

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 485 Return of Weapons and Arms Following an Arrest

SPONSOR(S): Brackett

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	18 Y, 0 N	Padgett	Hall
2) Judiciary Committee			

SUMMARY ANALYSIS

Generally, a law enforcement officer is authorized to search a person incident to a lawful arrest and seize items discovered on the person arrested or within his or her immediate control if the seizure is necessary to protect the officer from attack, prevent an escape, or assure the subsequent lawful custody of the fruits of a crime or the articles used in the commission of a crime. A law enforcement agency holds seized property that is needed for the prosecution of a crime as evidence. All other seized property that is not contraband is either held by a law enforcement agency as “personal property” or “safekeeping property.”

Section 790.08, F.S., requires every law enforcement officer who makes an arrest under s. 790.07, F.S., which prohibits the use or attempted use of a weapon, electric weapon or device, or arms (weapon or firearm) in committing a felony, or under any other law or municipal ordinance to take possession of any weapon or firearm found upon the person arrested and deliver such weapon or firearm to the sheriff or chief of police of the jurisdiction in which the arrest was made. The sheriff or the chief of police must retain such weapon or firearm until after the trial of the person arrested.

Sections 790.08(2) and (3), F.S., require the forfeiture of a weapon or firearm if a person is convicted of violating s. 790.07, F.S., or a similar offense involving the *use or attempted use* of a weapon or firearm in committing a felony, and the return of a weapon or firearm if a person is acquitted or such charges are dismissed. The forfeiture and return requirements do *not* apply in circumstances where a weapon or firearm was seized as evidence but was not *used* in committing a felony or where a weapon or firearm is seized and held by a law enforcement agency as safekeeping property. Because there is currently no statute prescribing procedures for the return of a weapon or firearm held as safekeeping property, the specific procedures for returning such property vary by jurisdiction. Certain general procedures, such as requiring a person to produce photo identification and complete a background check prior to the release of a firearm, appear universal. However, the specifics of such procedures, such as the proof of ownership required to claim property, the time required to complete a background check, and the need for judicial approval prior to releasing a weapon or firearm, may vary.

HB 485 amends s. 790.08, F.S., to delete the requirement for a sheriff or chief of police to retain custody of all weapons or firearms seized incident to an arrest until after the trial of the person arrested. Instead, the bill requires a law enforcement agency to return any weapons or firearms that are taken from a person following an arrest, but that are not seized as evidence, upon request of the person arrested, if he or she:

- Has been released from detention;
- Provides a form of government-issued photographic identification; and
- If requesting the return of a firearm, successfully completes a criminal history background check confirming the person is not prohibited from possessing a firearm under state or federal law, including not having any prohibition arising from an injunction, a risk protection order, or any other court order prohibiting the person from possessing a firearm.

The bill authorizes a sheriff or chief of police to develop reasonable procedures to ensure the timely return of weapons or firearms which are not inconsistent with the bill. The bill prohibits a sheriff or chief of police from requiring a court order to release weapons or firearms that are not seized as evidence in a criminal proceeding unless there are competing claims of ownership of such weapons or firearms.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2024.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives .

STORAGE NAME: h0485a.CRJ

DATE: 12/6/2023

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Seizing Property Following an Arrest

Generally

Section 901.21, F.S., authorizes a law enforcement officer to search a person who is lawfully arrested and the area within the person's immediate presence for the purpose of:

- Protecting the officer from attack;
- Preventing the person from escaping; or
- Discovering the fruits of a crime.

A law enforcement officer conducting such a lawful search without a warrant may seize all instruments, articles, or things discovered on the person arrested or within the person's immediate control, the seizure of which is reasonably necessary for the purpose of:

- Protecting the officer from attack;
- Preventing the escape of the arrested person; or
- Assuring subsequent lawful custody of the fruits of a crime or of the articles used in the commission of a crime.

A law enforcement agency holds seized property that is needed for the prosecution of a crime as evidence.¹ All other seized property that is not contraband is either held by a law enforcement agency as "personal property" or "safekeeping property."²

Weapons, Electric Weapons or Devices, or Arms

Section 790.08, F.S.,³ requires every law enforcement officer who makes an arrest under s. 790.07, F.S.,⁴ or under any other law or municipal ordinance to take possession of any weapons,⁵ electric weapons or devices,⁶ or arms mentioned in s. 790.07, F.S.,⁷ (weapons or firearms) found upon the person arrested and deliver such weapons or firearms⁸ to the sheriff or chief of police of the jurisdiction

¹ Broward County Sheriff's Office, *Evidence Unit*, <https://www.sheriff.org/LE/Pages/Evidence-and-Property-Unit.aspx> (last visited Dec. 6, 2023). Nassau County Sheriff's Office, *Property & Evidence*, <https://nassauso.com/administrative-services/property-evidence/> (last visited Dec. 6, 2023).

