

SUBJECT: Revising burden of proof in innocent owner asset forfeiture proceedings

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 7 ayes — Collier, K. Bell, Cason, Cook, Crockett, Hinojosa, Vasut

2 nays — A. Johnson, Murr

0 absent

WITNESSES: For — James Peinado, El Paso Republican Liberty Caucus; Arif Panju, Institute for Justice; Faith Bussey and Kathy Mitchell, Just Liberty; Thomas Wilson, Smith County Criminal District Attorney's Office; Emily Gerrick, Texas Fair Defense Project; Derek Cohen, Texas Public Policy Foundation; (*Registered, but did not testify*: Nick Hudson, American Civil Liberties Union of Texas; Justin Keener, for Doug Deason, Americans for Prosperity, and Libre Initiative; Amanda List, Texas Appleseed; Shea Place, Texas Criminal Defense Lawyers Association; Alycia Castillo, Texas Criminal Justice Coalition; Jason Vaughn, Texas Young Republicans; Molly Weiner, United Ways of Texas; Thomas Parkinson)

Against — Philip Mack Furlow, 106th Judicial District Attorney; Angela Beavers, Harris County District Attorney's Office; James Smith, San Antonio Police Department; (*Registered, but did not testify*: Eric Carcerano, Chambers County District Attorney's Office; Jennifer Szimanski, CLEAT; Shawn Connally, Galveston County Criminal District Attorney's Office; George Craig, Houston Police Department; John Hubert, Kleberg and Kenedy Counties District Attorneys Office; Laura Nodolf, Midland County District Attorney's Office; James Smith, San Antonio Police Department; Jimmy Rodriguez, San Antonio Police Officers Association; Lindy Borchardt for Sharen Wilson, Tarrant County Criminal District Attorney; Dallas Reed, Texas Municipal Police Association; John Chancellor and Robert Flores, Texas Police Chiefs Association)

On — (*Registered, but did not testify*: Buddy Mills, Sheriffs Association)

of Texas; Floyd Goodwin and Matt Hicks, Texas Department of Public Safety)

BACKGROUND: Under Code of Criminal Procedure ch. 59, Texas law enforcement officers may take private property if it is used or intended to be used for certain crimes. A civil court may then transfer ownership of the property to a law enforcement department or other government office that may use or sell it. Seizure is the taking of the property, and forfeiture is the transfer of ownership of the property.

Property may be seized if it is used or intended to be used to commit a felony or misdemeanor offense listed in Code of Criminal Procedure art. 59.01(2), including any first- or second-degree felony in the Penal Code and any felony in the Texas Controlled Substances Act.

Property owners who say they had no role in an alleged crime may use what is called the “innocent owner” defense to try to recover seized property. Code of Criminal Procedure art. 59.02 (c) and (h) require owners to prove by a preponderance of the evidence a lack of participation in the crime or of knowledge about the crime. Art. 59.02 (c) requires, in part, that owners prove that they acquired the property before or during the alleged crime and did not know or should not have reasonably known of the alleged crime or that it was likely to occur. Art. 59.02 (h) applies when owners claim not to have been a party to the alleged offense and that the property was stolen from them, purchased with money stolen from them or with proceeds from property stolen from them, or used in the commission of the alleged crime without the owner's effective consent.

DIGEST: CSHB 1441 would revise the burden of proof required in asset forfeiture proceedings in which property owners said they had no role in an alleged crime and were trying to recover property seized through Code of Criminal Procedure ch. 59.

Instead of the property owner having to prove by a preponderance of the evidence that they had no knowledge of the crime or that they did not participate in it, the state would have the burden of proving by clear and

convincing evidence that the required circumstances that can make property exempt from forfeiture do not apply to the property that was subject to seizure and forfeiture.

The bill would take effect September 1, 2021, and would apply only to forfeiture proceedings that began on or after that date.

**SUPPORTERS
SAY:**

CSHB 1441 would help property owners who are innocent of a crime recover property that had been seized through the asset forfeiture process by revising the burden of proof required in forfeiture proceedings when someone raised an innocent owner defense.

Current law requiring property owners to prove they and their property had no role in an alleged crime violates individuals' private property rights by upending the idea of innocent until proven guilty. Innocent owners are required to prove a negative — that they did not know or did not do something — to keep what is rightfully theirs. The process can be difficult and expensive and can discourage people from trying to regain their property.

Shifting the burden to the government when an owner raises the innocent owner defense would restore the presumption of innocence and place the responsibility where it belongs: on government officials taking private property. The government agencies seizing and bringing forth forfeiture proceedings should have sufficient information and records about a crime and the property to meet this burden. This shift in burden would help prevent injustices that occur when innocent owners give up their property rather than challenge the seizure because it is too difficult or costly.

The bill would raise the burden of proof in these proceedings from the low threshold of preponderance of evidence, sometimes referred to as having to prove something only by 51 percent, to a more appropriate level for something as important as property rights. The clear and convincing evidence standard is used in civil proceedings and would protect innocent property owners from an injustice while allowing cases in which property was owned by a criminal and tied to a crime to go forward.

Jurisdictions that are careful to ensure seized property meets statutory requirements to be tied to crimes and to identify the proper owner should not be burdened by CSHB 1441. This bill is narrowly drawn to affect only the innocent property owner's defense in a way that would not harm such jurisdictions.

CRITICS
SAY:

CSHB 1441 would erode an effective tool for preventing criminals from profiting from their crimes and for protecting the due process rights of property owners.

The burden of proof when an individual raises the innocent owner defense is properly placed on property owners because they have the information, such as car titles or bank records, that can prove their innocence. This follows the way affirmative defenses traditionally work with a defendant raising them and then giving evidence supporting the claim. If the burden were shifted and the government had to prove that the defense did not apply, the government likely would have to obtain the proof from the owners, which could involve detailed or intrusive investigations into property owners. This could extend court cases and delay returning property to innocent owners. Government agencies work in good faith to seize contraband only from those involved with a crime and to return property early in the forfeiture process to legitimate innocent owners.

Requiring a standard of clear and convincing evidence would be too high of a burden for decisions in asset forfeiture cases and would improperly equate these decisions with other situations using that standard, including parental rights cases. Using the current standard of preponderance of the evidence allows courts to get at the truth and identify when property belongs to criminals and to discover false ownership claims. Under current law there is a check on these proceedings because law enforcement authorities have to meet an initial burden of proving that property has a substantial connection to crime before seizure.

Since the asset forfeiture statutes were reformed about a decade ago, the law has functioned well and systemic abuses have been removed.

Any problems with improper seizures of property from innocent owners, would be better addressed by education and training.