

A Plan for  
**OHIO'S CRIMINAL  
ASSET FORFEITURE LAW**

A Report of the  
**OHIO CRIMINAL SENTENCING COMMISSION**  
Chief Justice Thomas J. Moyer, Chair  
David J. Diroll, Executive Director, Editor

**March 2003**

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## **SENTENCING COMMISSION DUTIES**

By law, the Sentencing Commission must study Ohio sentencing law, propose comprehensive plans to the General Assembly, and monitor the plans if enacted (Revised Code §§181.23-181.26). Since the mid-1990s, the Commission's plans have formed the basis for comprehensive reforms in many areas of sentencing, including:

- **Adult felonies** - S.B. 2, sponsored by former Senator Tim Greenwood, effective July 1, 1996;
- **Adult misdemeanors** - H.B. 490, sponsored by Representative Bob Latta, effective January 1, 2004;
- **Juvenile offenders** - S.B. 179, sponsored by then-Senator Bob Latta, effective January 1, 2002; and
- **Traffic** - S.B. 123, sponsored by then-Senator W. Scott Oelslager, effective January 1, 2004.

As part of its monitoring function, the Commission also promoted several “cleanup” bills, including S.B. 269 (1996), S.B. 107 (2000), H.B. 327 (2002), and H.B. 393 (2002). Mr. Latta sponsored the latter three.

### **Forfeiture Duties**

Under §181.26(B), the Commission must study the forfeiture statutes in Title 29 (Criminal Code) and Title 45 (Traffic Code). The Commission must report “any necessary changes” to the General Assembly.

This report focuses on forfeitures under the Criminal Code, particularly for drug offenses, corrupt activity, gang activity, contraband, and Medicaid fraud. The plan was approved by a unanimous Commission in January 2003. Our earlier proposals for revamping Traffic Code forfeitures were adopted in S.B. 123 (124<sup>th</sup> G.A.) and take effect in 2004. Those reforms are covered in the “Forfeiture under Traffic Law” section.

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## **EXECUTIVE SUMMARY**

### **Purpose Statement**

- Makes the purposes of forfeiture law clear (§2981.01(A)):
  - To provide economic disincentives and remedies;
  - To make forfeitures proportionate to offenses;
  - To protect innocent parties; and
  - To prioritize the victim's interest in restitution.

### **New Chapter**

- Greatly shortens forfeiture law and lends consistency by creating a new chapter to govern most asset forfeitures relating to crimes, other than for motor vehicles (Ch. 2981).
  - Forfeitures for corrupt activity, drug offenses, gang activity, Medicaid fraud, and contraband would fall under new Ch. 2981.

### **Simplifies Asset Forfeiture**

- Replaces the jumble of current forfeiture laws with clear terms:
  - “Contraband” - property that is unlawful to possess (§2901.01(A)(13));
  - “Proceeds” - property derived from crime (§2981.01(B)(7); and
  - “Instrumentality” - property otherwise lawful to possess that is connected to an offense (§2981.01(B)(3)).
- Provides simpler rules for what's forfeitable (§2981.02(A)):
  - Any contraband involved in any felony or misdemeanor;
  - The proceeds of any felony or misdemeanor;
  - Any instrumentality, provided it is substantially connected to the commission or facilitation of any felony or a misdemeanor when specifically authorized by statute or ordinance.
- Treats cars, boats, and planes used in crime as instrumentalities, rather than as contraband.

### **Protecting the Individual's Interests**

- Gives a person whose property was seized a chance at pretrial “hardship” release, unless the property was contraband, proceeds, needed as evidence, or likely to be used in a new crime (§2981.03(D)).
  - Sets out a quicker process for certain property, including vehicles and personal, business, and government records ((D)(4) & (6)).
- Requires a substantial link to the offense to forfeit instrumentalities. Merely showing the property was used or intended to be used in the offense (the current standard) would not be enough (§2981.02(A)(3)).
- Makes instrumentality forfeitures proportionate to the crime (§2981.08(B)).
- Provides a pre-seizure probable cause review in civil cases when the target is real estate (§2981.03(A)(3)).
- Raises the government's burden for criminal forfeiture from a “preponderance of the evidence” to “beyond a reasonable doubt” (§2981.04(B)).
- Makes the right to a jury trial clear in civil forfeitures (§2981.08(A)).

- Safeguards the rights of innocent parties such as true owners, lien and security holders, law-abiding spouses, and business associates.

### **Protecting the Public Interest**

- Clarifies that the State or subdivision has “provisional title” to the subject property (§2981.03(A)), allowing a broader range of tools to protect forfeitable property (§2981.03(B)(1)).
- Creates a new crime of transferring, hiding, or diminishing the value of property subject to forfeiture (§2981.07).
- Makes the civil forfeiture burden “a preponderance of the evidence” rather than the higher “clear and convincing evidence” used in some current statutes (§2981.05(D)(3)).
- Clearly gives the State or subdivision the right to a jury trial in civil forfeiture cases (§2981.08(A)).
- Authorizes criminal forfeitures in Medicaid fraud cases.
- Continues to steer forfeited monies largely to law enforcement agencies.

### **Protecting the Victim’s Interest & Distributing Forfeited Assets**

- Prioritizes the victim’s right to receive restitution or a civil recovery from forfeited assets (§2981.13(B)).
- Streamlines and standardizes language, but does not change basic formulas for distributing forfeited assets.
  - As now, amounts from forfeited contraband, proceeds, and instrumentalities would go largely to law enforcement agencies.
  - As now, amounts from other property room “forfeitures” would go largely to the appropriate general fund.

### **Traffic Forfeitures in S.B. 123**

S.B. 123 (effective 1-1-04) makes these changes based on earlier Sentencing Commission proposals:

- Eliminates vehicle seizures, immobilizations, and forfeitures when the offender does not own the car (§§4503.233, 4503.234, 4510.235, 4510.14, 4510.41, & 4511.203);
- Makes it illegal (“wrongful entrustment”) for a vehicle owner to allow another to drive the owner’s car if the owner knows or has reasonable cause to believe the person is unlicensed, under suspension, uninsured, or under the influence (§4511.203(A)).
  - Presumes the owner knows of certain violations when the owner lives with or rides with the offender (§4511.203(B)).
  - Makes wrongful entrustment an M-1, with a Class 7 (up to 1 year) suspension. It would carry a 30 day vehicle immobilization and plate impoundment (60 days with a prior; vehicle forfeiture if 2 priors) (§4511.203).
- Instructs the enforcement agency to pay moving and storage costs when an unauthorized impoundment occurs (§4510.41).
- No longer uses “forfeiture” to describe suspending or canceling an operator’s license.

# CONTENTS

<b>SENTENCING COMMISSION DUTIES</b>	<b>2</b>
<b>EXECUTIVE SUMMARY</b>	<b>3</b>
<b>CONTENTS</b>	<b>5</b>
<b>A SHORT HISTORY OF FORFEITURE LAW</b>	<b>7</b>
<b>A PLAN FOR ASSET FORFEITURES</b>	
<b>PURPOSE STATEMENT</b>	<b>10</b>
<b>NEW FORFEITURE CHAPTER</b>	<b>11</b>
Scope	11
Table: Current Major Criminal Code Forfeitures	11
Table: Proposed Forfeiture Chapter	12
<b>FORFEITABLE PROPERTY</b>	<b>12</b>
Simplified	12
Contraband: Illegal to Possess	13
Proceeds: Ill-Gotten Gains	14
Instrumentalities: Connected to Crime	15
“Substantial Connection” Test	16
Vehicles under Traffic Law	17
<b>PROTECTING THE INDIVIDUAL’S INTEREST</b>	<b>17</b>
Pretrial Hardship Release	17
Hearing on Real Estate	19
Substantial Connection for Instrumentalities	20
Proportionality Review	20
Right to a Jury Trial	21
Rights of Financial Institutions	21
<b>PROTECTING THE PUBLIC INTEREST</b>	<b>22</b>
Nature of the Government’s Interest	22
Orders to Preserve Property	22
Crime of Hiding, Transferring, Diminishing	24
Right to a Jury Trial	24
<b>CRIMINAL OR CIVIL</b>	<b>25</b>
Options	25
Timing	25
<b>CRIMINAL FORFEITURES</b>	<b>25</b>
Specification in Indictment, Etc.	25
Burden of Proof	26
Forfeiture Verdict	27
Notice and Hearing for Third Parties	28
Replevin, <i>Et Cetera</i> Stayed	28
<b>CIVIL FORFEITURES</b>	<b>29</b>
Third Party Claims	29
Burden of Proof	29
Clear Title	29
<b>ORDERS AFTER A FORFEITURE VERDICT</b>	<b>30</b>
Substitute Property	30
Various Other Orders	30
Notice to Interested Parties	30
<b>PROPERTY HELD BY LAW ENFORCEMENT</b>	<b>30</b>
Records & Reports	31
Exceptions	31

Notify Possible Claimants	32
<b>DISPOSAL OF FORFEITED PROPERTY</b>	<b>32</b>
Rules for Particular Property	32
General Rules	33
Distribution: Contraband, Proceeds, Instrumentalities	33
Victims Prioritized	33
To Law Enforcement Funds, <i>Etc.</i>	34
Distribution: Other “Forfeitures”	35
To the General Fund	35
Federal Forfeiture Option	36
<b>NOT INCLUDED IN THE NEW CHAPTER</b>	<b>36</b>
Sections That Do Not Move	36
Wild Animals & Trademarks	37
<b>OTHER DEFINITIONS</b>	<b>37</b>
<b>TRAFFIC LAW FORFEITURES</b>	<b>38</b>
S.B. 123 Forfeiture Summary	39
Third Party Forfeitures; Wrongful Entrustment	39
Government Pays for Mistakes	40
Operator's License Forfeitures	40
<b>ASSET FORFEITURE PROPOSAL</b>	
(in statutory form)	
§2901.01 - Contraband Defined	<b>41</b>
§2929.1412 - Criminal Forfeiture Specification	42
<b>NEW FORFEITURE CHAPTER</b>	
§2981.01 – Purposes; Definitions; Application	42
§2981.02 – Property Subject To Forfeiture	44
§2981.03 – Provisional Title; Preserving Property; Hardship Release	44
§2981.04 – Criminal Forfeiture Process	48
§2981.05 – Civil Forfeiture Process	51
§2981.06 – Orders After A Forfeiture Verdict	52
§2981.07 – Prohibition Against Diminishing Property	52
§2981.08 – Proportionality Review & Jury Trials	54
§2981.11 – Property Held by Law Enforcement Agencies	54
§2981.12 – Disposal of Certain Held Property	56
§2981.13 – Disposal of Contraband, Proceeds, & Instrumentalities	59
§2981.14 – Federal Forfeitures	62
<b>PROVISIONS THAT DO NOT MOVE TO NEW CHAPTER</b>	
§1531.20 - Illegally Taking or Transporting Wild Animals	63
§2913.34 - Trademark Violations	63
§2923.32 - Pattern of Corrupt Activity	63
§2923.34 - Corrupt Activity – Civil Proceedings	63
§2923.35 - Corrupt Activity – Court Orders	63
§2923.36 - Corrupt Activity – Lien Notice	63
§2923.42 - Participating In a Criminal Gang	63
§2923.43 - Gang Activity – Property Abatement	63
§2925.42 - Drug Forfeitures	63
§2933.75 - Medicaid Fraud – Lien Notice	63
<b>Appendix 1: CONVERTING CURRENT LAW TO NEW LAW</b>	<b>64</b>
<b>Appendix 2: ASSET FORFEITURE ACTIVITY IN OHIO</b>	<b>70</b>

# A SHORT HISTORY OF FORFEITURE LAW

## Early History

Using asset forfeiture to deter and punish criminal activity has a long history. This is the short version.

Classical Greek and Roman law contained references to taking a wrongdoer's property. By the Middle Ages, feudal England recognized three types of forfeiture:

- **Deodand** – Anything causing death to a subject was forfeited to the Crown. This type of forfeiture has biblical roots (Exodus 21:28 says if an ox kills a man, the ox must be slaughtered).
- **Summary forfeiture** – Since all crime was against the King, any felony violated the King's peace. A felon automatically forfeited his estate. This encouraged the ruling class to help with law enforcement because forfeitures partially offset the need for other funds to support the Crown or to help the needy.
- **Statutory forfeiture** – Began as an admiralty penalty, allowing the court to seize ships when the owner was out of reach. England's Navigation Acts of 1660 mandated the use of English ships to carry most goods to the colonies. A violator forfeited the ship and its goods.

## Development in the United States

The American colonies never adopted deodand. And the first Congress abolished summary criminal forfeiture in 1790. However, the nascent American legal system followed the British lead on statutory forfeiture. The First Continental Congress approved legislation similar to the Navigation Acts. It too was used to forfeit ships for customs violations.

Forfeiture use expanded in the United States during the Civil War. More types of property were seized for a wider range of acts. Sometimes the seizure was unrelated to the owner's malfeasance (it was *in rem*, against the "evil chattel", not against the owner). Forfeiture was widely used against Southern rebels and sympathizers.

Forfeiture law went dormant until 1970, when Congress passed the Comprehensive Drug Abuse and Control Act and the Racketeer Influenced Corrupt Organizations Act (RICO). Both brought detailed civil forfeiture statutes to Federal law. RICO went further, giving the U.S. its first comprehensive statutory criminal (*in personam*) forfeiture statutes.

The Federal “war on drugs” brought the Comprehensive Crime Control Act of 1984. It expanded forfeiture's scope as a law enforcement tool. Importantly, it created a seizure fund within the Department of Justice to finance certain law enforcement activities. The fund not only supports Federal drug enforcement, it also distributes money and property to cooperating local police agencies. Forfeited assets surged from \$27 million in 1985 to \$875 million by 1992.

### **The Ohio Experience**

Today, every state has civil forfeiture laws. They are *in rem* actions, where the suit is brought against the property itself, not against the owner. While the distinction seems legalistic, the practical upshot is that civil forfeiture can occur without formally charging the owner with a crime and with civil law's lower burden of proof.

Some states, including Ohio, also enacted *in personam* forfeitures. That is, criminal proceedings are brought against a person. The property is subject to forfeiture after a conviction.

Ohio's first comprehensive forfeiture statutes came with H.B. 5 in 1985, sponsored by Rep. Bob Hickey. That bill created detailed criminal and civil forfeiture procedures for “corrupt activity” (§§2923.31-2923.36). It is Ohio's version of Federal RICO law.

In 1990, the General Assembly enacted broader drug forfeiture statutes, allowing both civil and criminal seizures in language akin to corrupt activity law (§§2925.41-2925.45). This occurred in S.B. 258, sponsored by Sen. Chip Henry. Coincidentally, that bill also created the Sentencing Commission.

Comprehensive civil and criminal forfeitures for gang activity were added by H.B. 2, effective January 1999. That bill largely mimicked corrupt activity and drug forfeiture law. This came a year after the General Assembly authorized civil forfeiture in Medicaid fraud cases (S.B. 164).

### **Why the Recent Interest in Forfeiture?**

Incarceration, community supervision, or fines can be effective against individual criminals. But they are less useful in stemming crimes by larger organizations, where criminal foot soldiers are easily replaced. Drug networks, rackets, and gangs come to mind. Also, traditional penalties do not always keep the offender away from instrumentalities such as a drunken driver's automobile.

Policy makers turned to sanctions that disrupt criminal organizations (such as asset forfeiture) and that deny offenders the instruments used to commit crimes (such as forfeiting impaired drivers' cars). But that's not all. Forfeiture laws shift these assets from offenders to law enforcement agencies, which, in turn, use them to nab more offenders.

### **Revisiting Forfeiture Law**

Various criticisms of asset forfeiture law led the U.S. Congress to pass the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA" Rep. Henry Hyde the prime sponsor). Through a series of compromises between critics and defenders of forfeitures, CAFRA made several important changes in Federal *civil* forfeitures, including:

- Shifting the burden of proof from the owner to the government;
- Requiring a substantial connection between property used in a crime and the offense itself;
- Allowing a pre-disposition hardship release;
- Allotting attorney's fees to prevailing property owners;
- Compensating owners for any property damage while in the government's possession;
- Creating an innocent owner defense; and
- Uniformly defining the forfeitable proceeds of crimes.

Meanwhile, the President's Commission on Model State Drug Laws has developed model civil drug forfeiture statutes with an eye toward standardizing forfeiture practice in the states.

Against this backdrop, the Ohio Criminal Sentencing Commission began its comprehensive review of Ohio forfeiture statutes in 2000.

### **Sources**

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Krzystek, Marcel, *The Recent Congressional Reform of Federal Civil Forfeitures*, 9 Kansas J.L. & Pub. Policy 669 (2000).

President's Commission on Model State Drug Laws, National Alliance for Model State Drug Laws, *Commission Forfeiture Reform Act (CFRA)* (2001).

Schecter, Michael, *Fear and Loathing the Forfeiture Laws*, 75 Cornell L.Rev. 1151 (1990).  
1 Scott *The Civil Law* 69 (1932).

[www.state.hi/us/ag/asset\\_forfeiture\\_history.htm](http://www.state.hi/us/ag/asset_forfeiture_history.htm) (6/10/02).

## **A PLAN FOR ASSET FORFEITURES**

In addition to sanctions typically available for crimes, some offenses call for the offender to forfeit an interest in his or her property. Forfeiture is one of criminal law's touchiest topics. It can stymie economic misdeeds by making offenders surrender their criminal tools and ill-gotten gains. But it's an intrusive tool. It encourages law enforcement to reach beyond traditional penalties into an offender's bank account, car, and perhaps, his or her home.

The Sentencing Commission reviewed Ohio's complex forfeiture laws during the past three years. Forfeiture can be a valid law enforcement tool and a meaningful sentencing option or civil remedy. But the statutes are inconsistent, complex, and can raise due process concerns.

The plan laid out in this report tries to be mindful of both the interests of government and the individual. If adopted, asset forfeiture law should be easier to understand, more consistent, and fairer to all parties.

### **PURPOSE STATEMENT**

Forfeiture laws are meant to provide financial disincentives to crime and to repay society for harm. Yet, Ohio law lacks a purpose clause to make this clear. Other worthy goals deserve mention too. Forfeiture law needs to be flexible enough to protect innocent parties and victims. It should keep the amount of property taken in scale with the harm caused.

The new forfeiture chapter would begin by stating these purposes (proposed §2981.01(A)):

- To provide economic disincentives and remedies to deter and offset the economic effect of offenses by seizing and forfeiting contraband, proceeds, and certain instrumentalities;
- To ensure that seizures and forfeitures of property are proportionate to the offense committed;
- To protect third parties from wrongful forfeiture of their property; and
- To prioritize restitution for victims of offenses.

The proposal paraphrases the economic disincentives and deterrence language from a draft by the National Alliance for Model State Drug Laws. The proportionality and third party protection language comes from Utah's recent new forfeiture law. The fourth prong reflects the Commission's sense that victims' restitution should not be lost to forfeiture.

## NEW FORFEITURE CHAPTER

### Scope

Currently, the Criminal Code (Title 29) has lengthy criminal and civil asset forfeiture provisions in laws regulating corrupt activity (§§2923.31-36), drug organizations (§§2925.41-.45), gangs (§§2923.41-.47), contraband (§§2933.41-.44), and Medicaid fraud (§§933.71-.75).