² *Id.* Personal property includes items such as a wallet, keys, or watch. All other non-evidentiary items seized from a person at the time of arrest, such as weapons or firearms, are generally held by a law enforcement agency as safekeeping property.

³ Section 790.08, F.S., does not apply to a municipality in a county that has home rule under the Florida Constitution. S. 790.08(7), F.S. These counties include Duval, Monroe, Miami-Dade, and Hillsborough. 95-82 Fla. Op. Att'y Gen. (1995).

⁴ Section 790.07, F.S., prohibits a person from displaying, using, threatening, or attempting to use:

- Any weapon or electric weapon or device or carrying a concealed weapon while committing or attempting to commit any felony or while under indictment; or
- A firearm while committing or attempting to commit any felony.

A violation involving a weapon or electric weapon or device is a third degree felony, punishable by up to five years imprisonment and a \$5,000 fine. Ss. 775.082, 775.083, or 775.084. A violation involving a firearm is a second degree felony, punishable by up to 15 years imprisonment and a \$10,000 fine. Ss. 775.082, 775.083, or 775.084.

⁵ "Weapon" means any dirk, knife, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocketknife, plastic knife, or blunt-bladed table knife. S. 790.001(20), F.S.

⁶ "Electric weapon or device" means any device which, through the application or use of electrical current, is designed, redesigned, used, or intended to be used for offensive or defensive purposes, the destruction of life, or the infliction of injury. S. 790.001(7), F.S.

⁷ The term "arms" is not defined in ch. 790, F.S., or in s. 790.07, F.S. However, from the context of s. 790.07, F.S., the term "arms" appears to mean a firearm. See *infra*, note 4. For purposes of this analysis, the terms "arms" and "firearms" are interchangeable.

⁸ "Firearm" means any weapon, including a starter gun, which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffle r or firearm silencer; any destructive device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a crime. S. 790.001(9), F.S.

in which the arrest was made.⁹ The sheriff or the chief of police must retain such weapons or firearms until after the trial of the person arrested.¹⁰

Return of Seized Property Held by a Law Enforcement Agency

Weapons or Firearms Held as Evidence

Section 790.08(1), F.S., requires a sheriff or chief of police to retain a seized weapon or firearm until after the trial of the person arrested.¹¹ If a person arrested is convicted of violating s. 790.07, F.S., a similar offense under any municipal ordinance, or any other offense involving the *use or attempted use* of a weapon or firearm, such weapon or firearm is forfeited to the state.¹² If a person arrested is acquitted of such an offense or the charges against a person are dismissed, the weapon or firearm seized must be returned to the person.¹³ If a person fails to claim a weapon or firearm within 60 days of his or her acquittal or the dismissal of charges, the weapon or firearm must be delivered to the sheriff of the county in which the person was arrested.¹⁴ If a person fails to claim a weapon or firearm within six months from the date it was delivered to the sheriff, such weapon or firearm is forfeited to the state.¹⁵

The forfeiture and return requirements in s. 790.08(2) and (3), F.S., do *not* apply if a person is arrested for committing an offense in which a weapon or firearm is seized and held as evidence but was not *used* in committing a felony (e.g. unlawfully carrying a concealed firearm in violation of s. 790.01(3), F.S.)¹⁶ In such circumstances, the return of such a weapon or firearm is governed by s. 705.105, F.S., which generally provides for the disposition of unclaimed evidence following the conclusion of a criminal proceeding.¹⁷

Weapons or Firearms Held as Safekeeping Property

Similarly, the forfeiture and return requirements in s. 790.08(2) and (3), F.S., do *not* apply to a weapon or firearm seized incident to an arrest that is held as safekeeping property and not needed as evidence since the weapon or firearm was neither *used* in committing a felony nor related to the crime for which the person was arrested (e.g. a person is arrested for driving with a suspended license and is lawfully carrying a concealed firearm at the time of his or her arrest). Because there is currently no statute providing for the return of a weapon or firearm held as safekeeping property, the specific procedures for returning such property may vary by jurisdiction.¹⁸ Certain general procedures, such as requiring a person to produce photo identification and complete a background check prior to the release of a firearm, appear universal.¹⁹ However, the specifics of such procedures, such as the proof of ownership required to claim property, the time required to complete a background check, and the need for judicial

⁹ S. 790.08(1), F.S.

