



SOUTH CAROLINA REVENUE AND FISCAL AFFAIRS OFFICE
STATEMENT OF ESTIMATED FISCAL IMPACT
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| Bill Number: | S. 0590 | Introduced on February 28, 2019 |
| Author: | Malloy | |
| Subject: | Asset Forfeiture and Private Property Protection Act | |
| Requestor: | Senate Judiciary | |
| RFA Analyst(s): | Gardner | |
| Impact Date: | June 25, 2019 | |

Fiscal Impact Summary

This bill creates the Asset Forfeiture and Private Property Protection Act which, with a few exceptions, prevents the seizure of a person's property and monies if the person has not been charged with a crime. The bill also provides that a prosecuting agency may file a criminal complaint, file an indictment, or petition the court to issue an ex parte preliminary order to seize or secure property for which forfeiture is sought. The bill may also limit law enforcement and prosecuting agencies from retaining forfeited funds or proceeds from the sale of forfeited properties.

The Judicial Department reports that it expects to manage any increase in court caseloads using existing General Fund resources.

The State Law Enforcement Division (SLED) reports that it expects the bill to increase the number case filings, but as there is no data with which to determine how many filings may be initiated. Therefore, the expenditure impact cannot be determined.

The Office of the Attorney General reports that the bill will require the agency to create a database to track all money and properties seized by law enforcement. It will also be responsible for monitoring and tracking compliance as required by this bill. The agency will need to contract with an information technology provider to create a database and hire 2 full-time program coordinators to track seized properties. As such, the bill will have a recurring General Fund expenditure impact of \$181,500 and a non-recurring General Fund expenditure impact of \$366,000 beginning in FY 2019-20.

The Commission on Prosecution Coordination reports that the bill may prohibit it from retaining forfeited cash or proceeds from the sale of forfeited properties, which may result in an annual reduction in Other Funds revenue of approximately \$793,216 beginning in FY 2019-20. Since it is unknown (or cannot be anticipated) how many cases will be initiated by law enforcement agencies or contested by interested parties, we cannot estimate the expenditure impact. Therefore, the expenditure impact is undetermined for this agency.

The Commission on Indigent Defense reports that the amount of the expenditure impact of the bill depends on the number of individuals that contest forfeiture or seizure related actions who utilize public defenders. However, as this number cannot be anticipated, the General Fund expenditure impact cannot be determined for the agency.

The General Fund revenue impact of this bill for all remaining funds distributed pursuant to a court order pursuant to Section 17-32-190(B) is undetermined since it is unknown (or cannot be anticipated) how many cases will be initiated by law enforcement agencies or contested by interested parties, we cannot estimate the revenue impact. Therefore, the revenue impact is undetermined for this agency.

Three counties (Horry, Lancaster, and Lexington) report that the bill may have a local revenue impact exceeding \$1,200,000 for these 3 counties. Since it is unknown (or cannot be anticipated) how many cases will be initiated by local law enforcement agencies or contested by interested parties, we cannot estimate the revenue impact. Therefore, the statewide local revenue impact is undetermined.

Explanation of Fiscal Impact

Introduced on February 28, 2019

State Expenditure

This bill creates the Asset Forfeiture and Private Property Protection Act, which provides procedures for the forfeiture and replevin of certain property, other than contraband, that has been used in or derived from a violation of criminal law. If a person is convicted of violating a law subject to forfeiture, the court will order forfeiture of property or proceeds. Properties subject to forfeiture include but are not limited to real estate, personal property, money, securities, products, ammunition, and firearms. Properties exempt from seizure and forfeiture include homesteaded real property, United States currency totaling \$500 or less, and a conveyance of less than \$2,500 in market value.

The bill allows a prosecutor to initiate a forfeiture by filing a criminal complaint before a defendant's first appearance. The complaint must contain specific information, and interested third parties must be notified. Alternately, the bill allows the prosecution to seek forfeiture through a claim in an indictment. A prosecuting agency may also petition the court to issue an ex parte preliminary order to seize or secure personal property for which forfeiture is sought where seizure without a court order is not otherwise permitted. The defendant or a third party claiming an interest in seized property is entitled to bring a writ of replevin in the court having jurisdiction over the criminal charge prior to the trial. An innocent owner may also petition for a non-jury hearing any time before the conclusion of the criminal prosecution. The property of an innocent owner may not be forfeited under any forfeiture statute and must be returned if it has been seized. The bill also allows for appeals from these court orders on an interlocutory basis. Seizure of real property requires a court order, which may be issued only after notice and an opportunity to be heard.

