2009, Public Law 111-21 s. 2 (amending 18 USC s. 1956).

<sup>6</sup> *United States v. Santos*, 553 U.S. 507, 128 S.Ct. 2020 (2008) (Justice Scalia, was joined by Justices Souter, Thomas, and Ginsburg, with Justice Stevens concurring in judgment. Justice Alito, was joined by Chief Justice Roberts, Justice Kennedy, and Justice Breyer in dissent.)

Operating as a money transmitter without registration is a [felony] and also exposes the offender to an administrative fine.<sup>7</sup>

Section 560.125, F.S., provides the following penalties for engaging in money services businesses without a license:

- If the violation involves currency or payment instruments in amounts greater than \$300 but less than \$20,000 in any 12 month period, it is punishable as a third degree felony.<sup>8</sup>
- If the violation involves currency or payment instruments in amounts greater than \$20,000 but less than \$100,000 in any 12 month period, it is punishable as a second degree felony.<sup>9</sup>
- If the violation involves currency or payment instruments in amounts greater than \$100,000 in any 12 month period, it is punishable as a first degree felony.<sup>10</sup>
- In addition, persons who violate s. 560.125, F.S., face additional criminal fines and administrative penalties of up to five times the value of the currency.<sup>11</sup>

The same penalties are also imposed for violations of the Florida Control of Money Laundering in Financial Institutions Act, s. 655.50, F.S., and the Florida Money Laundering Act, s. 896.101, F.S.

### **Investigative Subpoenas**

Section 16.56, F.S., gives the Statewide Prosecutor the power to issue subpoenas to aid in investigations. Section 27.04, F.S., gives the state attorney the power to subpoena witness appearances. Section 896.101(10), F.S., provides, in relevant part:

If a subpoena issued under s. 16.56, F.S., or s. 27.04, F.S., contains a nondisclosure provision, any financial institution, licensed money services business, employee or officer of a financial institution or licensed money services business, or any other person may not notify any customer whose records are being sought by the subpoena or any other person named in the subpoena, about the existence or contents of that subpoena or about information that has been given to the prosecutor who issued the subpoena or other law enforcement officer named in the subpoena in response to the subpoena.

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

Senate Bill 2318 defines “prosecuting authority” in the Florida Racketeer Influenced and Corrupt Organization (RICO) Act, ch. 895, F.S., to mean the Attorney General, any state attorney, or the statewide prosecutor. The bill also defines “proceeds” to include gross receipts from a criminal enterprise in the Florida Control of Money Laundering in Money Services Business Act,

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<sup>7</sup> See *In re Forfeiture of One Hundred Seventy-One Thousand Nine Hundred Dollars (\$171,900) in United States Currency*, 711 So.2d 1269, 1273 (Fla. 3rd DCA 1998).

<sup>8</sup> Potential imprisonment up to five years and up to a \$5,000 fine.

<sup>9</sup> Potential imprisonment up to 15 years and up to a \$10,000 fine.

<sup>10</sup> Potential imprisonment up to 30 years and up to a 10,000 fine.

<sup>11</sup> See s. 560.125(6) and (7), F.S.

(s. 560.123, F.S.), and Florida Money Laundering Control Act (ch. 896, F.S.) (similar to the federal law definition).

This bill amends the money laundering statutes (s. 560.125, F.S., s. 655.50, F.S., and s. 896.101, F.S.) to remove the requirement that violations of these statutes must occur over a 12 month period, which will allow prosecutors to make charging decisions based on a longer or shorter period of criminal conduct. It removes the minimum threshold of \$300 from the enumerated third degree felony offense. The bill also makes conforming changes to the offense severity ranking chart in the Florida Punishment Code.

This bill also amends s. 896.101(10), F.S., relating to investigative subpoenas, to allow financial institutions, licensed money services businesses, or any person who has been subpoenaed under this subsection to provide information about the existence and contents of the subpoena and the investigation to the attorney he or she has consulted. It also provides a \$5,000 fine for each violation of the nondisclosure provision.

The bill creates s. 895.025, F.S., providing that ch. 895, F.S., should be liberally construed for the purpose of curtailing racketeering activity and controlled substance crimes and to lessen the economic power of criminal enterprises.

The bill also creates a criminal forfeiture process (s. 895.041, F.S.) in the state RICO statute, which will allow the forfeiture proceeding to be tried at the same time as the criminal case. (This newly created language is substantially similar to the federal law in 18 USC s. 1963.)

The newly created criminal forfeiture process is detailed below.

#### **Notice to the Defendant**

The bill amends s. 923.03, F.S., to provide that a judgment of forfeiture cannot be entered in a criminal case unless the indictment or information provides notice that the defendant has an interest in the property that is subject to forfeiture.<sup>12</sup> The state must prove beyond a reasonable doubt that the property is subject to forfeiture.<sup>13</sup>

#### **Property Subject to Forfeiture Upon Conviction**

The bill provides that when a defendant is convicted of a violation of the RICO statute, he or she forfeits any interest that has been acquired or maintained in violation of the statute, any interest providing a source of influence over any enterprise that has been acquired in violation of the statute, or any property or proceeds derived from the unlawful activity. Any such interest or property is transferred to the state upon conviction. Property subject to forfeiture includes real and personal property.

The bill provides that all rights to the property subject to forfeiture vests with the state upon commission of the crime. If the defendant transfers the property to another person after commission of the crime but before conviction, the bill provides a procedure for that person to

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<sup>12</sup> In *United States v. Musson*, 802 F.2d 384 (10th Cir. 1986), the court held that notice by indictment satisfied due process.

<sup>13</sup> In *United States v. Pellullo*, 14 F.3d 881 (3rd Cir. 1994), the court held that the state's burden of proof in criminal RICO forfeiture statutes is beyond a reasonable doubt. The language of the statute at issue in *Pellullo* is identical to the bill's language.

show that the property was purchased without knowledge that it was subject to forfeiture. The bill also gives the circuit courts the authority to enter orders related to forfeited property or property that is subject to forfeiture without regard to the location of the property.

### **Disposition of Forfeited Property**

The bill authorizes the court to enter a judgment of forfeiture upon conviction of a defendant and authorizes the prosecuting authority to seize the property. The court is authorized to enter appropriate orders to protect the state's interest. Once the property is seized, the bill authorizes the prosecuting authority to dispose of the property by sale or other means. The bill gives persons other than the defendant or persons acting in concert with the defendant the right to petition to stay the sale of property while any appeal is pending if the person can show that failure to enter a stay will result in irreparable harm.

The bill authorizes the prosecuting authority to grant petitions or remission of forfeiture, compromise claims that may arise regarding the property, award compensation to persons providing information resulting in forfeiture of property, and direct the disposition of property. The proceeds shall be deposited into the General Revenue Fund after payment of proper expenses.

The bill authorizes the Attorney General to adopt rules relating to notice, granting petitions for mitigation, sale of property, and the compromise of claims arising from forfeiture.

### **Pretrial Seizure of Property**

The bill provides a procedure for the state to petition the court to enter an injunction<sup>14</sup> to preserve the availability of property subject to forfeiture. The state may move for an appropriate order either:

- (1) upon the filing of an indictment or information charging a violation of s. 895.03(3), F.S.<sup>15</sup>  
The state must allege that the property is subject to forfeiture upon conviction; or
- (2) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that there is a substantial probability that the state will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture and the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered. A pre-indictment order is only effective for 90 days unless the court extends it for good cause.

The bill provides for a temporary restraining order without notice or a hearing when an information or indictment has not yet been filed with respect to the property and the state

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<sup>14</sup> In *Musson*, see note 10, *supra*, the court noted that the Supreme Court has approved physical seizure of property on the basis of probable cause without a hearing. Accordingly, the court held, the entry of restrictions on transfer of property is constitutionally permissible.

<sup>15</sup> In *Musson*, see note 10, *supra*, the court upheld the federal statute on which these provisions of the bill are based against various constitutional challenges. The *Musson* court rejected claims that the defendant was entitled to an evidentiary hearing on a restraining order entered after an indictment was issued and that due process does not require such a hearing.

demonstrates that there is probable cause to believe that the property would, in the event of conviction, be subject to forfeiture and that such notice will jeopardize the availability of the property for forfeiture.

A temporary order shall expire not more than 10 days after the date it is entered, unless extended for good cause. A hearing requested concerning an order must be held at the earliest possible time prior to the expiration of the temporary order. At the hearing, a court may receive and consider evidence and information that would be inadmissible under the Florida Rules of Evidence.<sup>16</sup>

### **Hearing for Bona Fide Purchasers**

The bill also provides a mechanism for a person other than the defendant to assert an interest in property that has been ordered forfeited to the state.<sup>17,18</sup>

It requires the state to publish notice of the forfeiture order and its intent to dispose of the property. The state may also provide direct written notice to any person known to have alleged an interest in the property. A person may petition for a hearing within 30 days of publication or receipt of notice, whichever is earlier. The petition must be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

The hearing is held before the court without a jury.<sup>19</sup> The hearing on the petition shall be held within 30 days (if practicable) after the filing of the petition. At the hearing, the state and the petitioner may present evidence and witnesses. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

The petitioner must show either:

- (1) a legal right, title, or interest in the property and that such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture; or

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<sup>16</sup> In *In re Assets of Parent Industries*, 739 F.Supp. 248 (E.D. Pennsylvania June 1, 1990), the court explained that more permissive evidentiary standards in pre-indictment cases are permissible and that the government is not required to reveal its entire RICO case in a pre-indictment hearing.

<sup>17</sup> The defendant is permitted to assert his or her interest during the criminal trial proceedings.

<sup>18</sup> The *Musson* court noted that the provisions for third party petitions addressed Musson's claim regarding limitations on his ability to sell his property. See *Musson*, note 10, *supra*.

<sup>19</sup> *Libretti v. United States*, 516 U.S. 29 (1995), holds that there is no Sixth Amendment right to a jury trial in a forfeiture determination.

- (2) that the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture.

If the petitioner makes the appropriate showing by a preponderance of the evidence, the court must amend the forfeiture order. Once the court has disposed of all petitions or if no such petitions are filed, the state shall have clear title to the property and may warrant good title to any subsequent purchaser or transferee.

The bill prohibits parties claiming an interest in property subject to forfeiture from intervening in the trial or appeal of a criminal case or commencing an action against the state concerning the validity of a property interest except as provided in the bill.

#### **Property Subject to Forfeiture if Assets Unavailable**

If the property subject to forfeiture is unavailable because of the homestead provisions of the Florida Constitution, because it cannot be located, because it has been sold or transferred to a third party, because it has been moved beyond the court's jurisdiction, or it has been comingled with other property, the court must order forfeiture of other property up to the value of the unavailable property.

#### **Discovery Authorized to Identify or Locate Forfeited Property**

The bill authorizes the court to enter orders compelling testimony regarding the identification or location of property ordered forfeited after the entry of an order declaring the property forfeited to the state.

#### **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:**

None.

**C. Government Sector Impact:**

The fiscal impact of the bill is indeterminate, but potentially positive. By expanding the definition of “proceeds,” there is a possibility the state will be able to capture more proceeds generated through criminal activity. There is also a potential for more revenue to the state by the use of criminal forfeiture in RICO cases.

**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.

**B. Amendments:**

None.