¹⁰ *Id.*

¹¹ It appears, in practice, that the requirement in s. 790.08(1), F.S., to retain a weapon or firearm until after the trial of the person arrested applies only to a weapon or firearm that is seized as evidence. See *infra* note 21.

¹² S. 790.08(2), F.S.

¹³ S. 790.08(3), F.S.

¹⁴ If the weapon, electric weapon or device, or firearm was delivered to the sheriff immediately following a person's arrest, no transfer is necessary. *Id.*

¹⁵ S. 790.08(5), F.S.

¹⁶ See *Darman v. State*, 774 So. 2d 798 (Fla. 4th DCA 2000).

¹⁷ Under s. 705.105, F.S., title to unclaimed evidence or unclaimed tangible personal property lawfully seized pursuant to a lawful investigation in the custody of the court or clerk of the court from a criminal proceeding or seized as evidence by and in the custody of a law enforcement agency vests permanently in the law enforcement agency 60 days after the conclusion of the proceeding. S. 705.105(1), F.S.

¹⁸ Brevard County Sheriff's Office, *Evidence Unit*, <https://www.brevardsheriff.com/home/commands-services/administrative-services-command/evidence-unit/> (last visited Dec. 6, 2023). Broward County Sheriff's Office, *Evidence Unit*, <https://www.sheriff.org/LE/Pages/Evidence-and-Property-Unit.aspx> (last visited Dec. 6, 2023). Escambia County Sheriff's Office, *Evidence Unit*, <https://www.escambiaso.com/departments/specialized-units/evidence-unit/> (last visited Dec. 6, 2023). Hillsborough County Sheriff's Office, *Return of Property*, <https://www.teamhcs.com/Section/d8e5482d-66a8-44bf-9ac6-8913eca8da4c/Property-and-Evidence#:~:text=Return%20of%20Property&text=You%20must%20bring%20the%20original,be%20presented%20to%20claim%20property> (last visited Dec. 6, 2023). Nassau County Sheriff's Office, *Property & Evidence*, <https://nassauso.com/administrative-services/property-evidence/> (last visited Dec. 6, 2023). Pinellas County Sheriff's Office, *Property & Evidence*, <https://pcsoweb.com/property-evidence> (last visited Dec. 6, 2023).

¹⁹ *Id.*

approval prior to releasing a weapon or firearm, may vary.²⁰ The lack of any standardized procedures across jurisdictions for returning a weapon or firearm that is held as safekeeping property may cause confusion and delay in returning a weapon or firearm to its owner. In addition, in those jurisdictions that require a court order to release a weapon or firearm, the owner of the weapon or firearm may incur the added expense of hiring an attorney to file a motion for the return of his or her property with the court.

Effect of Proposed Changes

HB 485 amends s. 790.08, F.S., to delete the requirement for a sheriff or chief of police to retain custody of all weapons or firearms seized incident to an arrest until after the trial of the person arrested. Instead, the bill requires a law enforcement agency to return any weapons or firearms that are taken from a person following an arrest, but that are *not* seized as evidence, upon request of the person arrested if he or she:

- Has been released from detention;
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- If requesting the return of a firearm, successfully completes a criminal history background check confirming the person is not prohibited from possessing a firearm under state or federal law, including not having any prohibition arising from an injunction, a risk protection order, or any other court order prohibiting the person from possessing a firearm.

The bill authorizes a sheriff or chief of police to develop reasonable procedures to ensure the timely return of weapons or firearms which are not inconsistent with the bill. The bill prohibits a sheriff or chief of police from requiring a court order to release weapons or firearms that are not seized as evidence in a criminal proceeding unless there are competing claims of ownership of such weapons or firearms.

The bill provides an effective date of July 1, 2024.

B. SECTION DIRECTORY:

Section 1: Amends s. 790.08, F.S., relating to taking possession of weapons and arms; reports; disposition; custody.

Section 2: Provides an effective date of July 1, 2024.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

²⁰ *Id.*

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES