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FISCAL IMPACT REPORT

ORIGINAL DATE 2/12/2016
SPONSOR Nunez/Montoya **LAST UPDATED** _____ **HB** 284

SHORT TITLE Return of Seized and Forfeited Property **SB** _____

ANALYST Rogers

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		
\$0.0	\$0.0	N/A	N/A

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	N/A	Indeterminate, but will increase costs	Indeterminate, but will increase costs	Indeterminate, but will increase costs	N/A	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Attorney Generals' Office (AGO)

Responses not Received From

Department of Public Safety (DPS)

SUMMARY

Synopsis of Bill

House Bill 284 proposes to amend Section 31-27-3 NMSA 1978 by striking subsections A and B from the definition section, specifically the terms “abandoned property” and “actual knowledge.”

HB 284 would also amend Section 31-27-4.1 NMSA 1978 Section B by allowing 90 days as opposed to 60 days to claim an interest in seized property by way of a motion requesting a writ

of replevin. The phrase “that was seized without a court order” would be added to Section E(1) of the statute. HB 284 further adds to Section E(3) that “the defendant made a prima facie showing that the property was not used in the furtherance of a crime.” Section F is amended to require that an accounting relating to the release of funds for legal representation be held in camera. If the court finds in the state’s favor in both parts of the bifurcated proceeding, then:

- 1) The accounting shall be disclosed; and,
- 2) Arguments shall follow as to what funds should be forfeited and what funds should be paid to counsel; and
- 3) The court will issue an order as to the allocation of the seized funds.

HB 284 seeks to amend Section 31-27-6(K) by limiting the period of time to challenge the constitutionality of the forfeiture to 30 days. In Section N, the proposal seeks to redact subsections 2 and 3 dealing with hardship to the defendant and to the defendant’s family if seizure is effectuated.

Section 31-27-7(B), NMSA 1978 would be amended to govern the allocation of seized property which would occur in the following order:

- 1) To pay “expenses related to the investigation, seizure, storage, protection, and transfer of the property;”
- 2) To pay “expenses incurred by the state treasurer’s office” related to disposal of the property;
- 3) “To reimburse law enforcement agencies;” and,
- 4) Any property left shall be deposited to the general fund.

HB 284 adds the requirement that any funds deposited in the general fund of the governing body of the seizing agency “shall be used for drug abuse prevention and education programs and treatment services, for other substance abuse or demand reduction initiatives or for the enforcement of drug related laws.” Section D relaxes the standard for a secured party from actual knowledge to whether the secured party “knew or should have known” of the criminal activity.

Section 31-27-7.1(c) again relaxes the standard, this time for innocent owners of seized property, from actual knowledge to whether the innocent owner “knew or should have known” of the criminal activity. Section D requires the state to show that, upon proof of an innocent owner, the innocent owner “knew or should have known” of the criminal activity. Subsection F again relaxes the standard to “knew or should have known.”

The phrase “selling or retaining seized property” is stricken from Section 31-27-8 NMSA 1978. Section D prohibiting law enforcement from retaining forfeited property would also be redacted.

Subsection 5 and 6 would be added to Section 31-27-9 NMSA 1978. Subsection 5 requires “the costs incurred by the agency for storage, maintenance and transportation of seized property” to be included in an agency’s annual report of seized property. Subsection 6 requires that “any costs incurred by the agency to prepare its report” be included in the annual report.

HB 284 lowers the threshold for transferring seized property to a federal agency from \$50 thousand to \$25 thousand. Former subsection B prohibiting law enforcement from transferring “property to the federal government if the transfer would circumvent the protections of the Forfeiture Act” would be stricken. A new subsection D allows seized assets, to include

“firearms, ammunition, explosives, property associated with child pornography or other property that directly relates to public safety concerns,” to be transferred to the federal government.

FISCAL IMPLICATIONS

The AOC states that there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law, appeals from the denial of return of seized property to secured parties and innocent owners, and challenges to the law. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

The bill states that it is making an appropriation, but there is no appropriation contained in the bill, unless the appropriation is considered to be routing forfeiture proceeds into the general fund. Federal law does not permit the transfer of federal forfeiture proceeds to the general fund.

Last year, HB 560 (Laws of 2015, Chapter 152) amended the State Forfeiture Act. The amendments made now direct all proceeds to the general fund, contradicting federal policy that prohibits the use or transfer of equitable sharing funds for non-law enforcement purposes. DPS now receive no federal sharing funds as a result of the amendments.

Thus, this bill could have further impact on federal forfeiture sharing.

SIGNIFICANT ISSUES

The AOC provides the following analysis:

1. In requiring that a court find only that a secured party or innocent owner “knew or should have known” of the underlying crime giving rise to the forfeiture in order to deny the return of property, the court will now be applying a vague standard. Section 31-27-3 NMSA 1978 currently contains a definition of “actual knowledge”, yet the HB 284 amendment does not contain a definition of or factors for a court to consider in making a determination that a secured party or innocent owner knew or should have known of the underlying crime. A lack of guidance as to factors to be considered may result in unequal and disparate application of the law, potentially leading to equal protection claims. (See, for contrast, the factors applied by New York courts when applying the “knew or should have known” standard in drug-holdover proceedings at https://works.bepress.com/gerald_lebovits/66/download/, Drug Holdover Proceedings: An Overview from “Knew,” to “Should Have Known,” to “Strict Liability”, (2007), p. 20)
2. The HB 284 amendment to Section 31-27-11(D) excludes seized property that includes, firearms, ammunition, explosives, property associated with child pornography or other property that directly relates to public safety concerns from the prohibition against the transfer of seized property to a federal law enforcement authority or other federal agency. It is unclear whether the exclusion applies only to the listed property (firearms, ammunition, explosives, etc.), or to other property that may be included with the listed property. If the intention is to only exclude the listed property from the exclusion against transfer, then it may be better to list seized property that “is” firearms, ammunition,

explosives, etc., rather than property that “includes” the specified property.

3. 2015’s HB 560, passed by the legislature and signed into law by the governor, required that forfeiture pursuant to the Forfeiture Act follow a criminal conviction. In making this and other changes, the Department of Public Safety (DPS) noted that the changes would have a negative impact on the funding of DPS and other public safety agencies. (See <http://www.nmlegis.gov/Sessions/15%20Regular/firs/HB0560.PDF>.) Amendments as made by HB 284 will permit law enforcement agencies to recoup specified costs associated with the seizure and forfeiture of property. Additionally, by lowering the standard to “knew or should have known” from “actual knowledge” of a secured party or innocent owner, distributions to law enforcement agencies of forfeited currency and the proceeds from the sale of forfeited property will increase.

OTHER SUBSTANTIVE ISSUES

The AGO explains that the primary concern with HB 284 is the financial impact on law enforcement agencies that rely on forfeited funds to supplement their budget. HB 284 requires that any funds deposited to the general fund of the LEA “be used for drug abuse prevention and education programs and treatment services, for other substance abuse or demand reduction initiatives or for the enforcement of drug related laws.” This limitation on the acceptable use of seized property as well as the decreased allocation of seized property to the seizing entity could have a detrimental effect on law enforcement, due to an effective cut in funding.

TMR/jle