

BILL ANALYSIS

H.B. 3758
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Criminal Jurisprudence
Committee Report (Unamended)

BACKGROUND AND PURPOSE

Civil asset forfeiture is meant to negatively affect large-scale criminal enterprises by diverting their resources. However, low-income Texans often find themselves targets of forfeiture proceedings that are too costly for them to fight. Since these seized goods often benefit police departments' bottom lines, some seizures might be motivated by profit rather than the need to fight crime. According to the Office of the Attorney General, in 2021, law enforcement agencies and prosecutors in Texas seized nearly \$34 million in valuables, cash, cars, jewelry, clothing, art, and other property allegedly linked to a crime.

The Texas Public Policy Foundation reports that under the current civil asset forfeiture process, police and prosecutors may take property without ever charging a person with a crime. The protections a person would have if they were accused of a crime, such as representation by a lawyer or the right to a jury trial, are not typically available during a forfeiture proceeding since the property itself is alleged to be "guilty" of the criminal offense. Furthermore, Texas law is among the most permissive with respect to civil asset forfeiture, requiring only a preponderance of the evidence standard to be met before the seizure of property, which is often without any representation of the interests of the property owner.

H.B. 3758 seeks to address these issues by prohibiting seizure of homestead property, motor vehicles valued at \$10,000 or less, and U.S. currency valued at \$200 or less, specifying the process by which property may be forfeited, requiring assets seized through forfeiture to be connected to a chargeable offense, providing for the speedy return of property once charges are dropped, and prohibiting the state from seeking money judgment against a defendant.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

H.B. 3758 repeals Code of Criminal Procedure provisions relating to the forfeiture of contraband and relating to the disposition of abandoned or unclaimed property, other than contraband subject to forfeiture and certain alcohol, that is seized by a peace officer. The bill amends the Code of Criminal Procedure to set out provisions relating to criminal asset forfeiture in Texas and to establish the purpose of those provisions, which is to do the following:

- deter criminal activity by reducing the economic incentives;
- increase the pecuniary loss that results from engaging in criminal activity; and
- protect against the wrongful forfeiture of property.

Criminal Asset Forfeiture Orders

H.B. 3758 authorizes a convicting court to order a person convicted of an offense subject to forfeiture to forfeit the following:

- any property the person derived from the commission of the offense;
- any property directly traceable to property derived from the commission of the offense; or
- any instrumentality the person used in the commission of the offense.

The bill defines "instrumentality" as property that is otherwise lawful to possess and that is used in the furtherance or commission of an offense subject to forfeiture. The bill sets out means of exchange that are expressly included in the term's definition, including a device or structure used for transportation. The bill subjects the following offenses to forfeiture under the bill's provisions:

- a first or second degree felony under the Penal Code;
- a third degree or state jail felony intoxication and alcoholic beverage offense, if the defendant has been previously convicted three times of such an offense;
- a Class A misdemeanor or any felony for racing on a highway, other than a Class A misdemeanor that is classified as such based solely on conduct constituting such a racing offense in which the actor was in possession of an open container at the time of the offense;
- a felony, as follows:
 - under the Money Services Act;
 - under the Texas Controlled Substances Act or the Texas Dangerous Drug Act;
 - under statutory provisions relating to Medicaid or for a health care fraud offense or perjury or falsification offense that involves a health care program;
 - for criminal solicitation of a minor, indecency with a child, or evading arrest or detention;
 - for the following offenses:
 - trafficking;
 - robbery, burglary and criminal trespass, theft, or fraud;
 - computer or telecommunications crimes;
 - money laundering or insurance fraud; or
 - public indecency; or
 - under the Securities Act;
- a Class A misdemeanor, as follows:
 - for the unauthorized or fraudulent procurement, sale, or receipt of telephone records; or
 - for certain prohibited actions under the Texas Litter Abatement Act, if the defendant has been previously convicted two times of such an offense;
- a Class B misdemeanor under Business & Commerce Code provisions regarding identify theft by an electronic device;
- any of the following:
 - the sale, purchase, installation, transfer, use, or possession of an automated sales suppression device or phantom-ware;
 - smuggling of persons or continuous smuggling of persons;
 - operation of a stash house;
 - dog fighting;
 - an unlawful weapons transfer offense in which a person delivers a handgun to any person knowing that the person to whom the handgun is to be delivered intends to use it unlawfully or in the commission of an unlawful act;
 - firearm smuggling;
 - an organized crime offense; or
 - an offense for a person failing to stop or comply with certain Transportation Code requirements following an accident involving personal injury or death; or

- any other offense that results in a personal injury to a victim and that is provided under the Penal Code or a federal criminal law.

The bill exempts from forfeiture property that is homestead property, a motor vehicle valued at less than \$10,000, and U.S. currency totaling \$200 or less and establishes that a person is considered convicted if a sentence is imposed on the person or the person receives community supervision, including deferred adjudication community supervision.

H.B. 3758 restricts the forfeiture of property to instances in which a person is convicted of an offense subject to forfeiture and the state establishes by clear and convincing evidence that the bill's requirements for such forfeiture are met. The bill establishes that criminal asset forfeiture does not prevent property from being forfeited by plea agreement approved by the convicting court.

H.B. 3758 authorizes the convicting court, on the state's motion following conviction, to order the forfeiture of substitute property owned by the defendant if the state proves by a preponderance of the evidence that the defendant intentionally transferred, sold, or deposited property with a third party to avoid the court's jurisdiction. The bill caps the value of forfeited substitute property at the value of the property transferred, sold, or deposited.

H.B. 3758 establishes that a defendant convicted of an offense subject to forfeiture is not jointly and severally liable for a forfeiture award owed by any other defendant and authorizes the convicting court, if ownership is unknown, to order each defendant to forfeit property on a pro rata basis or by other equitable means.

Contraband

H.B. 3758 prohibits a person from having a property interest in contraband, subjects contraband to seizure, requires contraband to be disposed of in accordance with state law, and establishes that contraband is not subject to criminal asset forfeiture under the bill's provisions. The bill defines "contraband" as tangible or intangible goods that are illegal to import, export, or possess, including a scheduled drug without a valid prescription.

Seizure of Property

H.B. 3758 authorizes a court, at the state's request made at any time, to issue an ex parte preliminary order to seize or secure personal property for which forfeiture is sought and to provide for its custody. The bill establishes that personal property subject to forfeiture may be seized at any time without a court order under any of the following conditions:

- the seizure is incident to a lawful arrest or search;
- the personal property has been the subject of a previous judgment in favor of the state; or
- the law enforcement agency seizing the property has probable cause to believe that:
 - the seizure is immediately necessary to prevent the removal or destruction of the personal property; and
 - the personal property is subject to criminal asset forfeiture.

The bill defines "law enforcement agency" as a law enforcement agency of Texas or a political subdivision of Texas that has authority under state law to engage in seizure and forfeiture.

H.B. 3758 authorizes the seizure of real property only under a court order and authorizes a court to issue an order to seize or secure real property for which forfeiture is sought only after the property owners are provided notice and an opportunity for a contested hearing to determine the sufficiency of the probable cause for the seizure. These provisions do not prohibit the state's attorney from seeking a lis pendens or restraining order to prohibit the sale or destruction of the real property.

H.B. 3758 requires a law enforcement officer who seizes property to give an itemized receipt to the person possessing the property or, in the absence of any person, to leave a receipt in the place where the property was found, if reasonably possible. The bill establishes that the state, at the time of a seizure or the issuance of a *lis pendens* or restraining order, acquires provisional title to the seized property and may hold and protect the property. The bill vests title to the property with the state on the date the court orders the property to be forfeited and the vesting relates back to the date the state acquired provisional title. The bill subjects title to such property to a claim by a third party adjudicated as provided by the bill's provisions relating to criminal asset forfeiture.

Hearings, Forfeiture Proceedings, and Appeal

H.B. 3758 grants a person claiming an ownership interest in property seized through criminal asset forfeiture the right to a pretrial hearing to determine the validity of the seizure and provides for the following relating to a pretrial hearing regarding a writ of replevin:

- the deadline by which the claimant must claim the right to possession of property by motion to the court to issue a writ of replevin;
- the claimant must file a motion establishing the validity of the alleged interest in the property;
- the deadline by which the court must hear the motion;
- the deadline by which the state must file an answer showing probable cause for the seizure or a cross motion;
- the findings that require the court to grant the claimant's motion;
- the discretion of the court to do the following:
 - order the return of funds or property sufficient for the defendant to obtain legal counsel; and
 - to require an accounting for the use of the returned funds or property; and
- the discretion of the court to order certain relief instead of ordering the issuance of the writ of replevin.

H.B. 3758 requires a proceeding for the forfeiture of property to be held following the trial of the related alleged offense and, if the value of the property is less than \$10,000, to be held before the judge only.

H.B. 3758 authorizes the defendant, at any time following a determination of forfeiture by the trier of fact, to petition the court to determine whether the forfeiture is unconstitutionally excessive under the U.S. Constitution or the Texas Constitution and places on the defendant the burden of establishing by a preponderance of the evidence that the forfeiture is grossly disproportional to the seriousness of the offense. The bill requires the hearing to be held before the judge only. The bill authorizes the court to consider all relevant factors in determining whether the forfeiture of property is unconstitutionally excessive and in determining the value of the property subject to forfeiture but prohibits the court from considering the value of the property to the state in determining whether the forfeiture of property is unconstitutionally excessive.

H.B. 3758 exempts a bona fide security interest from forfeiture unless the person claiming the security interest had actual knowledge, defined by the bill as direct and clear awareness of information, facts, or conditions, that the property was subject to forfeiture at the time the security interest was created. The bill requires a person claiming a security interest to establish the validity of the interest by a preponderance of the evidence.

H.B. 3758 prohibits forfeiture of the property of an innocent owner and sets out requirements for persons who claim to be an innocent owner of property subject to forfeiture, the state's burden to prove otherwise, and the court's finding and order if the state fails to meet its burden.

H.B. 3758 authorizes a party to forfeiture litigation to appeal the court's decision regarding the seizure, forfeiture, and distribution of property.

Disposition and Return of Property

H.B. 3758 sets out provisions relating to the disposition of property and proceeds, including provisions relating to the following:

- requirements for the delivery of abandoned and forfeited property to the applicable county treasurer;
- the destruction of contraband;
- the disposal of all forfeited and abandoned property other than currency at public auction; and
- the use and deposit of auction proceeds and forfeited currency.

The bill prohibits a law enforcement agency from retaining forfeited or abandoned property for the agency's use and from selling such property directly or indirectly to an agency employee, an employee's relative, or another law enforcement agency. The bill defines "abandoned property" as personal property left by an owner who has intentionally relinquished all rights to control of the property.

H.B. 3758 sets out provisions relating to the return of forfeited property to the owner by a law enforcement agency that holds the property and makes a law enforcement agency that holds the property responsible for all damages, storage fees, and related costs applicable to the returned property. The bill prohibits a law enforcement agency or state's attorney from directly or indirectly transferring seized property to any federal law enforcement authority or other federal agency unless the value of the seized property exceeds \$50,000 and the state's attorney determines that the activity giving rise to the investigation or seizure is interstate in nature and sufficiently complex to justify the transfer or that the seized property may only be forfeited under federal law.

Reporting

H.B. 3758 requires each law enforcement agency, not later than February 1 of each year, to report to the Department of Public Safety (DPS) the following information regarding seizures by the agency for which, during the preceding calendar year, a forfeiture order was issued under the bill's provisions or the property was otherwise forfeited under applicable federal law:

- the total number of forfeitures of currency;
- the total number of forfeitures and the number of items of property forfeited according to categories specified by DPS;
- the total market value of each category of property forfeited;
- the total number of occurrences of each type of offense underlying the forfeitures, including offenses involving controlled substances and driving while intoxicated; and
- any other information required by DPS.

The bill requires DPS to prescribe a standardized form and provide for electronic submission of the report. The bill requires a law enforcement agency to file with DPS separate reports for forfeitures under the bill's provisions and federal law and, if an agency did not engage in seizure that resulted in forfeiture during the reporting period, to file a report indicating that fact. The bill provides for the issuance of an aggregate report by DPS and the publication of the agency reports and the aggregate report on the DPS website not later than April 1 of each year.

Recovery and Civil Forfeiture

H.B. 3758 entitles a defendant whose conviction for an offense underlying the criminal asset forfeiture is reversed, set aside, or vacated on appeal to recover from the county any money deposited in the county's general fund as a result of the disposition of the defendant's forfeited property. The bill provides for a payment deadline and requires the outcome of a new trial to be treated in the same manner as any other conviction.

H.B. 3758 provides for the civil forfeiture of certain property owned by a person who is unavailable or who has not claimed the property or asserted any interest in the property, regardless of whether a conviction for an offense subject to criminal asset forfeiture occurred in connection with the property, and includes among the conditions subjecting a property to such forfeiture the property having been obtained, directly or indirectly, through the commission of a felony.

Repealers, Procedural Provisions, and Conforming Changes

H.B. 3758 repeals Parks and Wildlife Code provisions relating to the authority of a game warden or other peace officer who has probable cause to believe property is contraband to seize the property without a warrant, the authority of a court to order the destruction or forfeiture of property used in the commission of certain Parks and Wildlife Code offenses or violations, and the subsequent disposition of seized property.

H.B. 3758 requires any property in the possession of a law enforcement agency, game warden, or state's attorney on the bill's effective date that was seized under certain statutory provisions repealed by the bill and that has not been ordered forfeited to the state by a court to be returned to the person from whom the property was seized. The bill makes this requirement inapplicable to property that is evidence in the investigation or prosecution of a criminal offense until the disposition of all charges relating to the offense. The bill's repeal of provisions regarding the disposition of abandoned or unclaimed property do not apply to such property seized before the bill's effective date.

H.B. 3758 amends the Business & Commerce Code, Civil Practice and Remedies Code, Education Code, Family Code, Finance Code, Government Code, Health and Safety Code, Local Government Code, Occupations Code, and Penal Code to make conforming changes.

H.B. 3758 repeals the following provisions:

- Section 140A.102(h), Civil Practice and Remedies Code;
- Article 18.17, Code of Criminal Procedure;
- Chapter 59, Code of Criminal Procedure;
- Sections 24.377(c), 54.2205(b), 54.2405(b), 54.2606(b), and 54.656(b), Government Code;
- Section 365.012(i), Health and Safety Code; and
- Sections 12.101(1) and (2), 12.1106, 61.0221, and 62.017, Parks and Wildlife Code.

EFFECTIVE DATE

September 1, 2023.