The bill provides that the forfeiture proceeding itself must be held after the criminal proceeding and enables a public defender to continue representing his client during the forfeiture proceeding. In cases where the property at issue has a value of less than \$10,000, the forfeiture proceeding will not have a jury presiding. The owner of the property is entitled to petition the court during the forfeiture proceeding to claim that forfeiture would be unconstitutionally excessive and may request a non-jury hearing on the issue. The bill also allows parties other than the defendant to file interlocutory appeals during forfeiture proceedings and permits the defendant to file an

appeal against a final order. In cases where a property owner's claims result in recovery of at least half the value of the property or currency claimed, the law enforcement agency that conducted the seizure must pay for legal fees and costs incurred by the claimant, as well as post-judgment interest and any interest actually paid from the date of seizure.

After forfeiture of property has been ordered due to a defendant's guilty plea or a verdict of forfeiture, the State must provide notice to persons with a potential interest in the forfeited property. Law enforcement officers who seize properties must provide the property owner with an itemized receipt of the property obtained.

The bill prohibits law enforcement agencies from transferring possession of seized properties to a federal agency for the intention of circumventing state forfeiture laws. The bill requires that every law enforcement agency must report specific information on seized properties to the Office of the Attorney General on no less than an annual basis or incur a non-compliance penalty. The bill outlines the specific information that must be included on the type and status of the seized properties. This information will be subject to the provisions of the Freedom of Information Act.

Judicial Department. As the bill enables prosecutors and citizens to file a variety of complaints, applications, motions, and petitions it may cause an additional backlog in general sessions court, an increase general sessions judges' responsibilities, and shorten deadlines for hearings. However, the agency anticipates that any expenditure impact to the agency's General Funds due to an increase in caseloads will be managed within existing resources.

State Law Enforcement Division. SLED reports that the bill would materially change fundamental processes (such as rules of service, court scheduling, applicability of the common law, the rules of procedure, and other related laws) that currently exist in South Carolina and has the potential to increase litigation for all agencies that seize property. The bill enables prosecutors and citizens to file a variety of complaints, applications, motions, and petitions. However, there is no data to determine how many new cases will be filed by the agency. Therefore, the expenditure impact on the agency's General Funds is undetermined.

Office of the Attorney General. This bill will require the office to conduct a significant amount of record keeping, in that every item of evidence seized as part of an investigation by the law enforcement agencies of the state must be tracked. The office must monitor the status of the disposition of any items, cash, or property seized and develop annual reports containing status and disposition information. Additionally, the office must determine if law enforcement agencies are compliant with reporting requirements and enforce non-compliance penalties when necessary. The office must also create a standard report form and develop a reporting process.

The office will need to hire 2 full-time program coordinators to ensure the required monitoring is conducted. The total recurring costs for these 2 staff will be \$151,500 (\$121,500 in salary/fringe expenses and \$30,000 in other operating expenses). The office will also need to establish a custom-designed tracking database to monitor the reporting and status or disposition of seized properties. This will require procurement of an appropriate information technology vendor and hiring of temporary staff. The ongoing support and system maintenance of the database will cost \$30,000 annually. The office estimates that the database construction time will span a 32-week

period and will result in a one-time cost of \$366,000. Temporary staff needed to construct the database will consist of a project manager (at \$95 per hour), a business analyst (at \$80 per hour), and a developer (at \$110 per hour). Therefore, the bill will have a recurring General Fund expenditure impact of \$181,500 and a non-recurring General Fund expenditure impact of \$366,000 beginning in FY 2019-20.

Commission on Indigent Defense. The agency reports that the amount of the expenditure impact of the bill depends on the number of individuals that contest forfeiture or seizure related actions who utilize public defenders. However, as this number cannot be anticipated, the General Fund expenditure impact cannot be determined for the agency.

