

SUBJECT: Prosecution of money laundering and forfeiture of certain contraband

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 6 ayes — Herrero, Carter, Burnam, Leach, Moody, Toth

1 nays — Schaefer

1 absent — Hughes

1 present not voting — Canales

WITNESSES: For — (*Registered, but did not testify*: Morgan Dahse and Jason Larman, Montgomery County Criminal District Attorney's Office)

Against — (*Registered, but did not testify*: Kristin Etter, Texas Criminal Defense Lawyers Association)

On — (*Registered, but did not testify*: Forrest Mitchell and Kent Richardson, Office of the Attorney General)

BACKGROUND: The Bank Secrecy Act (31 USC Sec. 5311 et. seq.) is a federal law requiring financial institutions to keep certain records and report certain activity to assist in the detection and prevention of money laundering.

DIGEST: **Money laundering.** The bill would add violations of the Bank Secrecy Act to the definition of criminal activity for the offense of money laundering. The bill would make it an offense for a person to knowingly conduct, supervise, or facilitate a transaction in violation of the Bank Secrecy Act.

The bill would add funds used in the commission of an offense to the definition of proceeds of criminal activity for the offense of money laundering.

Forfeiture of substitute property. “Substitute property” would mean property that was not contraband and that was owned by a person who was or had been the owner of, or had an interest in contraband with an aggregate value of \$200,000 or more.

Substitute property would be able to be seized under a search warrant if contraband:

- could no longer be located after the exercise of reasonable diligence;
- had been transferred, conveyed, sold, or sold to or deposited with a person other than the owner or interest holder;
- was not within the jurisdiction of the court;
- had substantially diminished in value;
- had been commingled with other property and could not be readily distinguished or separated; or
- was proceeds gained in the commission of a felony and was used to acquire other property that was not within the jurisdiction of the court.

A district court could issue a search warrant authorizing a peace officer to seize substitute property if the officer submitted an affidavit that stated:

- probable cause for the commission of an offense giving rise to forfeiture of contraband;
- a description of the contraband involved and the estimated current fair market value of the substitute property to be seized;
- the reasons the contraband was unavailable for forfeiture;
- probable cause to believe that the owner of the substitute property owned or had an interest in contraband with an aggregate value of \$200,000 or more in connection with the commission of an underlying offense; and
- that due diligence had been exercised in identifying the minimum amount of substitute property necessary to approximate the estimated highest fair market value of the contraband during the period in which the owner of the substitute property had an interest in the contraband.

After seizure of substitute property, the disposition would proceed as in other forfeiture except that the prosecutor would need to prove by a preponderance of the evidence:

- that the contraband was subject to seizure and forfeiture;
- the highest fair market value of that contraband during the period in

which the owner of the substitute property owned or had interest in the contraband;

- the fair market value of the substitute property at the time it was seized; and
- that the owner of the substitute property owned or had an interest in contraband with an aggregate value of \$200,000 or more in connection with the commission of an underlying offense.

For the purposes of determining the aggregate value of the contraband, the owner would not be required to have simultaneously owned all of the property constituting the contraband. If the fair market value of the substitute property seized exceeded the highest fair market value of the contraband, the court would need to make appropriate orders to ensure that property equal in value to the excess was returned to the person or persons from whom the substitute property was seized.

Property removed from Texas. A peace officer who identified contraband determined to be located outside of Texas would be required to provide the prosecutor a sworn statement that identified the contraband and the reasons the contraband was subject to seizure. On receiving the sworn statement, the prosecutor could file a notice of intended forfeiture in a district court in:

- the county in which the contraband or proceeds used to acquire the contraband were known to be situated before their removal from the state;
- the county in which any owner or possessor of the contraband had been prosecuted for an underlying offense for which the property was subject to forfeiture;
- the county in which venue existed for prosecution of an underlying offense; or
- Travis County.

The prosecutor would be required to request that citation be served on any person who owned or was in possession or control of the contraband to which the article applied and, on proper service, could move to have the court order that the contraband be:

- returned or brought to the jurisdiction of the court; or
- delivered to an agent of this state for transportation to the jurisdiction of the court.

If it was found that any person after being served with such a citation had transported, concealed, disposed of, or otherwise acted to prevent the seizure and forfeiture of contraband located outside of the state, the court could:

- order the payment to the prosecutor of costs incurred in investigating and identifying the location of the contraband, including discovery costs, reasonable attorney's fees, expert fees, other professional fees, and travel expenses;
- enter a judgment for civil contempt and impose a fine of not more than \$10,000 or less than \$1,000, confinement in jail for not more than 30 days or less than 10 days, or both a fine and confinement;
- enter a judgment of forfeiture of the person's interest in the contraband;
- enter a judgment in the amount of the fair market value of the contraband;
- impose a civil penalty of not more than \$25,000 or less than \$1,000 for each item of contraband, or each separate fund, of which the person transported, concealed, disposed, or otherwise acted to prevent the seizure and forfeiture; or
- order any combination of these penalties.

The prosecutor would be entitled to all reasonable discovery in accordance with the Texas Rules of Civil Procedure to assist in identifying and tracking down contraband located outside of Texas.

If the court ordered the return of contraband under the bill, it would be subject to seizure and forfeiture upon its return.

Suit for proceeds. A peace officer who identified proceeds that were gained from the commission of an offense under the bill would be required to provide the prosecutor with an affidavit that identified the amount of the proceeds and stated probable cause that the proceeds were contraband subject to forfeiture. On receiving the affidavit, the prosecutor could file for a judgment in the amount of the proceeds in a district court in:

- the county in which the proceeds were gained;
- the county in which any owner or possessor of the property was prosecuted for an underlying offense;
- the county in which venue existed for prosecution of an underlying

- offense;
- the county in which the proceeds were seized; or
- Travis County.

If the court determined that probable cause existed for the suit to proceed, the court would be required to order that citation be properly served on all defendants named in the suit. Each person shown to have been a party to an underlying offense would be jointly and severally liable in a suit under the bill.

Multiple recovery prohibited. The prosecutor could use any combination of the methods under the bill to recover the value of contraband. A court would not be able to award or forfeit property or proceeds that exceeded the highest fair market value of the contraband subject to forfeiture for the offense.

The bill would take effect September 1, 2013 and would apply only to the forfeiture of property in relation to an offense or an offense itself committed on or after that date.

**SUPPORTERS
SAY:**

CSHB 3138 would help law enforcement investigate and prosecute money laundering crimes in Texas. Criminals who launder money engage in a practice known as “structuring” in an attempt to fly under the radar. This practice involves depositing money in small increments to avoid reporting their transactions and to evade the Bank Secrecy Act. This practice is becoming insidious and popular among money launderers because it cannot be prosecuted under Texas law. CSHB 3138 would close that loophole, giving law enforcement the power it needs to prosecute money launderers and criminal organizations.

The bill would allow peace officers to keep up with criminals who tried to stay one step ahead. Sometimes in the process of searching for contraband, peace officers will discover that the property has disappeared or has been sent to another state. Law enforcement frequently relies on information or evidence that is dated, which gives criminal organizations an edge to destroy or remove evidence or sell contraband and buy clean property instead. CSHB 3138 would mitigate the effects of this advantage by allowing law enforcement to seize substitute property if they were unable to find contraband. The bill would provide protections to ensure that peace officers and law enforcement did not recover more than the value of the contraband for which they were looking.

OPPONENTS
SAY:

CSHB 3138 would make it easier for law enforcement to forfeit a person's property. By allowing for forfeiture of substitute property, the bill could allow law enforcement to seize a person's home or belongings that had been purchased with lawful proceeds. Only contraband and illegally obtained property should be subject to forfeiture. This bill would have a serious detrimental effect on the property rights of Texans.