State Revenue

Any monies seized or proceeds from the sale of forfeited property may only be distributed pursuant to a court order and must be used to pay for specific expenses (in order of priority), after which all remaining funds must be forwarded to the State Treasurer for deposit into the General Fund. In cases where seized property is to be returned to an innocent owner or to a defendant who has posted bond or offered substitute property equal in value, the State must return such property within a reasonable period of time not to exceed three business days. However, if a trier of fact finds that property must be forfeited, the court must order the State to return stolen property to its rightful owner; sell firearms, ammunition, and firearm accessories to a licensed firearm dealer; and sell other property in a commercially reasonable manner.

For seized properties or currencies whose aggregate net equity value is \$50,000 or less (minus the value of any contraband), joint law enforcement task forces and multi-jurisdictional collaborations with a federal agency must transfer responsibility for the seized property to the prosecuting agency for forfeiture under state law. However, should federal law require surrender of the forfeited property to the federal government, the prosecuting agency may not accept payment or a distribution of forfeiture proceeds from the federal government. For seized properties or currencies whose aggregate net equity value exceeds \$50,000 (minus the value of any contraband), a joint law enforcement task force or multi-jurisdictional collaboration may transfer responsibility for the forfeiture to the federal government. Law enforcement agencies must, for all forfeiture case transfers to the federal government, adhere to specific reporting requirements.

Currently, Section 44-53-530 allows law enforcement agencies and prosecuting agencies to retain certain percentages of cash and proceeds from the sale of property that are forfeited by consent order. Additionally, Section 16-3-2090 and Section 16-8-260 allow state and local law enforcement agencies to retain some forfeited funds or proceeds. The bill may limit or eliminate the ability of law enforcement and prosecuting agencies to retain forfeited funds or proceeds unless it is allowed by the court. It is possible that in instances where a state or local law enforcement agency must transfer forfeited funds to the federal government, the federal agency receiving the funds may return some percentage back to the state or local law enforcement agency.

Commission on Prosecution Coordination. The commission indicates that under existing law, prosecution agencies (such as circuit solicitors and the Attorney General) must use the proceeds

of property and cash received from law enforcement agencies as forfeitures to prosecute drug offenses and litigate drug related matters.

Under current law, in accordance with Section 44-53-530(d) and (e), of the proceeds of property and cash exceeding \$1,000 in value that are forfeited by consent order, 75 percent is remitted to the law enforcement agency that seized the property or cash, 20 percent is remitted to the prosecuting agency, and 5 percent is remitted to the State Treasurer for deposit into the State's General Fund. Section 44-53-530(f) provides that the first \$1,000 of any cash seized and forfeited under these provisions remains with and is the property of the law enforcement agency that conducted the seizure, unless otherwise agreed to by the law enforcement agency and the prosecuting agency. Section 44-53-530(g) provides that all forfeited monies and proceeds from the sale of forfeited property must be retained by the governing body of the local law enforcement agency or prosecution agency and be deposited into separate, special accounts in the name of each agency. These accounts may be drawn on and used only by the agency for which the account was established. In no case are these accounts to be used to supplant operating funds, and any expenditures from these funds for a recurring expense must be approved by the governing body before the purchase or as otherwise provided by law.

The commission reports that between 2016 and 2018, the 16 judicial circuits received \$2,379,648 in forfeited monies, which is an average of \$793,216 per year. This bill could prevent the commission from retaining forfeited funds, which would result in an annual revenue impact of approximately \$793,216 in Other Funds. Since it is unknown (or cannot be anticipated) how many cases will be initiated by law enforcement agencies or contested by interested parties, we cannot estimate the expenditure impact. Therefore, the revenue impact is undetermined for this agency.

Local Expenditure

Lexington County indicates that the bill will add new prosecutorial duties and reporting and publication requirements. The County currently contracts with independent counsel to represent the Sheriff's Office and the 11th Circuit Solicitor in drug cases. The expanded prosecutorial duties may cause the independent counsel to increase contingency rates. As the County pays for these fees using drug seizure funds, implementation of the bill may require the fees be paid from an alternate source of funds. To meet the notification requirements of the bill, the County anticipates spending \$4,350 in publication costs to notify persons having a potential interest in seized properties. Please refer to the cost breakout shown below.

| County Office | Additional Cost Due to Bill | Purpose |
|---|--|------------------------------|
| Lexington County Sheriff's Office and 11 th Circuit Solicitor | Independent counsel for representation of County in drug forfeiture cases | Unknown |
| Lexington County Sheriff's Office and 11 th Circuit Solicitor | Cost of providing notice by publication to parties with potential interest in seized properties | \$4,350 |
| Total | | \$195,776⁺ |

Local Revenue

This bill may limit or eliminate the ability of law enforcement and prosecuting agencies to retain forfeited funds or proceeds unless specifically granted by the court. Of the 46 counties and the Municipal Association of South Carolina surveyed, responses were provided by Horry, Lancaster, and Lexington Counties provided responses on the expected financial impact of the bill.

Horry County indicates the implementation of the bill could result in an annual \$999,175 reduction in revenue to the department due to the loss of local forfeiture and seizure revenue required by this bill. Typically, these funds are used to cover costs affiliated with the county's Solicitor's Office and Sheriff's Department. Please refer to the cost breakout shown below.

| County Office | Purpose | Potential Loss in Recurring Forfeited Monies |
|------------------------------------|--|--|
| Horry County Drug Enforcement Unit | Costs for purchase of vehicles, ballistic vests, uniforms, training classes, ammunition, computer equipment/software, and surveillance equipment repairs | \$124,675 |
| Horry County Narcotics Unit | Operating and vehicle replacement costs | \$180,000 |
| Horry County Solicitor's Office | Costs for purchase of equipment and supplies, as well as training for Assistant Solicitors who prosecute drug cases in the 15 th Judicial Circuit | \$80,000 |
| County Office | Purpose | Potential Loss in One-Time Forfeited Monies |
| Horry County Narcotics Unit | Costs for purchase of supplies, drug lab equipment, and computers | \$233,000 |
| Horry County Sheriff's Department | Costs for purchase of equipment and training for staff | \$76,500 |
| Horry County Solicitor's Office | Costs related to renovation of the Drug Enforcement Unit's new office location | \$305,000 |
| Total | | \$999,175 |

Lancaster County indicates the bill could result in an annual \$10,000 reduction in revenue to the Sheriff's Office due to the loss of local forfeiture and seizure revenue required by this bill. Typically, these funds are used to cover operating expenses and purchase new vehicles or equipment. Please refer to the cost breakout shown on the following page.

| County Office | Purpose | Potential Loss in Recurring Forfeited Monies |
|-----------------------------------|------------------------------------|--|
| Lancaster County Sheriff's Office | Costs for purchase of new vehicles | \$8,000 - \$10,000 |
| Total | | \$10,000⁺ |

Lexington County indicates that it received \$413,808 in forfeiture proceeds from the federal government between 2016 and 2018. Of the 55 cases, only 1 exceeded \$50,000. This case resulted in \$241,336 in forfeited funds. Under the bill, \$172,472 of the total received would have been ineligible for receipt. The Lexington County Sheriff's Office also conducted 87 drug seizures for the same timeframe and collected \$189,541 in assets that had not, at the time of the County's response to this fiscal impact request, been reduced to proceeds. The County ultimately receives 10 percent of these proceeds (in this case, \$18,954). Therefore, if this bill had been in place between 2016 and 2018, the County could have lost \$191,426 in forfeited revenue.

| County Office | Forfeiture Reason | Potential Loss in Recurring Forfeited Monies |
|-----------------------------------|---|--|
| Lexington County Sheriff's Office | Federal cases exceeding \$50,000 | \$172,472 |
| Lexington County Sheriff's Office | Drug seizure funds (10 percent of total proceeds) | \$18,954 |
| Total | | \$191,426 |

While responses provided by Horry, Lancaster, and Lexington Counties indicate the bill could result in a reduction in local revenue of more than \$1,200,000 for these 3 counties, the total annual local reduction in revenue is undetermined. In summary, due to the lack of responses received and the inability to anticipate how many arrests will result in forfeiture or seizure actions by law enforcement agencies or contested by interested parties, the statewide loss of local forfeiture and seizure revenue is undetermined.



Frank A. Rainwater, Executive Director