The Commission proposes consolidating and streamlining these statutes in new Chapter 2981. This would shorten the Code, harmonize forfeitures, and minimize redundancy. It should make it easier for practitioners and persons charged with offenses to understand the law. This table shows the key current sections that would move to the new chapter. “Criminal” forfeitures flow from a conviction. “Civil” forfeitures on this list relate to an offense, with or without a conviction.

### Current Major Criminal Code Forfeitures

REVISED CODE SECTION	FORFEITURE PROVISIONS BY TOPIC	TYPE OF FORFEITURE
§2923.31 §2923.32 §2923.33 §2923.34 §2923.35 §2923.36	<b>Corrupt Activity (RICO):</b> Definitions Penalties Criminal Forfeiture Civil Forfeiture Control of Property/Court Orders Liens	Criminal & Civil
§2923.41 §2923.42 §2923.43 §2923.44 §2943.45 §2943.46 §2943.47	<b>Criminal Gang Activity:</b> Definitions Criminal Offense/Property Control Property Subject to Abatement Criminal Forfeiture Civil Forfeiture Disposal of Forfeited Property Returning Property	Criminal & Civil
§2925.41 §2925.42 §2925.43 §2925.44 §2925.45	<b>Felony Drug Offenses:</b> Definitions Criminal Forfeiture Civil Forfeiture Disposal of Forfeited Property Unlawfully Seized Property	Criminal & Civil
§2933.41	<b>Property Held by Law Enforcement</b>	Civil
§2933.42 §2933.43 §2933.44	<b>“Contraband”:</b> Offense Civil Forfeiture Juvenile Forfeiture Reports	Civil
§2933.71 §2933.72 §2933.73 §2933.74 §2933.75	<b>Medicaid Fraud:</b> Definitions Orders to Preserve Property Civil Forfeiture Disposal of Forfeited Property Liens	Civil

The new chapter standardizes forfeitures procedures. Other penalties and additional procedures in current law would remain in force (§2981.01(C)).

The next table shows how proposed Chapter 2981 would reorganize forfeiture law. Changes will be explained in context later in this outline.

**Proposed Forfeiture Chapter**

<b>REVISED CODE §</b>	<b>TOPICS</b>	<b>CHANGE</b>
§2981.01	Purposes/Definitions	New/Modified
§2981.02	Property Subject to Forfeiture	New to Some Modified for Others
§2981.03	“Provisional Title”/Preservation Pre-Trial Hardship Release	New/Modified New
§2981.04	Criminal Forfeiture	New to Some/Modified
§2981.05	Civil Forfeiture	New to Some/Modified
§2981.06	Orders After Forfeiture Substitute Property	Modified New to Some/Modified
§2981.07	Crime of Diminishing, Diverting, <i>Etc.</i>	New
§2981.08	Proportionality Review/Jury Trials	New/Modified
§2981.11	Property Held by Law Enforcement	Streamlined
§2981.12	Disposing Drugs, Weapons, Porn, <i>Etc.</i>	Virtually Unchanged
§2981.13	Disposing Instrumentalities, <i>Etc.</i>	New to Some/Streamlined
§2981.14	Federal forfeitures	Virtually Unchanged

**FORFEITABLE PROPERTY**

**Simplified**

Property subject to forfeiture in Ohio varies from statute to statute. And an expansive view of “contraband” picks up any property used in crime. This plan takes a tidier approach. It distinguishes between five types of property: (1) contraband; (2) proceeds; (3) instrumentalities; (4) lost, abandoned, stolen, and other property held by law enforcement; and (5) vehicles forfeitable for traffic offenses.

This property would be forfeitable (proposed §2981.02(A)):

- Any contraband involved in any offense;
- Any proceeds involved in any offense;
- Any instrumentality, provided it is substantially connected to the commission or facilitation of any felony or a misdemeanor when specifically authorized by statute or ordinance.

The definitions of “contraband”, “proceeds”, and “instrumentalities” become important. (We discuss traffic offenses and property held by law enforcement later.)

### **Contraband: Illegal to Possess**

**Revised Definition.** As now, contraband involved in any felony or misdemeanor would be forfeitable (proposed §2981.02(A)(1)). However, the plan narrows the definition of “contraband” to property that is unlawful to own.

“Contraband” is currently defined or applied in sweeping terms to cover property that is illegal to possess, lawful property used to transport other contraband, and any other property involved in crime (see current §§2901.01(A)(13) & 2933.41(C)).

The Commission proposes a definition that is more precise and more concise. “Contraband” would cover:

[P]roperty that is illegal for a person to possess under a statute, ordinance, or rule, or that a trier of fact lawfully determines to be illegal to possess by reason of the property’s involvement in the offense (proposed §2901.01(A)(13)).

The definition includes nonexclusive examples: drugs, gambling devices, weapons, and obscene materials (proposed §2901.01(A)(13)(a)-(e)). Most carry over from the current definition.

However, the definition no longer includes lawful items used in crime such as an automobile, computer, or money (current §2901.01(A)(13)(a), (e), (g), (h), & (j) would be repealed). They are more accurately defined as “instrumentalities” of crime. And property acquired through crime (current §2901.01(A)(13)(i)) moves under the new definition of “proceeds”.

**Upshot.** What do these changes mean? There are some easy cases. As now, a drug offender would lose his cocaine, a smuggler would lose her untaxed cigarettes, an inmate would lose his straight-edged razor, and your neighbor would lose her rocket launcher. All are illegal to have.

While narrowed somewhat, courts still have flexibility in other cases, since contraband would include property that “a trier of fact lawfully determines to be unlawful to possess *by reason of the property’s involvement in the offense*”. Here are examples:

- Materials are not “obscene” until a court so determines. At that point, the materials can be forfeited as contraband.
- A person has a legal handgun, but uses it in a robbery. The court determines the gun to be integral to the offense and forfeits it as contraband.

Absent such a ruling, vehicles, computers, equipment, and homes used in crimes would no longer be considered “contraband”. They may still be forfeitable, but under the stricter “instrumentality” rules below.

**Repeals.** Current law makes it an offense to possess contraband (§2933.42). Since the proposal makes clear that contraband is subject to forfeiture in *any* misdemeanor or felony case (proposed §2901.02(A)(1)), current §2933.42 would be repealed as unnecessary.

In repealing this section, the proposal also eliminates the “no person shall transport ... any contraband” proscription. That quirky language makes it an “offense” to carry contraband. But it does not set out a prison term or community sanction against the offender. Rather, it's designed to allow forfeiture under §2933.43.

§2933.43 also would be repealed. It provides that a vessel used to transport contraband becomes “contraband”. The proposal more accurately places cars, boats, and planes used to transport contraband under the new definition of “mobile instrumentality”. Nevertheless, the material being transported remains “contraband”. Other useful aspects of §2933.43 move to the new chapter.

### **Proceeds: Ill-Gotten Gains**

Today, property acquired through the sale or transfer of contraband is “contraband” (current §2901.01(A)(13)(i)). “Proceeds” are not defined.

Under this plan, “proceeds” would cover ill-gotten gains. Rather than rely on contraband law, proceeds of crime would be forfeitable in any felony or misdemeanor case (proposed §2981.02(A)(2)). The definition of “proceeds” is similar to the new Federal law (CAFRA, 18 U.S.C. §984). It states (proposed §2981.01(B)(7)):

- In cases involving *unlawful* goods, services, or activities, “proceeds” means any property derived directly or indirectly from an offense, including money or other means of exchange. The term is not limited to the net gain or profit realized from the offense (§2981.01(B)(7)(a)).

- In cases involving *lawful* goods or services sold or provided in an unlawful manner, “proceeds” means the gains acquired through the offense, less costs lawfully incurred in providing the goods or services. The claimant has the burden to show lawful costs. Lawful costs shall not include any part of the overhead expenses of, or income taxes paid by, the entity providing the goods or services (§2981.01(B)(7)(b)).

### **Instrumentalities: Connected to Crime**

While contraband and proceeds would be forfeitable for any offense, the scope of instrumentality forfeitures would be narrower and subject to more process than today (proposed §2981.02(A)(3) & (B)). The forfeiture battles waged today usually involve the instrumentalities of crime.

**“Instrumentality” Defined.** Currently, property “used in” a crime is forfeitable as contraband (§2933.41(C)(1)). Thus, present law sweeps otherwise lawful property—such as a home in which marijuana is found—into the category of illegal goods. While lawful goods used unlawfully may be subject to forfeiture, the Commission favors a more sensitive standard. The current provision would be repealed.

As noted earlier, contraband would be limited to things unlawful to possess. As for legal goods used illegally, the plan fills the void by defining “instrumentality” to cover “property otherwise lawful to possess that is substantially connected to an offense” (proposed §2981.01(B)(3)).

As with contraband, the definition also contains a nonexclusive list of instrumentalities, including firearms acquired lawfully, “mobile instrumentalities”, computers, telecommunications devices, and money (§2981.01(B)(3), 2<sup>nd</sup> ¶). All move from the current “contraband” definition.

**“Mobile Instrumentality” Defined.** The plan adds a definition of “mobile instrumentality” to cover items that are “inherently mobile and used in the routine transport of persons”. It would include motor vehicles, watercraft, aircraft, etc. (proposed §2981.01(B)(5)).

The new definition reflects the repeal of the aspects of contraband law that make forfeitable any vessel used to transport contraband (current §2933.42 & §2933.43).

Mobile instrumentalities would follow the same rules as other instrumentalities. However, they would be eligible for a quicker review if hardship issues are raised (see “Pretrial Hardship Release” below).

**“Substantial Connection” Test.** When are instrumentalities forfeitable? Under the proposal, the property must be “substantially connected” to the commission or facilitation of the offense (proposed §2981.02(A)(3)). Borrowed from recent Federal reforms, the standard is narrower than the sweeping standard in current law, which allows forfeiture of any property “used or intended to be used in” the offense.

The proposal defines “substantially connected” as integral, not merely incidental, to an offense (proposed §2981.01(B)(10)). Importantly, it instructs the judge or jury to consider “any or all” of these in determining whether there is a substantial connection §2981.02(B):

- Whether the offense could not have been committed or attempted but for the presence of the instrumentality; or
- Whether the primary purpose in using the instrumentality was to commit or attempt to commit the offense; or
- The extent to which the instrumentality furthered the commission of, or attempt to commit, the offense.

**Which Crimes?** Instrumentalities would be forfeitable in any civil or criminal case involving a felony (proposed §2981.02(A)(3)(a)), assuming the substantial nexus is shown and assuming the extent of property taken is proportionate to the offense (discussed later). This is similar to current civil forfeiture law.

Other than by implication in the current contraband and property room provisions (§§2933.41-2933.43), the Revised Code does not specifically authorize forfeiture in misdemeanor cases. The proposal would allow instrumentality forfeitures in misdemeanor cases, but only when authorized by statute or ordinance (proposed §2981.03(A)(3)(b)), and only after applying the nexus and proportionality standards.

**Upshot.** What does all of this mean? Finding a kilo of cocaine in the trunk of a known drug smuggler’s Buick makes the vehicle a likely forfeiture target. The car is substantially connected to the offense and the value of the drugs makes the seizure proportionate to the wrongdoing. But taking the car for finding marijuana residue in the driver’s pocket might fail both tests. There isn’t a substantial connection between the crime and the auto. The offender just happened to be in the auto when the drug was found. And relatively few people would argue that losing a car for a minor misdemeanor is punishment in scale with the offense.

There are tougher questions, of course. How much child pornography makes a computer forfeitable? How much marijuana in the field makes farmland forfeitable? Judges and juries will have to weigh the property’s

link to the crime and the extent to which it is “proportionate” to the offense. Let the forfeiture fit the crime.

**Authority to Seize.** Current law presumes that certain mobile property can be seized, even if otherwise legal. This plan eliminates the questionable presumption. It takes a simpler approach by making clear that a law enforcement officer may seize property that the officer has reasonable cause to believe is subject to forfeiture (proposed §2981.03(A)(4)). The statement is needed since, by definition, instrumentalities are lawful to possess.

This section also echoes current §2923.47, which specifically authorizes a person to file a motion for return of property improperly seized.

### **Vehicles under Traffic Law**

This plan does not cover or limit vehicle forfeitures under Title 45 (proposed §2981.02(C)). They were covered in S.B. 123 of the 124<sup>th</sup> General Assembly. That bill, sponsored by Senator Scott Oelslager, was based on earlier Commission recommendations. The “Traffic Law Forfeitures” section later in this report recaps those changes.

## **PROTECTING THE INDIVIDUAL’S INTERESTS**

### **Pretrial Hardship Release**

Once charged with an offense that makes property subject to forfeiture, or once a civil forfeiture action begins, the property owner has sketchy rights in current statutes. The proposal would give the person a chance for conditional release of property before trial, if a hardship were shown (proposed §2981.03(D)).

**Current Law’s Limitations.** Current contraband law allows releasing motor vehicles after seizure and before trial (§2933.43(B)(1)). Literally read, this complicated statute only lets the law enforcement agency to hold a motor vehicle 72 hours, unless the agency asks the court for a longer period before the 72 hours elapse. The court in turn must “immediately” schedule a hearing and notify the owner.

The statute does not work in practice. The seizing law enforcement agency often needs more than 72 hours simply to find and notify the owner of seizure. And release is not available if the owner is the defendant, making it meaningless in many cases.

**Broader Rights.** Assuming the property can be released (see exceptions below), the procedure mimics Federal law (18 U.S.C. §983(F)). A person with an interest in the property—including the defendant—must file a request with the appropriate custodial official showing how the three-part burden discussed below is met (proposed §2981.03(D)(1)).

The person can petition the appropriate court for conditional release if the custodian does not surrender the property within 15 days. The time frame is only seven days after the request if the property was seized as a mobile instrumentality or if the request is to copy records. The person must meet the burden noted below and show steps taken to secure release from the appropriate official. Unless extended for good cause shown, the petition must be filed within 30 days of the filing of the complaint, indictment, or information (proposed §2981.03(D)(2), 1<sup>st</sup> ¶).

The accelerated seven-day period replaces the unworkable 72 hour rule in current law. While the time frame is longer, note that it applies to more property and that defendants may petition the court for release, unlike current law.

The proposal also contains a new provision that gives a person the chance to copy any personal, business, or governmental records that are seized, unless they are contraband (proposed §2981.03(D)(2), 2<sup>nd</sup> ¶).

**The Claimant’s Burden.** A court could grant a conditional release of the property to a claimant who shows (proposed §2981.03(D)(3)(a)-(c)):

- A possessory interest in the property;
- Sufficient ties to the community to provide assurance that the property will be available at trial; and
- Failure to release will cause a substantial hardship.

**“Substantial Hardship”.** The key is “substantial hardship”. The proposal provides some guidance. The court would have to weigh whether the likely hardship from the government's continued possession of the property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if returned to the claimant (§2981.03(D)(4), 1<sup>st</sup> ¶). This balancing test is similar to that used in CAFRA, the new Federal law.

The court would consider whether withholding the property would prevent a legitimate business from functioning, prevent the claimant or an innocent person from maintaining employment, or leave the claimant or an innocent person homeless (proposed §2981.03(D)(4), 2<sup>nd</sup> ¶).

**Exceptions.** There is a big “if”. The property cannot be released if there is probable cause that it is (proposed §2981.03(D)(3), 1<sup>st</sup> ¶):

- Contraband (since it is illegal to possess);
- Proceeds of an offense (unlawful gains);
- Property that must be held as evidence; or
- Property that is likely to be used in additional offenses.

Obviously, there will be judgment calls, especially on the latter two.

**The Court’s Deadline.** The court must rule within 30 days of filing. If the property is alleged to be a mobile instrumentality, or involves personal, business, or governmental records, the court would have to decide as soon as practical. In any case, the time may be extended by consent of the parties or for good cause shown (proposed §2981.03(D)(6)).

If the government shows that the claim has no merit, the court must deny the request. Otherwise, the state or subdivision may respond by submitting evidence *ex parte* to avoid disclosing anything that might adversely affect an investigation or trial (proposed §2981.03(D)(5)).

**Conditional Release.** If the claimant makes the necessary showings, the court would order the property's return to the claimant pending completion of the forfeiture proceedings. In making this order, the court shall notify the claimant of the prohibitions against interfering with or diminishing property in §2981.07 (see “Protecting the Public Interest” below) (§2981.03(D)(7)).

If the court grants the request to release property, it could make any order necessary to ensure that the value of the property is maintained (proposed §2981.03(D)(8)).

If a third party does not file a timely motion, or if the motion is rejected, the person will have a second chance. He or she may still be dealt with as a third party in a criminal case or intervene in a civil action. Both are discussed later.

### **Hearing on Real Estate**

Another limit on provisional title would be new to Ohio law. In civil forfeiture cases, when the government seeks to seize realty, the property owner could request a pre-seizure hearing. At the hearing, the State or subdivision would have to show probable cause that the property is subject to seizure (proposed §2981.03(A)(3)). The pre-seizure hearing

grew out of the U.S. Supreme Court's holding in the 1993 case of *United States v. James Daniel Good Real Property, et al.*, 510 U.S. 43 (1993).

A similar probable cause hearing was not built into criminal forfeiture law since the property must be specified in the indictment. Thus, the grand jury would have found probable cause before indicting.

### **Substantial Connection for Instrumentalities**

Another key protection for individuals was mentioned in the “Instrumentalities: Connected to Crime” discussion earlier. To lose an instrumentality, there must be a substantial connection between the property and the offense (proposed §2981.02(A)(3)). This standard is more favorable to the property owner than current law, which makes property forfeitable when it is “used in” the offense.

### **Proportionality Review**

If someone grows an acre of marijuana in a 50-acre cornfield, should she lose the farm? If a driver has an open alcohol container, should he lose his Lexus? Under current law, both are possible. Since the farm and car are “instrumentalities” under the proposal, the court must decide that the seized goods are substantially connected to the crime. However, the question of scale is equally important.

Current Ohio statutes do not clearly address the issue even though both the farm and the auto are “contraband”. The defendant must hope a court sees the taking as disproportionate in a constitutional sense. In a significant move, the plan gives individuals the right to question the extent of certain forfeitures.

**The Standard.** Instrumentalities can be forfeited under new §2981.04 (criminal) and §2981.05 (civil) only to the extent the taking is “substantially proportionate” to the severity of the offense giving rise to the forfeiture (proposed §2981.08(B)). The new standard would not apply to contraband or proceeds (§2981.08(B)(2)).

The government would have to show substantial proportionality. In deciding proportionality, the court shall consider the severity of the offense and the value of the property involved (proposed §2981.08(B)(1)).

This is similar to Federal law. However, under CAFRA, the property owner has the burden to show forfeiture is “grossly disproportionate”, a very difficult test to pass. The Commission felt the burden should fall to the State, with substantial proportionality as the ball park standard.

**Guidance for Courts.** The plan helps courts decide substantial proportionality by setting out a non-exclusive list to use in determining severity (proposed §2981.08(B)(3)):

- The seriousness of the offense and its impact on the community, including the duration of the activity and the harm caused or intended by the claimant;
- The extent to which the claimant participated in the offense;
- Whether the offense was completed or attempted.

In addition, the proposal lays out a non-exclusive list of factors to determine the value of property subject to seizure (§2981.08(B)(4)):

- The fair market value of the property;
- The value of the property to the claimant, including hardship to the claimant or to innocent parties if the property were forfeited.

**When No Proportionality.** There would not be a right to proportionality review of proceeds or contraband (proposed §2981.08(B)(2)). With its definition narrowed, contraband is illegal property. You don't give the robber his gun back. And, as defined, proceeds are the profits from crime. Those, too, would be lost as a cost of doing illicit business.

### **Right to a Jury Trial**

As now, the defendant has the right to a jury trial in a criminal forfeiture case and the government and third parties do not (proposed §2981.08(A)(1)). But the right is less obvious in a civil case. The proposal makes clear that both the defendant *and* the government would have the right to a jury trial in civil forfeiture cases (proposed §2981.08(A)(2)).

### **Rights of Financial Institutions**

In streamlined form, the proposal carries over law that allows a financial institution with an interest in property subject to forfeiture to file a civil action. The provisions would extend formally to corrupt activity and Medicaid fraud forfeitures for the first time. If the property is sold, as now, costs and attorney's fees would be paid, and the lien satisfied. Distribution of any remaining amounts would dovetail with any criminal or civil forfeiture disposition under the chapter. (Current §§2923.44(A)(2), 2923.45(B)(4), 2923.46(C)(1) & (3), 2925.42(A)(4), & 2925.43(B)(4) become new §2981.03(E).)

## PROTECTING THE PUBLIC INTEREST

### Nature of the Government's Interest

**“Provisional Title”.** A person suspected of crime might be tempted to hide, transfer, or lessen the value of forfeitable property. Current gang and drug laws try to preempt such activity by saying the property “vests” with the State at the time the owner commits an offense (see §§2923.44(A)(2), 2923.45(B)(1), 2925.42(A)(2), 2925.43(B)(1)).

This is a relic of the common law “relation back” doctrine. Of course, the property does not truly “vest” at the point of offense. If it did, this would be a much shorter report. More importantly, it is unfair to retroactively “vest” property that may have an innocent owner.

This plan describes the State's interest more accurately. Once a person commits an offense that makes property forfeitable, the State or political subdivision has “provisional title”, subject to final adjudication, including, by reference, third party claims (proposed §2981.03(A)(1)).

Provisional title authorizes the state or subdivision to act to protect the property before a forfeiture proceeding commences. It would be subject to third party claims (proposed §2981.03(A)(1)).

**Presumption.** Current gang and drug laws contain a presumption that property is forfeitable (§2923.44(C) & 2925.42(C)). This plan rephrases the presumption. Instead of presuming property is forfeitable, it would presume that the State or subdivision is justified in taking provisional title so that it can protect or hold property, subject to third party claims (proposed §2981.03(A)(2)).

As now, the presumption is rebuttable. To prevail, the government would have to show both of the following by a preponderance of the evidence:

- The interest in the property was acquired by the offender during the commission of the crime, or within a reasonable time after it (proposed §2981.03(A)(2)(a));
- There is no likely source for the interest other than as proceeds from the commission of the crime (proposed §2981.03(A)(2)(b)).

### Orders to Preserve Property

In current law, various forfeiture statutes give the prosecutor options to preserve the property subject to forfeiture (*e.g.*, §2923.33(A) in RICO law). Presumably, this stems from the government's “title” to the property.

The proposal is more accurate and more flexible. Provisional title would enable the prosecutor to ask the court to “take any reasonable action necessary” to assure the property remains available. Orders can include restraining orders or injunctions, compelling the defendant to post bond or buy insurance, photographs, inspections and inventories, liens or *lis pendens*, and other orders (proposed §2981.03(B)(1)). Most of these carry over from current corrupt activity, gang, and drug law. However, the insurance, inspections/inventories, lien/*lis pendens* options—while perhaps implied in present law—are new to forfeiture statutes.

**Timing; Standard.** The prosecutor can ask the court for an order protecting property when filing the charging instrument, provided it alleges the property is subject to forfeiture (proposed §2981.03(B)(1)(a)).

If not ready to formally charge the property holder, the prosecutor can seek the order if all persons known to have an interest in the property are notified and have a chance to be heard. However, before granting the order, the court must find (proposed §2981.03(B)(1)(b)(i)-(iii)):

- There is substantial probability the state or subdivision will prevail on the forfeiture issue;
- There is substantial probability that failure to enter the order will result in the property being destroyed, removed, or otherwise made unavailable for forfeiture;
- The need to preserve the property’s availability outweighs the hardship on the property holder.

The third bullet’s balancing test replaces current corrupt activity law which instead requires the court to find that the order would not result in irreparable harm to the person (§2923.33(B)(2)).

Separately, a new provision also allows the court to issue a protective order as a condition of a hardship release (proposed §2981.03(B)(1)(c)).

**90 Day Limit.** Generally, as in most current forfeiture statutes, an order to preserve property would be valid for 90 days, unless extended by the court for good cause shown, or if a relevant indictment, information, or complaint charging the offense is filed (proposed §2981.03(B)(2)). *Ex parte* orders provide another exception to the 90 day limit.

**Ex Parte Orders.** As now in most forfeiture statutes, the court may make its order *ex parte* (without giving notice to another party) if the prosecutor shows the property is forfeitable and that notice would jeopardize availability of the property for forfeiture. However, an *ex parte*

order would only be effective for up to 10 days unless extended for good cause shown or the person subject to the order consents to a longer period. If a hearing is requested, the court must hold it at the earliest possible time before the order expires (proposed §2981.03(B)(3)).

**Transcript; Evidence.** As now in gang and drug law, a transcript would have to be made of the hearing, but the Rules of Evidence would not apply. The transcript would not fall under the public records law until the property is seized (proposed §2981.03(B)(4)).

### **Crime of Hiding, Transferring, Diminishing**

Current law does not contain specific criminal penalties for hiding, transferring, or diminishing the value of property subject to seizure. The government must rely on the court's contempt powers or possible tampering with evidence charges under §2921.12. Following Federal law (18 U.S.C. §2232) in more streamlined language, the proposal would make it a crime for a person to destroy, damage, remove, transfer or otherwise take action to devalue property or impede the government's lawful authority over the property (proposed §2981.07(A)).

This provision is an important counterpoint to the new hardship release provisions discussed above. Unlike CAFRA's flat penalty (up to 5 years), and consistent with Ohio's theft law, the penalty would vary depending on the value of the property destroyed, removed, etc., as follows (proposed §2981.07(B)):

<b>PROPERTY VALUE</b>	<b>PENALTY LEVEL</b>
Under \$500	M-1
\$500 to under \$5,000	F-5
\$5,000 to under \$100,000	F-4
\$100,000 or more	F-3

Of course, an F-3 tampering with evidence charge could be brought in appropriate cases.

### **Right to a Jury Trial**

As with defendants, the proposal makes clear that the government would have the right to a jury trial in a civil forfeiture case (§2981.08(A)(2)). The reason: in civil cases generally, the right extends to both parties. As now, the government could not request a jury trial in criminal cases, nor could third parties (§2981.08(A)(1)).

## **CRIMINAL OR CIVIL**

### **Options**

Today, only drug law tries to spell out the relationship between civil and criminal forfeiture actions (§2925.43(C)(3) & (D)(1)). Building on the law, the proposal clarifies that the prosecutor has the option of filing a criminal or civil action to seek any forfeiture under the new chapter. If property is seized and a criminal forfeiture has not begun, the prosecutor must commence a civil action (proposed §2981.03(F), 1<sup>st</sup> ¶).

A wholly new provision calls for bringing the civil action within 30 days of seizure of a mobile instrumentality. Otherwise, the deadline is 60 days. In either case, the period could be extended by agreement of the parties or for good cause shown (proposed §2981.03(F), 2<sup>nd</sup> ¶).

Nothing would preclude the prosecutor from filing a criminal forfeiture case after the civil action begins. As in current drug forfeiture law, filing a criminal action stays the civil action (proposed §2981.03(F), 3<sup>rd</sup> ¶).

Also, a civil forfeiture action may be commenced whether or not the charged offender was convicted of a crime or adjudicated delinquent (proposed §2981.03(F), 4<sup>th</sup> ¶).

### **Timing**

The proposal adds guidance to current law. If a mobile instrumentality were seized, the civil action would have to be brought within 30 days after seizure. If any other property were seized, the action would be brought within 60 days of seizure. In either case, the period may be extended by agreement of the parties or by the court for good cause shown (proposed §2981.03(F), 1<sup>st</sup> ¶).

## **CRIMINAL FORFEITURES**

This plan pulls together the criminal forfeiture process from current §§2923.44 (gangs), 2925.42 (drugs), 2923.34 (corrupt activity) law, with much streamlining and some key changes. Criminal proceedings would be new to Medicaid fraud law. Only civil forfeiture is available today.

### **Specification in Indictment, Etc.**

The proposal carries forward current provisions that make clear that the property subject to forfeiture in a criminal RICO case must be specified

in the indictment, information, or complaint (current §§2923.44(B)(1), 2925.42(B)(1), §2933.73(B) become new §2981.04(A)).

However, unlike other specifications (such as for possessing a firearm in committing a felony), the Revised Code did not set forth model specification language. The proposal does so in new §2929.1412.

The specification must state all of the following that is reasonably known at the time of the filing:

- The nature and extent of the alleged offender's interest in the property;
- A description of the property; and
- If the property is alleged to be an instrumentality, the alleged substantial nexus between the property and the offense.

The first two are shortened versions of current statutes. The third would be new. It would track the new standard for instrumentality forfeitures.

Current §2923.44(B)(2) and related provisions place this specification language “at the end of the body of the indictment, information, or complaint”. The quoted phrase was struck as unnecessary.

Current corrupt activity and drug law effectively require a bifurcated procedure in criminal cases by prohibiting disclosure of the specification to the jury before a finding of guilt (§2923.44(B)(4) & §2925.42(B)(4)). The proposal does not echo the current mandate. Instead, it simply states that, for good cause shown, the court may separate issues of guilt separate from forfeiture (proposed §2981.04(A), 3<sup>rd</sup> ¶). This allows the court to separate issues such as “substantial connection” and proportionality when considering the defendant’s guilt on the offense.

As now in some forfeiture statutes, if property were not reasonably foreseen to be subject to forfeiture at the time the charging document was filed, the judge or jury could still reach a forfeiture verdict covering that property. However, the trier of fact may only include property specified after the charging instrument if the prosecutor gives notice under Criminal Rule 7(E) to the alleged offender when the prosecutor realizes that property is forfeitable (proposed §2981.04(A), 2<sup>nd</sup> ¶).

### **Burden of Proof**

In a change from current law, the government would have to show, by proof beyond a reasonable doubt that the property is subject to forfeiture

in whole or in part (proposed §2981.04(B)). The current standard is a preponderance of the evidence.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the U.S. Supreme Court said any aspect of the offense that can lead to an increased penalty must be shown beyond a reasonable doubt. On one hand, forfeiture is part of the criminal penalty. On the other, it is designed to be a remedial remedy to discourage illegal activities by depriving offenders of property that is improperly obtained, rather than punishment.

In light of *Apprendi*, does Ohio's standard have to change? Probably not. But the change made sense to the Commission since the government would have to specify the property in charging the crime. Thus, the defendant would be entitled to the same standard of proof that is available for any criminal specification.

Besides, if the State or subdivision feels more comfortable with a lesser burden, it can proceed with a civil forfeiture action.

### **Forfeiture Verdict**

Once a person is found guilty of a crime or delinquent act with a specification covering property subject to forfeiture, the trier of fact must reach a second conclusion. The judge or jury must determine whether the property is to be forfeited (proposed §2981.04(B), 1<sup>st</sup> ¶). Language in current law addressing notice to the defendant and applying the rules of evidence was removed as unnecessary.

The forfeiture verdict would have to specifically describe the extent of the property subject to forfeiture. If the trier of fact were a jury, on the offender's motion, the judge would make the determination (proposed §2981.04(B), 2<sup>nd</sup> ¶). Albeit streamlined, this language comes from current gang and drug law (§§2923.44(B)(3) & 2925.42(B)(3)), although it drops the requirement that a "special proceeding" be held. It is more elaborate than corrupt activity law (§2923.32). Another key difference—the trier of fact must weigh whether the taking is proportionate to the offense (§2981.04(B) 2<sup>nd</sup> ¶ & §2981.08(B))

After entering a forfeiture verdict, the court would, in addition to any other sentence authorized, order the offender to forfeit the offender's interest in the property (proposed §2981.04(C)). This carries over the basic rule in gang and drug law (§§2923.44(B)(5)(a) & 2925.42(B)(5)(a)). It is implied in corrupt activity law. The property then vests with the state or subdivision subject to the claims of third parties.

## **Notice and Hearing for Third Parties**

As now, after a forfeiture order, the prosecutor would have to try to locate interested persons and serve notice (current §§2923.32(E)(1), 2923.44(F)(2), & 2925.42(F)(2) become new §2981.04(D)).

Hearing provisions were imported from drug law (§2925.42(F)(3)-(5)) and applied to other forfeitures. Anyone, other than the offender, who asserts a legal interest in the property, may ask for a hearing on the validity of the person's claimed interest (proposed §2981.04(E)(1), (2), & (3)).

This plan carries over the time for filing the petition or affidavit and its contents with one substantive change. Currently, a third party's petition or affidavit must be filed within 30 days of the final notice or the person's receipt of notice, whichever is earlier. The Commission thought it unfair to allow earlier published notice to trump a later actual notice. Thus, the "earlier" clause would be dropped (proposed §2981.04(E)(1)(a) & (E)(2)(a)).

The plan also contains language instructing the court to amend the forfeiture order if the petitioner demonstrates a vested interest in the property or *bona fide* purchase. As with other provisions on third party claims, the language would apply to a variety of forfeitures, not just those under drug law (proposed §2981.04(F)).

As now, once the court handles third party claims, the State or political subdivision gets clear title to the property (proposed §2981.04(G)).

## **Replevin, *Et Cetera* Stayed**

Replevin is an ancient tool used to compel someone to release property. Conversion is a civil action to recover money if the property were damaged or unavailable. Current civil forfeiture law involving gangs, drugs, and contraband say a forfeiture action is "not subject to replevin" (§§2923.45(B)(3), 2925.43(B)(3), & 2933.43(B)(2)). That probably means that the case must be resolved before considering the replevin action.

Oddly, the statutes do not mention conversion or other civil actions. RICO and Medicaid fraud law do not even mention replevin. Moreover, current criminal forfeiture statutes do not contain similar provisions.

It makes sense to instruct courts on conflicting claims. The proposal says that any replevin, conversion, or other civil action brought concerning property subject to criminal or civil forfeiture must wait until resolution of the forfeiture case (proposed §2981.03(C)). There is exception for certain property subject to liens under proposed §2981.03(E).

## **CIVIL FORFEITURES**

The package consolidates and streamlines civil forfeitures now contained in corrupt activity, gang, drug, “contraband”, and Medicaid fraud laws.

### **Initiating the Process**

Instead of seeking a criminal forfeiture, the prosecutor can file a civil forfeiture action (proposed §2981.05(A)). The new definition of “offense” contemplates both criminal and civil actions (“Other Definitions” below). Albeit streamlined, the new process is essentially the same as now.

### **Third Party Claims**

The prosecutor would have to make “reasonably diligent inquiries” to try to locate any interested parties before commencing the action (proposed §2981.05(B)). Current law requires notice then to be given both by certified mail and by publication in a newspaper. For economy, this proposal would only require published notice when an interested party cannot be found (proposed §2981.05(C)).

As now, a third party claimant can seek release of the property involved in a civil case. If release was not granted under the hardship provisions discussed earlier, the person may file a claim under the Rules of Civil Procedure (proposed §2981.05(D)).

### **Burden of Proof & Forfeiture**

Deciding a civil forfeiture action, including third party claims, would be akin to current civil drug and gang law, with one change. Rather than require the prosecutor to prove the case by “clear and convincing” evidence, the plan uses the traditional civil burden of proof—by a preponderance of the evidence (proposed §2981.05(E)).

The court could authorize a forfeiture only after finding that the prosecutor proved, by a preponderance, that the property is forfeitable and, after a proportionality review when relevant, the trier of fact specifically describes the property to be forfeited (also §2981.05(E)).

### **Clear Title**

As now, once the court deals with third party claims, the State or political subdivision gets clear title (proposed §2981.05(F)).

## **ORDERS AFTER A FORFEITURE VERDICT**

### **Substitute Property**

The plan carries over the ability to forfeit substitute assets if the property subject to forfeiture is unreachable (proposed §2981.06(D)). This can be useful in criminal cases. (Since civil actions are brought against the property rather than the person, the government will already hold the property in most civil cases.) The more important change is the new criminal penalty for making property unreachable (see “Crime of Hiding, Transferring, Diminishing” above).

### **Various Other Orders**

The plan consolidates current language authorizing the court, if necessary, to order law enforcement to seize forfeited property. The court also could restore victims’ property, pay rewards, compromise claims, dispose of the property making provisions for innocent persons, issue a stay pending appeal or resolution of conflicting claims, *etc.* Condensed versions of these provisions appear as new §2981.06(A), (B), & (C).

Likewise, the proposal carries over direction to the prosecutor to dispose of the property (§2981.06(E)). It makes clear the property does not revert to the offender if it is not used or transferred for value (§2981.06(F)).

### **Notice to Interested Parties**

Based on current gang and drug law (§2923.44(F)(2) & §2925.42(F)(2)), after a forfeiture order, the prosecutor would have to attempt to notify any person with an interest in the property (proposed §2981.06(A)(2)).

## **PROPERTY HELD BY LAW ENFORCEMENT**

The proposal cuts through the jungle of current rules governing property in the custody of law enforcement agencies. Held property covers a broad gamut: Lost, stolen, and abandoned property; property seized as evidence; property subject to forfeiture under the drug, gang, racketeering, and Medicaid fraud laws; and other “forfeited” property.

Obviously, the Commission sensed a need for clearer statutes to govern asset forfeitures. That’s what you’ve read to this point. The Commission also favored keeping the simpler process for “forfeiting” lost property, abandoned property, and the like.

The plan consolidates several lengthy sections. It tries to give clearer meaning to the current rules. Some requirements would apply to *any* property held by law enforcement, from a mugger’s bike to a smuggler’s yacht. Then, distinctions would be drawn (as now) by property type.

Unlike present law, this package does not characterize lawful property as “contraband”. While tidy, that approach is not particularly honest. As noted earlier, the plan gives “contraband” its lay meaning—property that is illegal to own.

## **Records & Reports**

As now, a law enforcement agency would follow some basic steps for almost all property that comes into its custody (consolidating and clarifying current provisions such as §§2923.32(B)(6), 2923.35, 2933.41(A), 2933.43(B)(2) & (D)(3), etc.):

- Safely keep the property until it is no longer needed as evidence (proposed §2981.11(A)(1));
- Draft a written internal control policy providing for detailed records of property taken and its disposal, including what happens to any monies gained from sale of the property (§2981.11(B)(1)); and
- File an annual report with the AG (§2981.11(B)(2)).

The records kept under the internal control policy and any report received by the Attorney General would be a public record, as now (§2981.11(B)(3)). The AG would have to report to the General Assembly annually, as now, on law enforcement trust funds and other matters (§2981.11(B)(4)).

## **Exceptions**

We mentioned that these rules would cover *most* held property. Current law contains several provisions that govern disposing of property involved in particular misconduct (§2933.41(F) & (H)). The plan generally carries over those exceptions, to the extent they do not conflict with the new chapter. Ch. 2981 would not cover the custody and disposal of the following (proposed §2981.11(A)(2)):

- Junk motor vehicles or other property of negligible value;
- Vehicles subject to forfeiture under the Traffic Code (Title 45), other than those seized in vehicle identification number (VIN) fraud cases;

- Property held by a prison that is unclaimed, that does not have an identified owner, that the owner agrees to dispose, or that is identified by the Department of Rehabilitation and Correction (DRC) as having little value;
- Controlled substances sold by a peace officer in performance of official duties under §3719.141 (with its own control policy);
- Animals taken, and devices used in unlawfully taking animals, under §1531.20;
- Property recovered by a township law enforcement agency under §§505.105 to 505.109 (current §2933.41(H)); and
- Property held and disposed of under a municipal ordinance or under §§737.29 to 737.33 ([current §2933.41(F)).

Note this allows an expedited process for disposing of property of negligible value. Current law only exempts junk motor vehicles. If there is no sense in requiring extensive record keeping for junk cars (which are titled and registered), it certainly makes little sense to keep detailed records of other junk held by law enforcement.

Building on that, also note the proposal exempts the DRC from the formal record keeping and reporting for junk property held by prisons. As in current law (§2933.42(I)), the proposal defines “law enforcement agency” to include correctional institutions (§2981.11(D)).

### **Notify Possible Claimants**

Before disposing of property covered by the new chapter, the law enforcement agency must make a prompt reasonable effort to find persons entitled to possession and let them know how and where to claim the property. If the owner is unknown, the agency must advertise in a newspaper (proposed §2981.11(C)). This mirrors current contraband law (§2933.41(B)).

## **DISPOSAL OF FORFEITED PROPERTY**

### **Rules for Particular Property**

The plan carries over these general rules for certain types of property (current §2933.41(D)(1)-(7) becomes §2981.12(A)(1)-(7)):

- Drugs – Destroy, turn over to Federal authorities, or use for medical or scientific purposes as provided by law;
- Weapons – Give to law enforcement for police use, sell for sporting or museum use, send to the Bureau of Criminal Identification and Investigation, or destroy;

- Obscene material – Destroy;
- Alcohol – Sell, use for training purposes, or destroy as provided by law;
- Inmate money – Return to sender or deposit in the inmate’s account;
- Vehicle parts seized in VIN fraud cases – Give to law enforcement or sell;
- Computer devices – Give to law enforcement or sell.

## **General Rules**

Any other held property may be (proposed §2981.12(B)):

- Used by the law enforcement agency, with court approval;
- Sold at public auction for cash, without appraisal; or
- Disposed of in another manner authorized by the court.

The rule would apply not only to lost and unclaimed property, but also to property seized as contraband, proceeds, or instrumentalities under the new chapter, unless an exception is specified (proposed §2981.13(A)).

The rule comes from current contraband law (§2933.41(D)(8) & §2933.43(D)-(1)). It brings RICO, gang, and drug law in, adding consistency. It also would replace current Medicaid fraud law (§2933.74(B)(1)), which almost casually says the prosecutor or AG should dispose of property by any of the following: public sale, transfer to a State agency, sale to an innocent person, or deal with as contraband.

## **Distribution: Contraband, Proceeds, Instrumentalities**

**Key Distinction Kept.** The plan carries over the key distinction between property formally forfeited under the new chapter and property “forfeited” because it is lost or unclaimed. Proceeds and money from the property’s sale would go largely to the law enforcement agencies involved in contraband, proceeds, and instrumentality forfeitures under new Chapter 2981 (§2981.13). Otherwise, gains would go to the local general fund (§2981.12), as now.

As a *Sentencing* Commission, we focused on the process leading to, and the scope of, the “sentence” of forfeiture. Other than prioritizing a restitution sentence, the Commission did not debate current formulas for distributing forfeited assets.

**Victims Prioritized.** Once forfeited property is sold, today’s general rule on distributing amounts after forfeiture does not mention

passing any assets on to victims, even when restitution is ordered in the case. The proposal makes clear that restitution, unlike fines, can be paid out of forfeited assets. Moreover, after paying the costs of storage, victim's restitution would have priority over other lienholders and law enforcement trust funds (proposed §2981.13(B)(2)).

**To Law Enforcement Funds, Etc.** Gains from the sale of property forfeited as contraband, proceeds, or instrumentalities would continue to go largely to law enforcement agencies. Here is the proposed allocation (§2981.13(B)). It tracks current contraband law (§2933.43(D)(1)(c)), except, as noted, it gives high priority to victims' interests.

- **Costs.** First, pay costs incurred in the seizure, storage, maintenance, security, and sale of the property and the costs of the forfeiture proceeding;
- **Victims.** Second, in a criminal forfeiture case, pay any restitution ordered or, in a civil case, pay any recovery ordered for the person harmed, unless paid from other assets.
- **Security Interests.** Third, pay the balance due on any security interest;
- **Juvenile Treatment.** Fourth, if the forfeiture is in juvenile court, pay 10% of the residue to certified alcohol and drug addiction treatment programs (see §2981.12(D)), as now.
- **Law Enforcement.** Pay the remaining 90% in juvenile cases—or the remaining 100% in adult cases—to the appropriate fund of the prosecutor and of the agency that substantially conducted the investigation:
  - To the relevant Law Enforcement Trust Fund, if it was the sheriff's department, municipal police, township police or constable, or park district police;
  - To the relevant Contraband, Forfeiture, and Other Fund, if it was the State Highway Patrol or the investigative unit of the Department of Public Safety;
  - To the Drug Law Enforcement Fund, if it was Pharmacy Board officers;
  - To the Medicaid Fraud Investigation and Prosecution Fund, if it was a Medicaid fraud case;
  - To the Ohio Treasurer for deposit in the Peace Officer Training Commission Fund, if it was another State agency.

The distribution resembles current RICO law (§2923.35(D)) and is somewhat like Medicaid fraud law (§2933.74(C)), but would change the order, making the law more consistent and efficient. By comparison, the current priorities in RICO law are: (1) 10% in juvenile cases to treatment; (2) 90% in juvenile cases and 100% in adult cases to the State Corrupt

Activity Investigation and Prosecution Fund; (3) To any civil plaintiff; (4) To pay costs of seizure, maintenance, etc. and court costs; (5) to the various trust funds. Victims should fare better under the proposal.

**Related Matters.** New section §2981.13 also would carry over these provisions without substantive changes. However, by gathering them in one place and simplifying language, the proposal will shorten the Criminal Code by many pages.

- Preserve law enforcement funds to receive assets moves to new §2981.13(C)(1);
- Limits on the funds' use move to new §2981.13(C)(2);
- Move the prosecutor's option to decline funds to new §2981.13(B)(4)(b), 2<sup>nd</sup> ¶);
- Allocating amounts when multiple agencies are involved moves to new §2981.13(B)(4)(c);
- Annual reports on funds received and their uses move to new §2981.13(C)(3);
- Accountability regarding prevention's share of trust funds moves to new §2981.13(D);
- Titled and registered property requirements move to new §2981.13(E);
- Language on the effect of noncompliance by a court, prosecutor, or law enforcement office moves to new division (F);

**Cannot Pay Fine.** As now, forfeited property could not be used to pay the fine imposed in a related criminal case (§2981.12(F)).

### **Distribution: Other "Forfeitures"**

**To the General Fund.** As now, amounts made from selling other goods held in police property rooms would go largely to the general fund of the jurisdiction that employs the seizing officers. Here is the order (proposed §2981.12(C)-(E)):

- **Juvenile Treatment.** First, if the forfeiture is in juvenile court, 10% of the residue goes to certified alcohol and drug addiction treatment programs (§2981.12(D));
- **General Fund.** Second, the remaining 90% in juvenile cases—or 100% in adult cases—goes to the General Fund of the State, county, township, or municipality of the law enforcement agency involved (§2981.12(C)).
- **Rewards.** If the subdivision recognizes a citizens' reward program, 25% of proceeds and amounts gained from sales go to the program, solely to pay rewards (§2981.12(F)).

As now, alcohol and drug treatment programs that receive funds from juvenile court forfeitures would have to file an annual report with the AG, the committing court, and the county commissioners (§2981.12(E)).

**Cannot Pay Fine.** As now, forfeited property cannot be used to pay a fine imposed in a related criminal case (§2981.12(F)).

### **Federal Forfeiture Option**

The proposal carries over language from current gang and drug law that gives law enforcement the option of seeking forfeiture under Federal law (§§2923.45(B)(3), 2923.46(A)(4)(a) & 2925.43(B)(3)). If the agency does not pursue the Federal option, then forfeitable property would be governed only by the new chapter (new §2981.14(A)).

The plan streamlines, but otherwise does not change the law governing money received as the result of Federal forfeiture actions (current §2933.43(D)(4)(a)-(d) would become §2981.14(B)).

### **NOT INCLUDED IN THE NEW CHAPTER**

While the Commission worked to consolidate and streamline forfeiture law in new Ch. 2981, current law contains additional penalties that were not so incorporated. For instance, a successful civil action for corrupt activity calls for triple damages or forfeiture to a private person. Gang law allows fines of twice the amount of gross proceeds wrongfully acquired. These penalties are not forfeitures. So, rather than apply them more broadly, they would not move to the new chapter. Also, targeted forfeiture statutes (such as for wild animals or trademarks violations) were left alone. The Commission plans to spend time with them soon.

### **Sections That Do Not Move**

Here are some key provisions in current “forfeiture” laws that would not become part of Ch. 2981:

- The offense of engaging in a pattern of corrupt activities and its non-forfeiture penalties (§2923.32(A) and part of (B)).
- Corrupt activity law allows private parties to commence civil actions for triple damages, a \$100,000 penalty, and forfeiture to the private person (§2923.34(B)-(N) & §2923.35(B)).
- Racketeering and Medicaid fraud law have a separate procedure for lien notices that are different from the “provisional title” concept of forfeiture law (§2923.36 & §2933.75).

- The offense of participating in a criminal gang and its non-forfeiture penalties (§2923.42(A), (B), part of (C), & (D)), including fines of twice the amount of gross proceeds wrongfully taken (also §2923.44(B)(5)(a), 2<sup>nd</sup> sentence & (B)(5)(b), which probably ought to move to §2925.42).
- Gang forfeiture law makes any building or land used by a criminal gang on more than two occasions in one year a nuisance subject to abatement (§2923.43).
- In a long section, drug forfeiture law (which earmarks forfeited monies to law enforcement) also earmarks fine money to law enforcement (§2925.42(B)(5)(b)).
- Forfeitures based on illegally taking wild animals and violating trademarks, discussed next (§1531.20 & §2913.34).

### **Wild Animals & Trademarks**

Current law requires forfeiture in cases involving the unlawful taking of animals (§1531.20). It contemplates a prompt, summary forfeiture. If you shoot the pheasant out of season, you forfeit the gun, bullets, and pheasant. Since the stakes typically are small and the need for prompt action great, summary forfeiture makes sense for the animals taken and items of limited value used in the taking.

However, §1531.20 also allows seizing any vehicle or boat used to unlawfully take and transport animals. The Commission will soon look at whether these forfeitures should be treated as mobile instrumentalities under this plan. Expensive equipment—such as large fish nets—also might follow the new rules.

Currently, goods produced in violation of a trademark, and the tools and equipment used to produce them, may be forfeited under §2913.34(D). Summary forfeiture of the goods produced makes sense. The Commission will discuss whether the equipment used to produce them should fall under the “instrumentality” rules.

## **OTHER DEFINITIONS**

### **Current Definitions**

Definitions in §§2923.31 (RICO), 2923.41 (gangs), 2925.41 (drugs), 2933.41 (“contraband”), and 2933.71 (Medicaid fraud) should remain as needed for law that does not move to Ch. 2981. Terms relevant only to Ch. 2981 should move and those relevant to both should appear in both.

### **New Definitions**

The proposal includes other definitions that allow further streamlining:

**“Offense”.** “Offense” would mean any act or omission that could be charged as a crime or delinquent act, irrespective of whether formal charges were brought (proposed §2981.01(B)(6)). The term covers all felonies and misdemeanors, including minor misdemeanors. The new definition gives the proposal a shorthand term to apply to both criminal and civil forfeitures, since civil forfeitures must arise out of an “offense”.

**“Property”.** The current definition of “property” covers “any property, real or personal, tangible or intangible, and any interest or license in that property” (§2901.01(A)(10)). The definition proceeds to list particular property.

The Commission began with the present definition. The proposal then adds property interests that are subject to forfeiture under current corrupt activity law: any benefit, privilege, claim, position, interest in an enterprise, or right derived directly or indirectly from the offense (proposed §2981.01(B)(8)). By making them “property”, they can be forfeited as “proceeds”. Remember, they are forfeitable now.

**“Property Subject to Forfeiture”.** Includes contraband, proceeds, and may include instrumentalities (proposed §2981.01(B)(9)).

**“Prosecutor”.** Picks up on current §2935.01’s definition to cover the county prosecutor, city law director, village solicitor, their assistants, and anyone else who prosecutes a case on behalf of a political subdivision. In addition, the definition includes the Attorney General, when relevant (proposed §2981.01(B)(10)).

**Other Terms.** As noted in the prior section, the proposal should carry over other definitions from current law, as needed.

## **TRAFFIC LAW FORFEITURES**

As part of its 1998 report on traffic offenses, the Sentencing Commission proposed several changes to traffic-related forfeitures. These were approved by the General Assembly in 2002 in Am. Sub. S.B. 123, sponsored by Senator W. Scott Oelslager. The changes take effect January 1, 2004.

Before S.B. 123, “forfeiture” had two meanings in the Traffic Code. First, the term referred to the State's acquiring title to a motor vehicle used in drunken driving and certain other offenses. Second, Title 45 sometimes

used the term “forfeit” to refer to a suspended or cancelled driver's license. S.B. 123 addresses both types of traffic forfeitures.

### **S.B. 123 Forfeiture Summary**

Exceeding 1,000 pages in bill form, S.B. 123 made scores of changes in traffic law. Passed unanimously in the Senate and with only three dissenters in the House, here is how it changes traffic forfeiture law:

- Ends third party vehicle forfeitures (*i.e.*, when the violator is driving another person's vehicle), thereby affording more protection for innocent people;
- Makes it easier to prosecute friends and relatives who allow suspended, drunken, or unlicensed persons to drive their cars;
- No longer uses the term “forfeiture” in the Traffic Code to describe a driver's license suspension or cancellation.

### **Third Party Forfeitures; Wrongful Entrustment**

Typically, “forfeiture” in the Traffic Code means losing title to a motor vehicle for certain serious traffic offenses. The Sentencing Commission did not second-guess using forfeitures as a tool to keep highways safer. Rather, it had concerns about how forfeiture works when a third party owns the vehicle involved in the offense.

Until S.B. 123 takes effect in 2004, arresting officers must seize and immobilize a vehicle driven by a drunken driver if the person had a prior OMVI in the past six years. Similar forfeitures occur for certain multiple DUS (driving under suspension) convictions, for driving under an OMVI suspension, and for driving under a financial responsibility suspension.

Pre S.B. 123 law required the seizure irrespective of whether the driver owned the car. The Ohio Supreme Court questioned this practice.

S.B. 123 eliminates innocent third party vehicle forfeitures. Except under the wrongful entrustment law (below), a driver only forfeits a vehicle when it is registered in the driver's name.

However, Commission members felt that a third party should bear some culpability for entrusting a vehicle to someone who is drunk, unlicensed, under a suspended license, or uninsured. Under current law, an “innocent owner's” vehicle could not be forfeited (§4503.235). If a person claimed the innocent owner defense, forfeiture is rare. To convict someone of wrongfully allowing such a person to drive, the prosecution

must prove a negative: that the person did not *know* the other was not allowed to drive.

S.B. 123 repeals the “innocent owner” defense. In its place, the bill beefs up the “wrongful entrustment” statute (§4511.203) by creating rebuttable presumptions (*prima facie* evidence) that a person violated the statute in certain cases when the person who loaned the car lives with, or is in the vehicle with, the driver.

The offense becomes a first degree misdemeanor with a possible Class 7 (up to 1 year) suspension. The offender's vehicle will be immobilized and its plates impounded for 30 days. The period becomes 60 days with one prior conviction. On the third offense, the offender's vehicle is forfeited and the offender cannot register another vehicle for five years.

In short, an innocent third party's vehicle can no longer be forfeited. Other third parties cannot have their vehicles seized, immobilized, or forfeited unless the third party is an owner who is charged with a third offense of wrongful entrustment.

### **Government Pays for Mistakes**

In a related change, S.B. 123 provides that a person whose vehicle impoundment was unauthorized cannot be charged storage or towing fees. Rather, the State or local entity that has jurisdiction over the law enforcement agency that impounded the vehicle would pay the fees (§4511.195(D)(1)(d)).

### **Operator's License Forfeitures**

S.B. 123 makes another more technical change regarding “forfeiture” in Traffic Law. Title 45 allows courts and the Bureau of Motor Vehicles to “forfeit” a driver's license or permit for certain violations. This is confusing. Does it mean the license is suspended, cancelled, or revoked? S.B. 123 gathered license suspension law in new Chapter 4510. It eliminated confusing terms such as “forfeit” and “revoke” in favor of standard definitions for “suspend” and “cancel” (§4510.01).

# ASSET FORFEITURE PROPOSAL

March 2003

Here is how the Commission's proposals look in bill form.

## §2901.01 CONTRABAND DEFINED

(A) As used in the Revised Code:

\* \* \*

(13) **"Contraband"** [*Limits "contraband" to property that is unlawful to possess—both more precise and more concise than current law*] means any property that is ~~unlawful~~ illegal for a person to acquire or possess under a statute, ordinance, or rule, or that a trier of fact lawfully determines to be illegal to possess by reason of the property's involvement in an offense. "Contraband" includes, but is not limited to, all of the following:

- (a) ~~Property that in and of itself is unlawful for a person to acquire or possess; [subsumed in the prior paragraph]~~
- (b) ~~Property that is not in and of itself unlawful for a person to acquire or possess, but that has been determined by a court of this state, in accordance with law, to be contraband because of its use in an unlawful activity or manner, of its nature, or of the circumstances of the person who acquires or possesses it, including, but not limited to, goods and personal property described in division (D) of section 2913.34 of the Revised Code; [covered as instrumentalities, defined later]~~
- (c) ~~Property that is specifically stated to be contraband by a section of the Revised Code or by an ordinance, regulation, or resolution; [subsumed in the lead paragraph]~~
- (d) ~~Property that is forfeitable pursuant to a section of the Revised Code, or an ordinance, regulation, or resolution, including, but not limited to, forfeitable firearms, dangerous ordnance, obscene materials, and goods and personal property described in division (D) of section 2913.34 of the Revised Code; [covered in new (c) and elsewhere]~~
- (e) ~~Any controlled substance, as defined in section 3719.01 of the Revised Code, or and any drug device, or paraphernalia, ~~money as defined in section 1301.01 of the Revised Code, or other means of exchange that has been, is being, or is intended to be used in an attempt or conspiracy to violate, or in a violation of, Chapter 2925. or 3719. of the Revised Code; [money becomes an "instrumentality"]~~~~
- (f)(b) ~~Any gambling device, or paraphernalia, ~~money as defined in section 1301.01 of the Revised Code, or other means of exchange that has been, is being, or is intended to be used in an attempt or conspiracy to violate, or in the violation of, Chapter 2915. of the Revised Code; [money becomes an "instrumentality"]~~~~
- (c) Firearms, dangerous ordnance, obscene materials; [from current law]
- (g) ~~Any equipment, machine, device, apparatus, vehicle, vessel, container, liquid, or substance that has been, is being, or is intended to be used in an attempt or conspiracy to violate, or in the violation of, any law of this state relating to alcohol or tobacco; [covered under "instrumentality"]~~
- (h) ~~Any personal property that has been, is being, or is intended to be used in an attempt or conspiracy to commit, or in the commission of, any offense or in the transportation of the fruits of any offense; [covered under "instrumentality"]~~

~~(i) Any property that is acquired through the sale or other transfer of contraband or through the proceeds of contraband, other than by a court or a law enforcement agency acting within the scope of its duties; [covered under "proceeds"]~~

~~(j) Any computer, computer system, computer network, computer software, or other telecommunications device that is used in a conspiracy to commit, an attempt to commit, or the commission of any offense, if the owner of the computer, computer system, computer network, computer software, or other telecommunications device is convicted of or pleads guilty to the offense in which it is used; [covered under "instrumentality"]~~

~~(k) Any property that is material support or resources and that has been, is being, or is intended to be used in an attempt or conspiracy to violate, or in the violation of, section 2909.22, 2909.23, or 2909.24 of the Revised Code or of section 2921.32 of the Revised Code when the offense or act committed by the person aided or to be aided as described in that section is an act of terrorism. As used in division (A)(13)(k) of this section, "material support or resources" and "act of terrorism" have the same meanings as in section 2909.21 of the Revised Code. [covered under "instrumentality"]~~

**§2929.1412 CRIMINAL FORFEITURE SPECIFICATION** *[New. Dovetails with the requirement in proposed §2981.04(A) that the charging instrument in a criminal forfeiture case contain a specification setting forth the property subject to forfeiture.]*

(A) Property is not subject to forfeiture in a criminal case unless the indictment or information charging the crime specifies, to the extent it is reasonably known at the time of filing, the nature and extent of the alleged offender's interest in the property, a description of the property, and, if the property is alleged to be an instrumentality, the alleged substantial connection between the property and the offense. The specification shall be stated in substantially the following form:

"SPECIFICATION (or SPECIFICATION TO THE FIRST COUNT). The grand jurors (or insert the person's or prosecuting attorney's name when appropriate) further find and specify that (set forth a description of the property subject to forfeiture)."

(B) The trier of fact shall determine whether the property is subject to forfeiture.

## NEW FORFEITURE CHAPTER

### §2981.01 PURPOSES; DEFINITIONS; APPLICATION

(A) **Purposes** [new] Forfeitures under this chapter shall be governed by all of the following purposes:

(1) To provide economic disincentives and remedies to deter and offset the economic effect of offenses by seizing and forfeiting contraband, proceeds, and certain instrumentalities;

(2) To ensure that seizures and forfeitures of instrumentalities are proportionate to the offense committed;

(3) To protect third parties from wrongful forfeiture of their property;

(4) To prioritize restitution for victims of offenses.

(B) **Definitions** As used in this chapter:

(1) "Criminal gang" means . . . [carry over from current law]

(2) “Felony drug abuse offense” means . . . [carry over from current law]

(3) “Instrumentality” [new] means property otherwise lawful to possess that is substantially connected to an offense.

Instrumentality may include, but is not limited to: a firearm; a mobile instrumentality; computer hardware, software, and networking devices; telecommunications devices; and money, as defined in section 1301.01 of the Revised Code, or any other means of exchange.

(4) “Law enforcement agency” [consolidated from RICO, drug, & Medicaid fraud law—§§2923.32(G), 2925.42(B)(5)(c)(i), & 2933.74(D)] includes, but is not limited to, the state board of pharmacy.

(5) “Mobile instrumentality” [new] means an instrumentality that is inherently mobile and used in the routine transport of persons. “Mobile instrumentality” includes, but is not limited to, any vehicle as defined in section 4501.01 of the Revised Code, any watercraft as defined in section 1547.01 of the Revised Code, and any aircraft as defined in section 4561.01 of the Revised Code.

(6) “Offense” [new] means any act or omission that could be charged as a crime or a delinquent act, whether or not a formal criminal prosecution or delinquency proceeding began at the time the forfeiture is initiated. Except as otherwise specified, an offense for which property may be forfeited includes any felony and any misdemeanor, including a minor misdemeanor.

(7) “Proceeds” [new] means all of the following:

(a) In cases involving unlawful goods, services, or activities, “proceeds” means any property derived directly or indirectly from an offense. “Proceeds” may include, but is not limited to, money, as defined in section 1301.01 of the Revised Code, or any other means of exchange. “Proceeds” is not limited to the net gain or profit realized from the offense.

(b) In cases involving lawful goods or services that are sold or provided in an unlawful manner, “proceeds” means the amount of money or other means of exchange acquired through the illegal transactions resulting in the forfeiture, less the direct costs lawfully incurred in providing the goods or services. The claimant has the burden of proof to show lawful costs. The lawful costs deduction shall not include any part of the overhead expenses of, or income taxes paid by, the entity providing the goods or services.

(8) “Property” [new] means, in addition to property defined in section 2901.01 of the Revised Code, any benefit, privilege, claim, position, interest in an enterprise, or right derived, directly or indirectly from the offense.

(9) “Property subject to forfeiture” [new] includes contraband and proceeds and may include instrumentalities as provided in this chapter.

(10) “Prosecutor” [current law] has the same meaning as in section 2935.01 of the Revised Code. When relevant, “prosecutor” also includes the attorney general.

[Insert other relevant definitions from §§2923.31, 2923.41, 2925.01, & 2933.71.]

(C) **This Chapter Controls** The penalties and procedures under Chapters 2923. [RICO & gangs], 2925. [drugs], and 2933. [contraband & Medicaid fraud] of the Revised Code remain in effect to the extent that they do not conflict with this chapter.

## §2981.02 PROPERTY SUBJECT TO CRIMINAL OR CIVIL FORFEITURE

(A) **Scope** [new clarity] The following property is subject to forfeiture to the state or a political subdivision under either the criminal or delinquency process in section 2981.04, or the civil process in section 2981.05, of the Revised Code:

- (1) Any **contraband** involved in any offense;
- (2) Any **proceeds** involved in any offense;
- (3) Any **instrumentality**, provided it is substantially connected to the commission or facilitation of the following offenses [*“substantial connection” replaces current law’s “used in” standard*]:

- (a) **Felonies** Any felony;
- (b) **Misdemeanors** A misdemeanor when specifically authorized by the statute or ordinance that creates the offense or sets forth its penalties.

(B) **Guidance as to “Substantial Connection”** [new] In determining whether an alleged instrumentality is “substantially connected” to the commission or facilitation of an offense or to an attempt, complicity, or conspiracy to commit an offense, the trier of fact shall consider any or all of the following:

- (1) Whether the offense could not have been committed or attempted but for the presence of the instrumentality; or
- (2) Whether the primary purpose in using the instrumentality was to commit or attempt to commit the offense; or
- (3) The extent to which the instrumentality furthered the commission of, or attempt to commit, the offense.

(C) **Vehicle Forfeitures** [implied in current law] This chapter does not apply to or limit forfeitures under Title XLV of the Revised Code, including forfeitures relating to vehicular homicide and vehicular assault.

## §2981.03 PROVISIONAL TITLE; PRESERVING PROPERTY; HARDSHIP RELEASE

(A)

- (1) **Provisional Title** [replaces the “vesting” notion in current gang & drug law— §§2923.44(A)(2), 2923.45(B)(1), & 2925.43(B)(1)] The state or political subdivision acquires provisional title to property subject to forfeiture under this chapter upon a person’s commission of an offense giving rise to forfeiture, subject to a final adjudication under section 2981.04 or 2981.05 of the Revised Code.

Provisional title authorizes the state or subdivision to seize and hold the property and to act to protect the property under this section before any proceeding under this Chapter. Title to the property vests with the state or subdivision when the trier of fact renders a final forfeiture verdict or order under section 2981.04 or 2981.05 of the Revised Code, subject to third party claims adjudicated under those sections.

- (2) **Presumption** [nearly verbatim from current gang & drug law— §§2923.44(C) & 2925.42(C)] There shall be a rebuttable presumption that the state or subdivision has

provisional title and a right to hold property, subject to third party claims, if the state or subdivision proves both of the following by a preponderance of the evidence:

- (a) The interest in the property was acquired by the offender during the commission of the crime, or within a reasonable time after that period;
- (b) There is no likely source for the interest in the property other than as proceeds obtained from the commission of the crime.

(3) **Realty in Civil Cases** [*new*] In a civil forfeiture case under this chapter in which the state or subdivision seeks to seize realty, the property owner may request a hearing before the seizure in which the state or subdivision shall show probable cause that the property is subject to forfeiture.

(4) **Seizing Property** [*replaces the awkward presumption in current gang law—§2923.43(A)(1)*] A law enforcement officer may seize property that the officer has reasonable cause to believe is property subject to forfeiture.

[Streamlines the ability to seek relief from an alleged unlawful seizure—§2923.47 & §2925.45] A person aggrieved by an alleged unlawful seizure of property may seek relief from the appropriate court. The motion shall show the movant's interest in the property, state why the seizure was unlawful, and request the property's return. The court shall promptly schedule a hearing on the motion if filed before an indictment, information, or complaint is filed seeking forfeiture of the property. At the hearing, the movant must show by a preponderance of the evidence that the seizure was unlawful and that the movant is entitled to the property. If the motion is filed after the indictment, information, or complaint, the court shall consider the motion as a motion to suppress evidence.

[From current §2933.43(A)(2), but recognizes the 72-hour time frame is unworkable. Notice here could trigger the accelerated right to hardship release under (D)(3) & (5).] If a law enforcement officer seizes property that is titled or registered under law, the officer or the officer's employing agency shall notify the owner of the seizure. Notice shall be given to the owner at the owner's last known address as soon as practical after the seizure, and may be given orally by any means, including telephone, or by certified mail. If the officer or agency is unable to provide the notice required by this division despite reasonable, good faith efforts, the efforts constitute fulfillment of the notice requirement.

(B) **Actions to Preserve Reachability of Property**

(1) **Restraining Order, Bond, Etc.** [*expands current RICO, gang, drug, & Medicaid fraud law—§§2923.33(A)-(C), 2923.44(D), 2925.42(D)(1), & 2933.72(A)-(C)*] Upon application by the prosecutor who prosecutes or brings an action that allows forfeiture under this chapter, the court of competent jurisdiction over the forfeiture action may make an order taking any other reasonable action necessary to preserve the reachability of the property including, but not limited to, a restraining order or injunction, an order requiring execution of a satisfactory bond or insurance policy, an order to inspect, photograph, or inventory the property, placing a lien or lis pendens against the property, or appointing a receiver at any of the following times:

- (a) Upon filing a complaint, indictment, or information alleging that property is subject to forfeiture under section 2981.02 of the Revised Code;
- (b) Prior to filing complaint, indictment, or information, if, after notice is given to all persons known to have a interest in the property, and those persons have an opportunity to be heard, the court determines all of the following:
  - (i) There is substantial probability the state or subdivision will prevail on the forfeiture issue;

(ii) There is substantial probability that failure to enter the order will result in the property being destroyed, removed from the court's jurisdiction, or otherwise made unavailable for forfeiture;

(iii) The need to preserve the availability of the property outweighs the hardship on the person against whom the order is to be entered. [differs from the current RICO standard which says the "order would not result in irreparable harm to the person against whom the order is entered" (§2923.33(B)(2))]

(c) [new] As a condition of releasing the property based on a substantial hardship under division (D) of this section.

(2) **90-Day Limit** [current RICO, gang, drug, & Medicaid fraud law—§2923.33(B)(2), 2923.44(D)(2), 2925.42(D)(2), & 2933.72(B)(2)] An order under division (B)(1)(b) of this section is effective for not more than ninety days, unless extended by the court for good cause shown, or unless an indictment, information, or complaint is filed alleging that the property is subject to forfeiture.

(3) **Ex Parte Orders** [current RICO, gang, drug & Medicaid fraud law—§§2923.34(C)(3), 2923.44(D)(3), 2925.42(D)(3), & 2933.72(C)(3)] A court may issue an order under division (B)(1) of this section, without giving notice or a hearing to a person known to have an interest in the property, if the prosecutor demonstrates that the property is subject to forfeiture and that giving notice and a hearing will jeopardize the availability of the property for forfeiture.

Notwithstanding the ninety day limit in division (B)(2) of this section, an order under this division is effective for not more than ten days unless extended for good cause shown or unless the person subject to the order consents to a longer period. If a hearing is requested on the order, the court shall hold the hearing at the earliest possible time before the order expires.

(4) **Evidence; Record** [streamlines current gang & drug law—§§2923.44(D)(4) & 2925.42(D)(4)] At any hearing under division (B) of this section, the court may receive and consider evidence and information that is inadmissible under the Rules of Evidence. The hearing shall be recorded and a transcript made. If property is to be seized as a result of the hearing, the recording and transcript shall not be a public record for purposes of section 149.43 of the Revised Code until the property is seized. This section does not authorize making any confidential law enforcement investigatory record or trial preparation record available for inspection.

(C) **Replevin, Conversion, Etc. Stayed** [expands current gang, contraband, & drug law beyond replevin in civil cases—§2923.45(B)(3), 2933.43(B)(2), & 2925.43(B)(3) and applies it to RICO and Medicaid cases] Except as otherwise provided in division (E) of this section, any replevin, conversion, or other civil action brought concerning property subject to a criminal or civil forfeiture action under this chapter shall be stayed until the forfeiture case is resolved.

(D) **Pretrial Hardship Release** [new]

(1) **From Custodian** A person with an interest in property subject to forfeiture under this chapter may seek conditional release of property under this section by requesting possession from the appropriate official with custody of the property. The request shall show how divisions (D)(3)(a), (b), and (c) are met.

(2) **By the Court; Timing** If the property is not released within fifteen days after a request under division (D)(1) of this section, or within seven days after the request if the property was seized as a mobile instrumentality or the request is to copy records, the claimant may file a petition for conditional release with the court in which the complaint was filed, or if no complaint, the court that issued the seizure warrant for the property.

The petition shall show how divisions (D)(3)(a), (b), and (c) are met and the steps taken to secure release of the property from the appropriate official. Unless extended for good cause shown, the petition shall be filed within thirty days of the filing of a complaint, indictment, or information in the case.

If personal, business, or governmental records are seized, including those contained in computer files, a claimant may petition the court for a prompt opportunity to copy any files that are not contraband. The court may grant the order if the claimant shows divisions (D)(3)(a) and (c) are met. The court shall order a competent person to supervise the copying.

**(3) Exceptions** Except when there is probable cause that the property is contraband or the proceeds of an offense, property that must be held for a reasonable time as evidence related to an offense, or property that is likely to be used in additional offenses, conditional release of property subject to forfeiture may be granted to a claimant who demonstrates all of the following:

- (a) A possessory interest in the property;
- (b) Sufficient ties to the community to provide assurance that the property will be available at the time of trial;
- (c) Failure to release the property will cause a substantial hardship.

**(4) “Hardship” Guidance** In determining whether a substantial hardship exists, the court shall weigh whether the claimant’s likely hardship from the state’s or subdivision’s continued possession of the property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if returned to the claimant.

The court shall consider in favor of release whether withholding the property would prevent a legitimate business from functioning, prevent the claimant or an innocent person from maintaining employment, or leave the claimant or an innocent person homeless.

**(5) Government Options** If the state or subdivision shows that the claimant’s claim is frivolous, the court shall deny the request. Otherwise, the state or subdivision may respond to the request by submitting evidence ex parte to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending trial.

**(6) Court Decision Timing** The court shall render a decision on the request not more than thirty days after it is filed. If the property seized is alleged to be a mobile instrumentality, the court shall render a decision on the request as soon as practical within the thirty day period. If personal, business, or governmental records were seized and a claimant files a request to copy the records, the court shall render a decision as soon as practical. In any case, the time may be extended by consent of the parties or by the court for good cause shown.

**(7) Release** If the court finds that division (D)(3) is met, the court shall order the property’s conditional return to the claimant pending completion of the forfeiture proceedings. In making this order, the court shall notify the claimant of the prohibitions against interfering with or diminishing property in section 2981.07 of the Revised Code.

**(8) Conditions** If the court grants the request to release property, it may make any order necessary to ensure that the value of the property is maintained pursuant to division (B) of this section.

**(E) Rights of Financial Institutions** *[streamlined from current gang & drug law— §§2923.44(A)(2) & .45(B)(4), & .46(C)(1)&(3) & 2925.42(A)(4) & .43(B)(4)]* Nothing in this section

precludes a financial institution that has or purports to have a security interest in or lien on property described in section 2981.02 of the Revised Code from filing an action in connection with the property, prior to its disposition under this chapter, to obtain possession of the property in order to foreclose or otherwise enforce the security interest or lien.

If a financial institution commences a civil action or takes any other appropriate legal action to sell the property prior to its seizure or prior to its disposition under this chapter, and if the person who is responsible for conducting the sale has actual knowledge of the commencement of a forfeiture action under either section 2981.04 or section 2981.05 of the Revised Code, then the person shall dispose of the proceeds of the sale in the following order:

(1) First, to the payment of the costs of the sale, excluding any associated attorney's fees, and to the payment of the costs incurred by law enforcement agencies and financial institutions in connection with the seizure, storage, and maintenance of, and provision of security for, the property.

(2) Second, in the order of priority of the security interests and liens, to the payment of valid security interests and liens pertaining to the property that, at the time of the state or subdivision gains provisional title, are held by known secured parties and lienholders.

(3) Third, to the court that has or would have jurisdiction in a case proceeding under section 2981.04 or section 2981.05 of the Revised Code for disposition under this chapter.

**(F) Filing and Relationship of Criminal and Civil Forfeiture Actions** [*Specifies deadlines. Otherwise streamlines current drug law—§2925.43(C)(3) & (D)(1)—and applies to other cases*] A prosecutor may file a forfeiture action under section 2981.04 or 2981.05 of the Revised Code, or both. If property is seized pursuant to this section and a criminal forfeiture has not begun under section 2981.04 of the Revised Code, the prosecutor of the county in which the seizure occurred shall commence a civil action to forfeit that property under section 2981.05 of the Revised Code.

If property alleged to be a mobile instrumentality is seized, the civil action shall be brought within thirty days of seizure. If any other property is seized, the action shall be brought within sixty days of seizure. In either case, the period may be extended by agreement of the parties or by the court for good cause shown.

Nothing in this division precludes the prosecutor from filing an appropriate charging instrument under section 2981.04 of the Revised Code to seek a criminal forfeiture after the civil forfeiture action begins. Filing such a charging instrument for an offense that is also the basis of a civil forfeiture action shall stay the civil action.

A civil action to obtain civil forfeiture may be commenced as described in section 2981.05 of the Revised Code whether or not the charged adult or juvenile offender has been convicted or adjudicated delinquent.

**(G)** [*Streamlines RICO law—§2923.35(C)(4) & (A)(2)*] The prosecutor shall maintain an accurate record of each item disposed under sections 2981.04 and 2981.05 of the Revised Code. The record shall not identify or enable the identification of the officer who seized the property. The record is a public record open for inspection under section 149.43 of the Revised Code.

## **§2981.04 CRIMINAL FORFEITURE PROCESS**

**(A) Specification; Notice** [*Streamlined from current gang, drug, & civil Medicaid fraud law—§2923.44(B)(1), 2925.42(B)(1), §2933.73(B)—made clear for RICO forfeitures. (A)(3) is new.*] Property described in section 2981.02 of the Revised Code may be forfeited under this

section only if the complaint, indictment, or information charging the crime, or the complaint charging the delinquent act, contains a specification, that sets forth all of the following to the extent it is reasonably known at the time of the filing:

- (1) The nature and extent of the alleged offender's interest in the property;
- (2) A description of the property;
- (3) If the property is alleged to be an instrumentality, the alleged substantial connection between the property and the offense.

If the property was not reasonably foreseen to be subject to forfeiture at the time of filing the indictment, information, or complaint, the trier of fact may still reach a verdict of forfeiture concerning that property in the hearing described in division (B) of this section, but only if the prosecutor gave prompt notice under Criminal Rule 7(E) to the alleged offender of the property when it was discovered to be subject to forfeiture.

[Replaces RICO and drug law's 2-hearing requirement—§2923.44(B)(4) & §2925.42(B)(4)] For good cause shown, the court may consider issues of guilt separate from whether property specified as subject to forfeiture should be forfeited.

**(B) Forfeiture Burden & Verdict** *[Burden of proof raised from “preponderance of the evidence” to “beyond a reasonable doubt”. Otherwise streamlined from current gang and drug law—§§2923.44(B)(3) & 2925.42(B)(3)—more elaborate than corrupt activity law (§2923.32).]* Once a person is found guilty of a crime or delinquent act with a specification covering property subject to forfeiture under section 2981.02 of the Revised Code, the trier of fact shall determine whether the defendant's property shall be forfeited.

If the state or subdivision shows, by proof beyond a reasonable doubt, that the property is subject to forfeiture under section 2981.02 of the Revised Code, in whole or part, after a proportionality review under section 2981.08 of the Revised Code when relevant, the trier of fact shall render a verdict of forfeiture that specifically describes the extent of the property subject to forfeiture. If the trier of fact is a jury, on the offender's motion, the judge shall make the determination.

**(C) Sentence** *[Streamlined from gang and drug law (§§2923.44(B)(5)(a) & 2925.42(B)(5)-(a)), implied in corrupt activity law.]* If a verdict of forfeiture is entered under this section, the court imposing sentence or disposition shall, in addition to any other sentence authorized by Chapter 2929. or 2152. of the Revised Code, order that the offender forfeit to the state or subdivision the offender's interest in the property. The property vests with the state or subdivision subject to the claims of third parties. The court may issue any additional order to affect the forfeiture, including, but not limited to, orders under section 2981.06 of the Revised Code.

**(D) Locating and Serving Notice to Interested Parties** *[consolidates & streamlines current gang & drug law—§§2923.44(F)(2) & 2925.42(F)(2)]—and applies to other forfeitures]* After the entry of a forfeiture order under this section, the prosecutor shall attempt to identify any person with an interest in the property subject to forfeiture by searching appropriate public records and making reasonably diligent inquiries.

The prosecutor shall give notice of the pending forfeiture and proposed disposal to any person known to have an interest in the property. The prosecutor also shall publish notice once each week for two consecutive weeks in a newspaper of general circulation in the county in which the property was seized.

**(E) Hearing Third Party Claims** *[Consolidates current RICO, gang, drug, & Medicaid fraud law—§§2923.32(E)(2)-(4), 2923.44(F), 2925.42(F) & 2933.73(F)(2)&(3). The affidavit under (E)(2) comes from gang & drug law—§§2923.44(F)(3)(b) & 2925.42(F)(3)(b). It's new to others.]*

(1) **Petition for Hearing** Any person, other than the offender whose conviction or adjudication of delinquency is the basis of the forfeiture order, who asserts a legal interest in the property that is the subject of the order, may petition the court that issued the order for a hearing to adjudicate the validity of the person's alleged interest in the property.

(a) **Time for Filing** The petition shall be filed within thirty days after the final publication of notice or the person's receipt of notice under this section.

(b) **Contents** The petition shall be signed by the petitioner under the penalties for falsification specified in section 2921.13 of the Revised Code. The petition shall also set forth the nature and extent of the petitioner's interest in the property, the time and circumstances of the petitioner's acquisition of that interest, any additional facts supporting the petitioner's claim, and the relief sought.

(2) **Affidavit for Hearing** In lieu of filing a petition as described in division (E)(1) of this section, a secured party or other lienholder of record that asserts a legal interest in the property that is the subject of the forfeiture order, including, but not limited to, a mortgage, security interest, or other type of lien, may file an affidavit as described in this division to establish the validity of the alleged right title, or interest in the property.

(a) **Time for Filing** The affidavit shall be filed within thirty days after the earlier of the final publication of notice or the receipt of notice under this section.

(b) **Evidentiary Value** Except as otherwise provided in this section, the affidavit shall constitute prima facie evidence of the validity of the secured party's or other lienholder's alleged interest in the property.

(c) **Procedure for Challenging** Unless the prosecutor files a motion challenging the affidavit within ten days after its filing and unless the prosecutor establishes, by a preponderance of the evidence, at a subsequent hearing before the court that issued the forfeiture order, that the secured party or other lienholder does not possess the alleged interest in the property or that the secured party or other lienholder had actual knowledge of facts pertaining to the crime that was the basis of the forfeiture order, the affidavit shall constitute conclusive evidence of the validity of the secured party's or other lienholder's interest in the property.

(i) **Time of Hearing** To the extent practical and consistent with the interests of justice, any such hearing shall be held within thirty days after the prosecutor files the motion.

(ii) **Rights** At any such hearing, the prosecutor and the secured party or other lienholder may present evidence and witnesses and cross-examine witnesses.

(d) **Legal Effect of the Affidavit** Any subsequent purchaser or other transferee of the property pursuant to forfeiture under this section shall take the property subject to the continued validity of the interest of the secured party or other lienholder of the property.

(e) **Contents of the Affidavit** To be valid for purposes of this division, the affidavit of a secured party or other lienholder shall contain averments that the secured party or other lienholder acquired its alleged right, title, interest in the property in the regular course of its business, for a specified valuable consideration, without actual knowledge of any facts pertaining to the crime that was the basis of the forfeiture order, in good faith and without the intent to prevent or otherwise impede the state or subdivision from seizing or obtaining a forfeiture of the property.

(3) **Hearing** Upon receipt of a petition or affidavit filed under division (E)(1) or (2) of this section, the court shall hold a hearing to determine the validity of the petitioner's interest in the property that is the subject of the forfeiture order.

(a) **Time of Hearing** To the extent practical and consistent with the interests of justice, the hearing shall be held within thirty days after the filing of the petition.

(b) **Consolidation** The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the offender whose conviction or adjudication of delinquency is the basis of the forfeiture order.

(c) **Rights** At the hearing, the petitioner may testify, present evidence and witnesses on the petitioner's behalf, and cross-examine witnesses for the state or subdivision. The state or subdivision may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses for the petitioner.

(d) **Case Record** In addition to evidence and testimony presented at the hearing, the court shall consider the relevant portions of the record in the criminal or juvenile case that resulted in the forfeiture order.

(F) **Amending the Forfeiture Order** [*Consolidates current RICO, gang, drug, & Medicaid fraud law—§§2923.32(E)(4), .*]

(1) **Amending in Favor of the Petitioner** The court shall amend its forfeiture order if it determines, at the hearing, that the petitioner has established either of the following by a preponderance of the evidence:

(a) The petitioner has a legal interest in the property that renders the forfeiture order completely or partially invalid because it was vested in the petitioner, rather than the offender whose conviction or adjudication of delinquency is the basis of the order, or was superior to any interest of that offender, at the time of the commission of the crime that is the basis of the order.

(b) The petitioner is a bona fide purchaser for value of the interest in the property and was, at the time of the purchase, reasonably without cause to believe that it was subject to forfeiture.

(2) **Amending in Favor of the Affiant** The court shall also amend its forfeiture order to reflect any interest of a secured party or other lienholder of record in the property subject to forfeiture who prevails at a hearing on the petition or affidavit filed pursuant to division (E)(1) or (2) of this section.

(G) **Clear Title** [*from current drug law--§2925.42(G)(1)*] If the court disposes of all petitions or affidavits timely filed under this section, the state or subdivision shall have clear title to all property that is the subject of a forfeiture order issued under this section and may warrant good title to any subsequent purchaser or other transferee.

## **§2981.05 CIVIL FORFEITURE PROCESS**

(A) **Filing a Civil Complaint** [*Consolidates current RICO, gang, & drug law--§§2923.34(A), 2923.45(E)(1), & 2925.43(E)(1)*] The prosecutor of the place in which property described in section 2981.02 of the Revised Code is located may commence a civil forfeiture action under this section by filing, in the court of common pleas of that county, a complaint requesting an order that forfeits the property to the state or a political subdivision. The filing shall be consistent with division (F) of section 2981.03 of the Revised Code.

(B) **Locating Interested Parties** [*consolidates & streamlines current gang & drug law—§§2923.45(E)(2) & 2925.43(E)(2)—and applies to other forfeitures*] Prior to or upon the

commencement of a civil forfeiture action, the prosecutor shall attempt to identify any person with an interest in the property subject to forfeiture by searching appropriate public records and making reasonably diligent inquiries.

**(C) Serving Notice** [*ditto (B)*] The prosecutor shall then give notice of the commencement of the civil action, together with a copy of the complaint, to each person who is reasonably known to have any interest in the property, by certified mail, return receipt requested, or by personal service. If any such person cannot be located, the prosecutor shall cause a similar notice to be published once each week for two consecutive weeks in a newspaper of general circulation in the county in which the property is located.

**(D) Third Party Claimant's Options** [*consolidates & streamlines current gang & drug law—§§2923.45(E)(3)&(4) & 2925.43(E)(3)&(4)*] A person with an interest in the property may petition the court to release property pursuant to division (D) of section 2981.03 of the Revised Code. The court shall consider the petition as provided in that section. If a timely petition for pretrial hardship release is not filed, or if a petition is filed but not granted, the person may file a claim under the Rules of Civil Procedure. The court shall dispose of any motions or petitions timely filed under this section.

**(E) Civil Forfeiture Order** [*consolidates and elaborates on current gang & drug law—§§2923.45(E)(5) & 2925.43(E)(5)*] The court shall issue a civil forfeiture order if it determines that the prosecutor has proven, by a preponderance of the evidence, that the property is forfeitable under section 2981.02 of the Revised Code, and, after a proportionality review under section 2981.08 of the Revised Code when relevant, the trier of fact specifically describes the extent of the property to be forfeited.

A civil forfeiture order shall state that all interest in the property in question of the adult or juvenile who committed the act that is the basis of the order is forfeited to the state or subdivision and shall make due provision for the interest in that property of any other person when appropriate under this section. The court may issue any additional order to affect the forfeiture, including, but not limited to, orders under section 2981.06 of the Revised Code.

**(F) Clear Title** If the court disposes of all petitions timely filed under this section, the state or subdivision shall have clear title to all property that is the subject of a forfeiture order under this section and may warrant good title to any subsequent purchaser or other transferee.

## **§2981.06 ORDERS AFTER A FORFEITURE VERDICT**

**(A) Seizure** [*consolidates current RICO, gang, & drug law—§2923.32(C) & 1<sup>st</sup> ¶ of §§2923.44(E)(1) & 2925.42(E)(1)*] Upon the entry of a forfeiture order under section 2981.04 or 2981.05 of the Revised Code, if necessary, the court shall order an appropriate law enforcement officer to seize the forfeited property on conditions that the court considers proper. If necessary, the court shall order the person in possession of the property to deliver the property, by a specific date, to the law enforcement agency involved in the initial seizure. Delivery of the order shall be by personal service or certified mail.

**(B) Follow-up Orders** [*consolidates the remaining provisions of sections noted in (A) with current RICO & Medicaid fraud law and other parts of gang & drug law--§§2923.35(A), 2923.44(E)(2), 2925.42(E)(2), & 2933.74(A)*] With respect to property that is the subject of a forfeiture order issued under this chapter, the court that issued the order, upon petition of the prosecutor who prosecuted the underlying offense or act or brought the civil action under section 2981.04 or 2981.05 of the Revised Code, may do any of the following:

- (1) Enter any appropriate restraining orders or injunctions; require execution of satisfactory performance bonds, appoint receivers, conservators, appraisers,

accountants, or trustees; or take any other action necessary to safeguard and maintain the forfeited property. Any income accruing to or derived from the forfeited property may be used to offset ordinary and necessary expenses related to the property that are required by law or necessary to protect the interest of the state, subdivision, or third parties.

(2) Authorize rewards to persons who provide information resulting in forfeiture under this chapter with funds provided under division (F) of section 2981.12 of the Revised Code;

(3) Authorize the prosecutor to settle claims;

(4) Restore forfeited property to victims and grant petitions for mitigation or remission of forfeiture;

(5) [streamlined from RICO law—§2923.35(C)(3)] Authorize a stay of the forfeiture order pending appeal or resolution of any claim to the property, if requested by a person other than the defendant or a person acting in concert with, or on behalf of, the defendant.

**(C) Depositions** [*consolidated from current gang & drug law--§§2923.44(E)(3) & 2925.42(E)(3)—and applied to other forfeitures*] To facilitate the identification and location of property that is the subject of a forfeiture order, and to facilitate the disposition of petitions for remission or mitigation issued under this section, after the issuance of a forfeiture order and upon application by the prosecutor, the court may order that the testimony of any witness relating to the forfeited property be taken by deposition, and that any designated material that is not privileged be produced at the same time and place as the testimony, consistent with the Civil Rules.

**(D) Substitute Property** [*consolidated and streamlined from current RICO, gang, drug, & Medicaid fraud laws—§§2923.32(B)(5), 2923.44(B)(6), 2925.42(B)(6), & 2933.73(C)*] The court shall order forfeiture of any other property of the offender up to the value of the unreachable property if any of the following describe any property subject to a forfeiture order under section 2981.04 or 2981.05 of the Revised Code:

(1) It cannot be located through due diligence;

(2) It has been transferred, sold, or deposited with a third party;

(3) It has been placed beyond the jurisdiction of the court;

(4) It has been substantially diminished in value, or has been commingled with other property and cannot be divided without difficulty or undue injury to innocent persons.

**(E) Disposition** [*consolidates current RICO, gang, drug, Medicaid law—§§2923.35(C)(1), 2923.44(E)(2)(d), 2925.42(E)(2)(d), & 2933.74(B)(1)*] After the state or subdivision is granted clear title under section 2981.04 or 2981.05 of the Revised Code, the prosecutor shall direct disposition of the property pursuant to this chapter, making due provisions for the rights of innocent persons.

**(F) Property Does Not Revert** [*consolidates current RICO, gang, drug, & Medicaid fraud law—§2923.35(C)(2), 2<sup>nd</sup> ¶ of §§2923.44(E)(1) & 2925.42(E)(1), & §2933.74(B)(2)*] Any interest in property not exercisable by, or transferable for value to, the state or political subdivision shall expire and shall not revert to the offender who forfeited the property. The offender is not eligible to purchase the property at a sale under this chapter.

## **§2981.07 PROHIBITION AGAINST DIMINISHING PROPERTY** [*New; similar to CAFRA*]

**(A) The Offense** No person shall destroy, damage, remove, transfer, or otherwise take any action with purpose to do any of the following:

- (1) Prevent or impair the state's or subdivision's lawful authority to take the property into its custody or control under this chapter or to continue holding the property under its lawful custody or control;
- (2) Impair or defeat the court's continuing jurisdiction over the person and property;
- (3) Devalue property that the person knows, or has reasonable cause to believe, is subject to forfeiture proceedings under this chapter.

(B) **Penalty** Whoever violates division (A) of this section is guilty of interference with or diminishing forfeitable property, and shall be punished as follows. If the value of the property is less than five hundred dollars, the offense is a misdemeanor of the first degree. If the value of the property is five hundred dollars or more but less than five thousand dollars, the offense is a felony of the fifth degree. If the value of the property is five thousand dollars or more but less than one hundred thousand dollars, the offense is a felony of the fourth degree. If the value of the property is one hundred thousand dollars or more, the offense is a felony of the third degree.

## §2981.08 RIGHTS TO A JURY TRIAL & PROPORTIONALITY REVIEW

(A) **Right to a Jury Trial** Parties to a forfeiture case under this chapter have a right to trial by jury as follows:

- (1) **Criminal Forfeiture** In a criminal forfeiture trial, the defendant has the right, but not the state, political subdivision, or third parties;
- (2) **Civil Forfeiture** [New] In a civil forfeiture action, both the defendant and the state or political subdivision have the right.

(B) **Right to Proportionality Review** [New] Property substantially connected to the offense is subject to forfeiture as an instrumentality under section 2981.04 or 2981.05 of the Revised Code only if the amount of property is substantially proportionate to the severity of the offense.

(1) **The Standard** In determining substantial proportionality, the court shall consider the severity of the offense and the value of the property subject to forfeiture.

(2) **Limitation** Contraband and any proceeds obtained from the offense are not subject to proportionality review.

(3) **Factors to Determine Severity** In determining the severity of the offense for purposes of forfeiture, the court shall consider relevant factors including, but not limited to, the following:

- (a) The seriousness of the offense and its impact on the community, including the duration of the activity and the harm caused or intended by the claimant;
- (b) The extent to which the claimant participated in the offense;
- (c) Whether the offense was completed or attempted.

(4) **Factors to Determine Value** In determining the value of the property involved, the court shall consider relevant factors including, but not limited to, the following:

- (a) The fair market value of the property;
- (b) The value of the property to the claimant, including hardship to the claimant or to innocent parties if the property were forfeited.

## §2981.11 PROPERTY HELD BY LAW ENFORCEMENT AGENCIES

*[This would generally govern property in the law enforcement agency's custody. Current law calls abandoned property and property where the true owner can't be found "contraband". This draft*

avoids that term, but otherwise tracks relevant parts of current §§2933.41(A), 2923.32, & 2933.42). It also makes sure that relevant language in repealed §2933.43(B)(2) is covered.]

**(A) General Rule & Exceptions**

**(1) Keep Safe** [*rearranged and streamlined from current contraband law—1<sup>st</sup> part of §2933.41(A)(1)*] Any property that has been lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited, and that is in the custody of a law enforcement agency shall be kept safely by the agency, pending the time it no longer is needed as evidence or for another lawful purpose, and disposed of pursuant to sections 2981.12 and 2981.13 of the Revised Code.

**(2) Exceptions** [*modified from current contraband law—§2933.41(F)&(H)*] This chapter shall not apply to the custody and disposal of any of the following:

(a) Vehicles subject to forfeiture under Title 45 of the Revised Code, except as provided in division (A)(6) of section 2981.12 of the Revised Code;

(b) Abandoned junk motor vehicles or other property of negligible value [expands current §2933.41(F), which only covers junk vehicles];

(c) Property held by a department of rehabilitation and correction institution that is unclaimed, that does not have an identified owner, that the owner agrees to dispose, or that is identified by the department as having little value [new];

(d) Animals taken, and devices used in unlawfully taking animals, under section 1531.20 of the Revised Code;

(e) Controlled substances sold by a peace officer in performance of official duties under section 3719.141 of the Revised Code [which has its own internal control policy];

(f) Property recovered by a township law enforcement agency under sections 505.105 to 505.109 of the Revised Code [current §2933.41(H)];

(g) Property held and disposed of under an ordinance of the municipal corporation or under sections 737.29 to 737.33 of the Revised Code. However, when a municipal corporation that has received notice of a reward program as provided in division (F) of section 2981.12 of the Revised Code disposes of property under an ordinance, it shall pay twenty-five per cent of the gains from any sale or auction to the program under that division [current §2933.41(F)].

**(B) Recordkeeping & Reports** [*consolidated and streamlined from current RICO, gang, contraband, Medicaid fraud law—§§2923.32(B)(6)& (C), 2923.35(C)(4), 2923.42(C)(2), 2933.41(A)(2), 2933.43(D)(3)(a)(i)&(b), 2933.73(D), & 2933.74(B)(4). The formal internal control policy would be new to contraband law. Covers property held, unless exempted under (A)(2).*]

**(1) Internal Control Policy** Each law enforcement agency that has custody of any property that is subject to this section shall adopt and comply with a written internal control policy that does all of the following:

(a) Provides for keeping detailed records as to the amount of property taken in by the agency and the date property was acquired;

(b) Provides for keeping detailed records of the disposition of the property, which shall include, but not be limited to, all of the following:

(i) The manner in which it was disposed, the date of disposition, detailed financial records concerning any property sold, and the name of any person who received the property. However, the record shall not identify or enable identification of the individual officer who seized any item of property;

(ii) The general types of expenditures made with amounts gained from the sale of the property that are retained by the agency, including

the specific amount expended on each general type of expenditure. However, the policy shall not provide for or permit the identification of any specific expenditure that is made in an ongoing investigation.

(c) Complies with section 2981.13 of the Revised Code, if the agency has a law enforcement trust fund or similar fund created under that section.

(2) **Report to AG** Each law enforcement agency that, during any calendar year, has any seized or forfeited property covered by this section in its custody, including amounts distributed to its law enforcement trust fund, or similar fund created for the state highway patrol, department of public safety, or state board of pharmacy, under section 2981.13 of the Revised Code, shall prepare a report covering the calendar year that cumulates all of the information contained in all of the public records kept by the agency pursuant to this section for that calendar year and shall send a copy of the cumulative report, no later than the first day of March in the calendar year following the calendar year covered by the report, to the attorney general. [Currently DPS must file its report by August, rather than March. This makes every agency file by March.]

(3) **Public Record** The records kept under the internal control policy shall be open to public inspection during the agency's regular business hours. The policy adopted under this section and each report received by the attorney general is a public record open for inspection under section 149.43 of the Revised Code.

(4) **AG's Report to GA** Not later than the fifteenth day of April in the calendar year in which reports are sent to the attorney general under this section, the attorney general shall send to the president of the senate and the speaker of the house of representatives a written notice that does all of the following:

(a) Indicates that the attorney general received the reports, when applicable, that cover the previous calendar year;

(b) Indicates that the reports are open for inspection under section 149.43 of the Revised Code;

(c) Indicates that the attorney general will provide a copy of any or all of the reports to the president of the senate or the speaker of the house of representatives upon request.

(C) **Notice to Possible Claimants** [from current contraband law— §2933.41(B)] A law enforcement agency with custody of property to be disposed of under this section shall make a reasonable effort to locate persons entitled to possession of the property, to notify them of when and where it may be claimed, and to return the property to them at the earliest possible time. In the absence of evidence identifying persons entitled to possession, it is sufficient notice to advertise in a newspaper of general circulation in the county, briefly describing the nature of the property in custody and inviting persons to view and establish their right to it.

(D) **Definitions** [From current §2933.42(I)] As used in sections 2981.11 through 2981.13 of the Revised Code, "law enforcement agency" includes correctional institutions, and "citizens' reward program" has the same meaning as in section 9.92 of the Revised Code. "Township law enforcement agency" means an organized police department of a township, a township police district, a joint township police district, or the office of a township constable.

## **§2981.12 DISPOSAL OF CERTAIN PROPERTY HELD BY LAW ENFORCEMENT**

(A) **Disposal of Certain Property** [consolidated from current gang, drug, & contraband law—§§2923.46(B)(2)-(6), 2925.44(B)(3)-(7), & 2933.41(D)] Unclaimed or forfeited property in the custody of a law enforcement agency, other than property described in division (A)(2) of section

2981.11 of the Revised Code, shall be disposed by order of any court of record that has territorial jurisdiction over the political subdivision that employs the law enforcement agency, as follows:

- (1) **Drugs** Drugs shall be disposed of pursuant to section 3719.11 of the Revised Code or placed in the custody of the secretary of the treasury of the United States for disposal or use for medical or scientific purposes under applicable federal law.
- (2) **Weapons** Firearms and dangerous ordnance suitable for police work may be given to a law enforcement agency for that purpose. Firearms suitable for sporting use or as museum pieces or collectors' items may be sold at public auction pursuant to division (B) of this section. Other firearms and dangerous ordnance shall be destroyed by the agency or sent to the bureau of criminal identification and investigation for destruction by the bureau.
- (3) **Porn** Obscene materials shall be destroyed.
- (4) **Alcohol** Beer, intoxicating liquor, or alcohol seized from a person who does not hold a permit issued under Chapters 4301. and 4303. of the Revised Code or otherwise forfeited to the state for an offense under section 4301.45 or 4301.53 of the Revised Code shall be sold by the division of liquor control, if the division determines that it is fit for sale, or placed in the custody of the investigations unit in the department of public safety and be used for training relating to law enforcement activities. The department, with the assistance of the division of liquor control, shall adopt rules in accordance with Chapter 119. of the Revised Code to provide for the distribution to state or local law enforcement agencies upon their request. If any tax imposed under Title XLIII of the Revised Code has not been paid in relation to the beer, intoxicating liquor, or alcohol, the gains from the sale shall first be used to pay the tax. All other money collected under this division shall be paid into the state treasury. Any beer, intoxicating liquor, or alcohol that the division determines to be unfit for sale shall be destroyed.
- (5) **Inmate Money** Money received by an inmate of a correctional institution from an unauthorized source or in an unauthorized manner shall be returned to the sender, if known, or deposited in the inmates' industrial and entertainment fund if the sender is not known.
- (6) **Vehicles**
  - (a) [Streamlined from RICO law—2923.46(B)(1) & (C)(2)] Any mobile instrumentality forfeited under this chapter may be given to the law enforcement agency that initially seized the vehicle for use in performing its duties, if the agency wants the vehicle. The agency shall take the vehicle subject to any security interest or lien on the vehicle.
  - (b) Vehicles and vehicle parts forfeited under sections 4549.61 to 4549.63 of the Revised Code [vehicle identification number fraud] may be given to a law enforcement agency for use in performing its duties. Those parts may be incorporated into any other official vehicle. Parts that do not bear vehicle identification numbers or derivatives of them may be sold or disposed of as provided by rules of the director of public safety. Parts from which a vehicle identification number or derivative of it has been removed, defaced, covered, altered, or destroyed and that are not suitable for police work or incorporation into an official vehicle shall be destroyed and sold as junk or scrap.
- (7) **Computers** Computers, computer networks, computer systems, and computer software suitable for police work may be given to a law enforcement agency for that purpose or disposed of under division (B) of this section. As used in this section,

“computers,” “computer networks,” “computer systems,” and “computer software” have the same meanings as in section 2913.01 of the Revised Code.

**(B) Use or Auction** *[from contraband law—§2933.41(D)(8) & §2933.43(D)(1)—making gang & drug law consistent—§2923.46(B)(7) & §2925.44(B)(8)]* Other unclaimed or forfeited property, with court approval, may be used by the law enforcement agency in possession of it. If it is not used by the agency, it may be sold without appraisal, at a public auction to the highest bidder for cash, or disposed of in another manner that the court considers proper.

**(C) Gains to the General Fund** *[From current §2933.41(E)(1)(b), this is the key distinction between distribution under this section v. §2981.13]* Except as provided in divisions (A) and (E) of this section and after compliance with division (D) of this section when applicable, the gains from property disposed of pursuant to this section shall be placed in the general fund of the state, the county, the township, or the municipal corporation of the law enforcement agency involved.

**(D) 10% for Treatment in Juvenile Cases** *[From current drug & contraband law—§§2925.44(B)(8)(c)(i) & 2933.41(E)(1)(a)]* If the property was in the possession of the law enforcement agency in relation to a delinquent child proceeding in a juvenile court, ten per cent of any gains from property disposed of under this section shall be applied to one or more alcohol and drug addiction treatment programs that are certified by the department of alcohol and drug addiction services under section 3793.06 of the Revised Code. A juvenile court shall not specify a program, except as provided in this division, unless the program is in the same county as the court or in a contiguous county. If no certified program is located in any of those counties, the juvenile court may specify a certified program anywhere in Ohio. The remaining ninety per cent of the proceeds or cash shall be applied as provided in division (C) of this section.

*[From current §2933.44(A) & (B). Tying the prior ¶1 to forfeitures under “this chapter” makes the current definition of “juvenile-related forfeiture order” and various cross-references unnecessary.]*

Each treatment program that receives in any calendar year forfeited money under this division shall file an annual report for that year with the attorney general and with the court of common pleas and board of county commissioners of the county in which the program is located and of any other county from which the program received forfeited money. The program shall file the report on or before the first day of March in the calendar year following the calendar year in which the program received the money. The report shall include statistics on the number of persons the program served, identify the types of treatment services it provided to them, and include a specific accounting of the purposes for which it used the money so received. No information contained in the report shall identify, or enable a person to determine the identity of, any person served by the program.

**(E) Juvenile Forfeitures; Treatment Program Reports** *[from current §2933.44]* Each certified alcohol and drug addiction treatment program that receives in any calendar year money under this section or under section 2981.13 of the Revised Code subsequent to a juvenile forfeiture order shall file an annual report for that calendar year with the attorney general and with the court of common pleas and board of county commissioners of the county in which the program is located and of any other county from which the program received the money. The program shall file the report on or before the first day of March in the calendar year following the year in which the program received the money. The report shall include statistics on the number of persons served with the money, identify the types of treatment services provided, and specifically account for how the money was used. No information in the report shall identify, or enable a person to determine the identity of anyone served by the program.

As used in this division, “juvenile-related forfeiture order” means any forfeiture order issued by a juvenile court under section 2981.04 or 2981.05 of the Revised Code and any disposal of property ordered by a court under section 2981.11 of the Revised Code regarding property that

was in the possession of a law enforcement agency in relation to a delinquent child proceeding in a juvenile court.

**(F) Reward Programs** [*from current §2933.41(E)(2)*] Each board of county commissioners that recognizes a citizens' reward program under section 9.92 of the Revised Code shall notify each law enforcement agency of that county and of a township or municipal corporation wholly located in that county of the recognition by filing a copy of its resolution conferring that recognition with each of those agencies. When the board recognizes a reward program and the county includes a part, but not all, of the territory of a municipal corporation, the board shall so notify the law enforcement agency of that municipal corporation of the recognition of the reward program only if the county contains the highest percentage of the municipal corporation's population.

Upon being so notified, each law enforcement agency shall pay twenty-five per cent of any forfeited proceeds or cash derived from each sale of property disposed of pursuant to this section to the citizens' reward program for use exclusively to pay rewards. No part of the funds may be used to pay expenses associated with the program. If a reward program that operates in more than one county or in another state in addition to this state receives funds under this section, the funds shall be used to pay rewards only for tips and information to law enforcement agencies concerning offenses committed in the county from which the funds were received.

Receiving funds under this section or section 2981.11 of the Revised Code does not make the reward program a governmental unit for purposes of section 149.43 of the Revised Code.

**(G) Property Not to Pay Fine** [*consolidates current gang, drug, & contraband law— §§2923.46(D), 2925.44(D), & 2933.43(H)*] Any property forfeited under this chapter shall not be used to pay any fine imposed upon a person who is convicted of or pleads guilty to an underlying criminal offense or a different offense arising out of the same facts and circumstances.

### **§2981.13 DISPOSAL OF CONTRABAND, PROCEEDS, & INSTRUMENTALITIES**

**(A) Options** [*makes sale language consistent with §2981.12*] Except as otherwise provided in this section, property ordered forfeited as contraband, proceeds, or an instrumentality pursuant to this chapter shall be disposed of, used, or sold pursuant to section 2981.12 of the Revised Code. If the property is to be sold under that section, the prosecutor shall cause notice of the proposed sale to be given in accordance with law.

**(B) Distribution of Sold Property** [*streamlined from current contraband & Medicaid fraud law, and similar to current RICO law—§§2933.43(D)(1) §2933.46(B)(7), 2933.74(C), & 2923.35(D)(2)*] If the contraband or instrumentality forfeited under this chapter is sold, gains from a sale and any proceeds forfeited under this chapter shall be applied in the following order:

**(1) Costs** First, to pay costs incurred in the seizure, storage, maintenance, security, and sale of the property and in the forfeiture proceeding;

**(2) Victim's Restitution** [*Prioritizes victim's restitution and includes civil recoveries (see, e.g., current §2923.35(D)(1)(b)'s civil RICO provisions).*] Second, in a criminal forfeiture case, to satisfy any restitution ordered to the victim of the offense or, in a civil forfeiture case, to satisfy any recovery ordered for the person harmed, unless paid from other assets.

**(3) Security Interests** Third, to pay the balance due on any security interest preserved under this chapter;

**(4) The Rest** Fourth, apply the remaining amounts as follows:

(a) 10% of Juvenile Forfeitures If the forfeiture was ordered by a juvenile court, ten per cent to one or more certified alcohol and drug addiction treatment programs as provided in division (D) of section 2981.12 of the Revised Code. [streamlines and makes more consistent]

(b) To Law Enforcement Trust Funds, Etc. [This is the key distinction between distribution under this section v. §2981.12.] If the forfeiture was ordered in a juvenile court, ninety per cent, and if the forfeiture was ordered in a court other than a juvenile court, one hundred per cent to the law enforcement trust fund of the prosecutor and to the following fund supporting the law enforcement agency that substantially conducted the investigation: the law enforcement trust fund of the county sheriff, municipal corporation, township, or park district created under section 511.18 or 1545.01 of the Revised Code; the state highway patrol contraband, forfeiture, and other fund; the department of public safety investigative unit contraband, forfeiture, and other fund; the board of pharmacy drug law enforcement fund created by division (B)(1) of section 4729.65 of the Revised Code; the medicaid fraud investigation and prosecution fund; or the treasurer of state for deposit into the peace officer training commission fund if any other state law enforcement agency substantially conducted the investigation. In the case of property forfeited for medicaid fraud, any remaining amount shall be used by the attorney general to investigate and prosecute medicaid fraud offenses.

If the prosecutor declines to accept any of the remaining amounts, the amounts shall be applied to the fund of the agency that substantially conducted the investigation.

(c) Multiple Agencies [streamlined from current RICO, contraband, & Medicaid fraud law—§§2923.35(D)(3), 2933.43(D)(2), & 2933.74(C)(3)] If more than one law enforcement agency is substantially involved in the seizure of property forfeited under this chapter, the court ordering the forfeiture shall equitably divide the amounts, after calculating any distribution to the law enforcement trust fund of the prosecutor pursuant to division (B)(4) of this section, among the entities that the court determines were substantially involved in the seizure. [The rest (from current law) can be stricken as unnecessary.]

### (C) Law Enforcement Trust Funds, Etc.

(1) Creation [from current contraband law—§2933.43(D)(1)(c)(ii), 2<sup>nd</sup> ¶]  
A law enforcement trust fund shall be established by the prosecutor of each county who intends to receive any remaining amounts pursuant to this section, by the sheriff of each county, by the legislative authority of each municipal corporation, by the board of township trustees of each township that has a township police department, township police district police force, or office of the constable, and by the board of park commissioners of each park district created pursuant to section 511.18 or 1545.01 of the Revised Code that has a park district police force or law enforcement department, for the purposes of this section.

There is hereby created in the state treasury the state highway patrol contraband, forfeiture, and other fund, the department of public safety investigative unit contraband, forfeiture, and other fund, the medicaid fraud investigation and prosecution fund, and the peace officer training commission fund, for the purposes of this section.

Amounts distributed to any municipal corporation, township, or park district law enforcement trust fund shall be allocated from the fund by the legislative authority only to the police department of the municipal corporation, by the board of township trustees only

to the township police department, township police district police force, or office of the constable, and by the board of park commissioners only to the park district police force or law enforcement department.

**(2) Limits on Use** [*consolidated and streamlined from current contraband law—§2933.43(D)(1)(c)(ii), 4<sup>th</sup> - 6<sup>th</sup> ¶s.*] No amounts shall be allocated to a fund created under this section or used by an agency unless the agency has adopted a written internal control policy that addresses the use of moneys received from the appropriate fund.

The appropriate fund shall be expended only in accord policy, and, subject to the requirements specified in this section, only to pay the costs of protracted or complex investigations or prosecutions, to provide reasonable technical training or expertise, to provide matching funds to obtain federal grants to aid law enforcement, in the support of DARE programs or other programs designed to educate adults or children with respect to the dangers associated with the use of drugs of abuse, to pay the costs of emergency action taken under section 3745.13 of the Revised Code relative to the operation of an illegal methamphetamine laboratory if the forfeited property or money involved was that of a person responsible for the operation of the laboratory, or for other law enforcement purposes that the superintendent of the state highway patrol, department of public safety, prosecutor, county sheriff, legislative authority, board of township trustees, or board of park commissioners determines to be appropriate.

The board of pharmacy drug law enforcement fund shall be expended only in accordance with the written internal control policy so adopted by the board and only in accordance with section 4729.65 of the Revised Code, except that it also may be expended to pay the costs of emergency action taken under section 3745.13 of the Revised Code relative to the operation of an illegal methamphetamine laboratory if the forfeited property or money involved was that of a person responsible for the operation of the laboratory.

The state highway patrol contraband, forfeiture, and other fund, the department of public safety investigative unit contraband, forfeiture, and other fund, the board of pharmacy drug law enforcement fund, and a law enforcement trust fund shall not be used to meet the operating costs of the state highway patrol, of the investigative unit of the department of public safety, of the state board of pharmacy, of any political subdivision, or of any office of a prosecutor or county sheriff that are unrelated to law enforcement.

Forfeited moneys that are paid into the state treasury to be deposited into the peace officer training commission fund shall be used by the commission only to pay the costs of peace officer training.

**(3) Reports** [*streamlined from current contraband law—§2933.43(D)(1)(c)(ii) 7<sup>th</sup> ¶*] Any of the following offices or agencies that receive amounts under this section during any calendar year shall file a report with the specified entity, no later than the thirty-first day of January of the next calendar year, verifying that the moneys were expended only for the purposes authorized by this section or other relevant statute and specifying the amounts expended for each authorized purpose:

- (a) Any sheriff or prosecutor shall file the report with the county auditor.
- (b) Any municipal corporation police department shall file the report with the legislative authority of the municipal corporation.
- (c) Any township police department, township police district police force, or office of the constable shall file the report with the board of township trustees of the township.
- (d) Any park district police force or law enforcement department shall file the report with the board of park commissioners of the park district.

(e) The superintendent of the state highway patrol shall file the report with the attorney general.

(f) The executive director of the state board of pharmacy shall file a the report with the attorney general, verifying that cash and forfeited proceeds paid into the board of pharmacy drug law enforcement fund were used only in accordance with section 4729.65 of the Revised Code.

(g) The peace officer training commission shall file a report with the attorney general, verifying that cash and forfeited proceeds paid into the peace officer training commission fund pursuant to this section during the prior calendar year were used by the commission during the prior calendar year only to pay the costs of peace officer training.

**(D) Prevention's Share** [*streamlined from current contraband law—§2933.43(D)(3)(a)(ii)*] The written internal control policy of a county sheriff, prosecutor, municipal corporation police department, township police department, township police district police force, office of the constable, or park district police force or law enforcement department shall provide that at least ten per cent of the first one hundred thousand dollars of amounts deposited during each calendar year in the agency's law enforcement trust fund under this section, and at least twenty per cent of the amounts exceeding one hundred thousand dollars that are so deposited, shall be used in connection with community preventive education programs. The manner of use shall be determined by the sheriff, prosecutor, department, police force, or office of the constable after receiving and considering advice on appropriate community preventive education programs from the county's board of alcohol, drug addiction, and mental health services, from the county's alcohol and drug addiction services board, or through appropriate community dialogue.

The financial records kept under the internal control policy shall specify the amount deposited during each calendar year in the portion of that amount that was used pursuant to this division, and the programs in connection with which the portion of that amount was so used.

As used in this division, "community preventive education programs" include, but are not limited to, DARE programs and other programs designed to educate adults or children with respect to the dangers associated with using drugs of abuse.

**(E) Titled & Registered Property** [*from current contraband law—§2933.43(E).*] Upon the sale, under this section or section 2981.12 of the Revised Code, of any property that is required by law to be titled or registered, the state shall issue an appropriate certificate of title or registration to the purchaser. If the state is vested with title and elects to retain property that is required to be titled or registered under law, the state shall issue an appropriate certificate of title or registration.

**(F) Effect of Failure to Comply** [*streamlined from current contraband law—§2933.43(G)*] Any failure of a law enforcement officer or agency, prosecutor, court, or the attorney general to comply with this section in relation to any property seized does not affect the validity of the seizure and shall not be considered to be the basis for suppressing any evidence resulting from the seizure, provided the seizure itself was lawful.

#### **§2981.14 FEDERAL FORFEITURES**

*[streamlined from contraband law—§2933.43(D)(4)(a)-(d)]*

**(A)** [*from current gang law—§2923.45(B)(3)*] Nothing in this chapter precludes the head of a law enforcement agency that seizes property from seeking forfeiture under federal law. If the property is forfeitable under this chapter and federal forfeiture is not sought, the property is subject only to this chapter.

(B) Any law enforcement agency that receives moneys from a sale of forfeited property under federal law shall deposit, use, and account for the amounts, including any interest derived, in accordance with applicable federal law. If the state highway patrol or the investigative unit of the department of public safety receives such federal forfeiture moneys, the appropriate official shall deposit all interest or other earnings derived from the investment of the moneys into the contraband, forfeiture, and other fund of the highway patrol or the department, whichever is appropriate.

## PROVISIONS THAT DO NOT MOVE TO THE NEW CHAPTER

**§1531.20 DEVICES USED TO ILLEGALLY TAKE OR TRANSPORT WILD ANIMALS** [*With little process, this section requires forfeiting devices (nets, guns, trap, etc.) used in unlawfully taking wild animals. It also contemplates forfeiting vehicles and boats used to transport what is taken. The Commission continues to study whether any aspect of these forfeitures should be under Ch. 2981.*]

**§2913.34 TRADEMARK VIOLATIONS** [*Goods produced in violation of a trademark, and the tools and equipment used to produce them, may be forfeited under div.(D). The Commission continues to study whether any aspect of these forfeitures should be brought under Ch. 2981.*]

**§2923.32 PATTERN OF CORRUPT ACTIVITY** [*The offense of engaging in a pattern of corrupt activity and the penalties laid out in divisions (A) and (B)(1)-(3) would remain unchanged, except that a reference authorizing forfeiture under new Chapter 2981 should be added to (B)(3). Division (D) on nonexclusive penalties seems to be unnecessary. If it remains it would become (C). Divisions (B)(4)-(6), (C), & (E)-(G) would be repealed in favor of the new Chapter.*]

**§2923.34 CORRUPT ACTIVITY – CIVIL PROCEEDINGS** [*This section sets out unusual civil penalties in addition to forfeiture for civil RICO violations (including triple damages, class action allocations, a \$100,000 assessment, costs, and attorney fees). Division (A) would be repealed in favor of the new general forfeiture rules, provided the statute makes clear that forfeiture is authorized under Ch. 2981. The rest of the section would remain.*]

**§2923.35 CORRUPT ACTIVITY – COURT ORDERS** [*Much of this would instead be covered by Ch. 2981. However, part of (B)(1) and all of (B)(2) would remain, or better, move to §2923.34.*]

**§2923.36 CORRUPT ACTIVITY – LIEN NOTICE** [*Contains a separate procedure for lien notices different from the “provisional title” concept of forfeiture law*]

**§2923.42 PARTICIPATING IN A CRIMINAL GANG** [*This offense and its non-forfeiture penalties remain (divs.(A), (B), part of (C), & (D)), including fines of twice the amount of gross proceeds wrongfully taken. Also, §2923.44(B)(5)(a), 2<sup>nd</sup> sentence, & (B)(5)(b), probably ought to move to this section.*]

**§2923.43 GANG ACTIVITY – PROPERTY ABATEMENT** [*Makes any building or land used by a criminal gang on more than two occasions in one year a nuisance subject to abatement.*]

**§2925.42 DRUG FORFEITURES** [*In addition to earmarking forfeited monies to law enforcement—which moves to Ch. 2981—the section also earmarks fine money to law enforcement. That provision should remain somewhere in drug law (§2925.42(B)(5)(b))*]

**§2933.75 MEDICAID FRAUD – LIEN NOTICE** [*Contains a separate procedure for lien notices different from the “provisional title” concept of forfeiture law.*]

## Appendix 1: CONVERTING CURRENT LAW TO NEW LAW

What would happen to current asset forfeiture statutes if new Chapter 2981 were enacted. (Law student Mindy Rinehart was a great help in preparing these tables.)

<b>CORRUPT ACTIVITY (RICO)</b>			
<b>CURRENT SECTION</b>	<b>TOPIC</b>	<b>CHANGE</b>	<b>NEW SECTION(S)</b>
<b>§2923.31</b>	Definitions	Stay/move	§§2923.31&2981.01(B)
<b>§2923.32(A)</b>	Corrupt activity: crime	None	Same as current law
§2923.32(B)(1)-(3)	Basic penalties	Cross-ref./new Ch.	Same as current law
§2923.32(B)(4)	Specification	Streamlined	§2981.04(A)
§2923.32(B)(5)	Substitute property	Streamlined	§2981.06(D)
§2923.32(B)(6)	Recordkeeping	Streamlined	§2981.11(A)&(B)
§2923.32(C)	Seizure order	Nearly verbatim	§2981.06(A)
§2923.32(D)	Nonexclusive penalties	Repeal-unnecessary	None
§2923.32(E)(1)	Notice after verdict	Streamlined	§2981.04(D)
§2923.32(E)(2)-(3)	3 <sup>rd</sup> party: claims/crim.	Streamlined	§2981.04(E)(1)&(3)
§2923.32(E)(4)	Same: amend order	Nearly verbatim	§2981.04(F)(1)
§2923.32(F)	Replevin, etc.	Rephrased	§2981.03(C)
§2923.32(G)	“Law enforcement” def.	Verbatim	§2981.01(B)(4)
<b>§2923.33(A)&amp;(B)</b>	Reachability orders	Expanded	§2981.03(B)(1)
§2923.33(B)(2) 2 <sup>nd</sup> ¶	Same: 90 day limit	Nearly verbatim	§2981.03(B)(2)
§2923.33(C)(1)-(3), ¶1	Same: TRO	Expanded	§2981.03(B)(1)
§2923.33(C)(3) 2 <sup>nd</sup> ¶	Same: <i>ex parte</i>	Nearly verbatim	§2981.03(B)(3)
§2923.33(D)	Post verdict process	Rephrased	§2981.06
<b>§2923.34(A)</b>	Civil action: prosecutor	Nearly verbatim	§2981.05(A)
§2923.34(B)	Same: other persons	None	§2923.34(A)
§2923.34(C)	Same: remedies	None	§2923.34(B)
§2923.34(D)	Same: AG intervention	None	§2923.34(C)
§2923.34(E)	Same: Injunctions	None	§2923.34(D)
§2923.34(F)	Same: Triple damages	None	§2923.34(E)
§2923.34(G)	Same: Costs	None	§2923.34(F)
§2923.34(H)	Same: Atty fees to D	None	§2923.34(G)
§2923.34(I)	Same: \$100,000penalty	None	§2923.34(H)
§2923.34(J)	Same: estoppel	None	§2923.34(I)
§2933.34(K)	Same: 5 yrs to file	None	§2923.34(J)
§2923.34(L)-(N)	Same: Nonresidents, ...	None	§2923.34(K)-(M)
<b>§2923.35(A)(1)</b>	Post verdict process	Expanded	§2981.06(B)(1)
§2923.35(A)(2)	Recordkeeping	Repeal-unnecessary	§2981.03(G)
§2923.35(B)(1)	Same: claimant’s right	Harmonize/move	§§2923.34&2981.13(B)
§2923.35(B)(2)	Same: multi claims	None/Move	§2923.34

§2923.35(C)(1)	Post verdict disposition	Nearly verbatim	§2981.06(E)
§2923.35(C)(2)	No reversion	Streamlined	§2981.06(F)
§2923.35(C)(3)	Stay pending appeal ...	Streamlined	§2981.06(B)(5)
§2923.35(C)(4)	Recordkeeping	Streamlined	§2981.11(B)
§2923.35(D)(1)(a)	Juvenile treatmnt 10%	Nearly verbatim	§2981.12(D)
§2923.35(D)(2)(a)-(c)	Disposition	Reorder/Streamline	§2981.13(B)
§2923.35(D)(2)(c) 3 <sup>rd</sup> ¶	Same	Streamlined	§2981.13(B)(4)
§2923.35(D)(3)	Disposition: >1 agency	Nearly verbatim	§2981.13(B)(4)(c)
§2923.35(E)	“Law enforcement” def.	Verbatim	§2981.01(B)(4)
<b>§2923.36</b>	Lien notice, etc.	None	Same as current law

<b>GANG ACTIVITY</b>			
<b>CURRENT SECTION</b>	<b>TOPIC</b>	<b>CHANGE</b>	<b>NEW SECTION(S)</b>
<b>§2923.41</b>	Definitions	Stay/move	§§2923.41& 2981.01(B)
<b>§2923.42(A)&amp;(B)</b>	Crime & penalties	None	Same as current law
§2923.42(C)(1)	Fine to law enforcement	None	§2923.42(C)
§2923.42(C)(2)	Forfeiture/ Recordkeeping	Cross-reference/ Streamlined	§2923.42(C)(2)/ §2981.11(B)
§2923.42(D)	Prosecute other crimes	None	Same as current law
<b>§2923.43</b>	Abate for gang activity	None	Same as current law
<b>§2923.44(A)(1)</b>	Criminal forfeiture	Harmonize new Ch.	§2981.01(B)(9)&.04(E)
§2923.44(A)(2)	Provisional title	New concept	§2981.03(A)(1)
§2923.44(A)(3)	Preempt civil forfeiture	Streamlined	§2981.03(F)
§2923.44(A)(4)	Financial institutions	Streamlined	§2981.03(E)
§2923.44(B)(1)	Criminal: specification	Streamlined	§2981.04(A)
§2923.44(B)(2)	Same: place in indictmt	Repeal-unnecessary	None
§2923.44(B)(3)	Crim.: burden & verdict	Raised burden	§2981.04(B)
§2923.44(B)(4)	Must separate issues	May separate issues	§2981.04(A), 3 <sup>rd</sup> ¶
§2923.44(B)(5)(a), 1 <sup>st</sup> sentence	Forfeiture order	Streamlined	§2981.04(C)
§2923.44(B)(5)(a), 2 <sup>nd</sup> sentence	Fine 2 times gross profits	None	§2923.44(B)(5)
§2923.44(B)(5)(b)	Pay to law enforcement	None	§2923.44(B)(5)
§2923.44(B)(6)	Substitute property	Streamlined	§2981.06(D)
§2923.44(C)	Provisional title presum	Harmonized	§2981.03(A)(2)
§2923.44(D)	Reachability orders	Expanded	§2981.03(B)(1)
§2923.44(D)(2)	Same: 90 day limit	Nearly verbatim	§2981.03(B)(2)
§2923.44(D)(3)	Same: <i>ex parte</i>	Nearly verbatim	§2981.03(B)(3)
§2923.44(D)(4)	Same: evidence	Nearly verbatim	§2981.03(B)(4)
§2923.44(D)(5)	Same: seizure warrant	Expanded	§2981.03(A), etc.
§2923.44(E)(1) 1 <sup>st</sup> ¶	Post verdict process	Expanded	§2981.04(D)
§2923.44(E)(1) 2 <sup>nd</sup> ¶	Disposition/No revert	Nearly verbatim	§2981.06(E)&(F)

§2923.44(E)(1) 3 <sup>rd</sup> ¶	Reachability orders	Expanded	§2981.06(B)(1)
§2923.44(E)(2)	Post verdict process	Expanded	§2981.06(B)(2)-(5)
§2923.44(E)(2)(d)	Post verdict disposition	Nearly verbatim	§2981.06(E)
§2923.44(E)(3)	Post verdict depositions	Nearly verbatim	§2981.06(C)
§2933.44(F)(1)	Intervention/replevin ...	Streamlined	§§2981.03(C) & .04
§2923.44(F)(2)	Notice after verdict	Streamlined	§2981.04(D)
§2923.44(F)(3)(a)	3 <sup>rd</sup> party: petition	Nearly verbatim	§2981.04(E)(1)
§2923.44(F)(3)(b)	Same: affidavit	Nearly verbatim	§2981.04(E)(2)
§2923.44(F)(4)	Same: hearing	Streamlined	§2981.04(E)(3)
§2923.44(F)(5)(a)	Same: amend order	Nearly verbatim	§2981.04(F)(1)
§2923.44(F)(5)(b)	Same: amend order	Nearly verbatim	§2981.04(F)(2)
§2923.44(G)(1)	Clear title	Nearly verbatim	§2981.04(G)
§2923.44(G)(2)	Affidavit: valid interest	Streamlined	§2981.04(E)(2)(d)
<b>§2923.45(A)</b>	Forfeitable property	Streamlined	§2981.02(A)
§2923.45(B)(1)	Provisional title	New concept	§2981.03(A)(1)
§2923.45(B)(2)	Contraband N/A	Repeal-unnecessary	None
§2923.45(B)(3) 1 <sup>st</sup> ¶	Replevin, etc.	Expanded	§2981.03(C)
§2923.45(B)(3) 2 <sup>nd</sup> ¶	Federal option	Nearly verbatim	§2981.14(A)
§2923.45(B)(4)	Financial institutions	Streamlined	§2981.03(E)
§2923.45(C)	Seizure/civil action	Repeal-unnecessary	§2981.03(A)&(F)
§2923.45(D)	Not used to pay fine	Nearly verbatim	§2981.12(G)
§2923.45(E)(1)	Civil action	Nearly verbatim	§2981.05(A)
§2923.45(E)(2)	3 <sup>rd</sup> party: notice	Nearly verbatim	§2981.05(B)&(C)
§2923.45(E)(3)&(4)	3 <sup>rd</sup> party: petition	Streamlined	§2981.05(D)
§2923.45(E)(5)	Forfeiture/clear title	Clarified	§2981.05(E)&(F)
<b>§2923.46(A)</b>	Distribution of property	Repeal-unnecessary	§§2981.12 & .13
§2923.46(A)(4)(a)	Federal option	Nearly verbatim	§2981.14(A)
§2923.46(B)(1)	Distribution of vehicles	Streamlined	§2981.12(A)(6)(a)
§2923.46(B)(2)-(5)	Distribution of property	Nearly verbatim	§2981.12(A)(1)-(4)&(7)
§2923.46(B)(7)	Distribution of property	Made consistent	§2981.13(B)
§2923.46(C)(1)	Financial institutions	Repeal-unnecessary	§2981.03(E)
§2923.46(C)(2)	Vehicle subject to lien	Streamlined	§2981.12(A)(6)(a)
§2923.46(C)(3)	Financial institutions	Repeal-unnecessary	§2981.03(E)
§2923.46(C)(4)	Titled & registered prop	Nearly verbatim	§2981.13(E)
§2923.46(E)	Forfeiture, contraband	Repeal-unnecessary	§2981.12 & 2981.13
<b>§2923.47</b>	Return seized property	Streamlined	§2981.03(A)(4)

<b>FELONY DRUG ABUSE OFFENSE</b>			
<b>CURRENT SECTION</b>	<b>TOPIC</b>	<b>CHANGE</b>	<b>NEW SECTION(S)</b>
<b>§2925.41</b>	Definitions	Move needed/repeal	§2981.01(B)
<b>§2925.42(A)(1)</b>	Forfeitable property	Revised/streamline	§2981.02(A)

§2925.42(A)(2)	Same: amend order	Nearly verbatim	§2981.04(F)(1)
§2925.42(A)(3)	Civil vs. criminal	Repeal-unnecessary	§2981.03(F)
§2925.42(A)(4)	Financial institutions	Streamlined	§2981.03(E)
§2925.42(B)(1)	Criminal specification	Streamlined	§2981.04(A)
§2925.42(B)(2)	Same: position	Repeal-unnecessary	§2981.04(A)
§2925.42(B)(3)	Forfeiture verdict	Streamlined	§2981.04(B)
§2925.42(B)(4)	Must separate issues	May separate issues	§2981.04(A), 3 <sup>rd</sup> ¶
§2925.42(B)(5)(a)	Criminal sentence	Streamlined	§2981.04(C)
§2925.42(B)(5)(b)	Fine money	None	§2925.42(B)
§2925.42(B)(5)(c)	Definitions	Nearly verbatim	§2981.01(B)(5) & (10)
§2925.42(B)(6)	Substitute property	Streamlined	§2981.06(D)
§2925.42(C)	Provisional title presum	Streamlined	§2981.03(A)(2)
§2925.42(D)(1)	Reachability orders	Expanded	§2981.03(B)(1)(b)(i)-(ii)
§2925.42(D)(2)	Same: 90 day limit	Nearly verbatim	§2981.03(B)(2)
§2925.42(D)(3)	Same: <i>ex parte</i>	Nearly verbatim	§2981.03(B)(3)
§2925.42(D)(4)	Same: evidence	Nearly verbatim	§2981.03(B)(4)
§2925.42(D)(5)	Seizure	Streamlined	§2981.03(A)(4)
§2925.42(E)(1) 1 <sup>st</sup> ¶	Post verdict process	Expanded	§2981.04(D)
§2925.42(E)(1) 2 <sup>nd</sup> ¶	Disposition; no revert	Nearly verbatim	§2981.06(E)&(F)
§2925.42(E)(2)	Post verdict process	Expanded	§2981.06(B)(2)-(5)
§2925.42(E)(2)(d)	Post verdict disposition	Nearly verbatim	§2981.06(E)
§2925.42(E)(3)	Post verdict depositions	Nearly verbatim	§2981.06(C)
§2925.42(F)(1)	Replevin, etc.	Expanded	§2981.03(C)
§2925.42(F)(2)	Notice after verdict	Streamlined	§2981.06(D)
§2925.42(F)(3)(a)	3 <sup>rd</sup> party: petition	Nearly verbatim	§2981.04(E)(1)
§2925.42(F)(3)(b)	Same: affidavit	Nearly verbatim	§2981.04(E)(2)
§2925.42(F)(4)	Same: hearing	Streamlined	§2981.04(E)(3)
§2925.42(F)(5)(a)	Same: amend order	Nearly verbatim	§2981.04(F)(1)
§2925.42(F)(5)(b)	Same: amend order	Nearly verbatim	§2981.04(F)(2)
§2925.42(G)(1)	Clear title	Nearly verbatim	§2981.04(G)
<b>§2925.43(A)</b>	Forfeitable property	Streamlined	§2981.02(A)
§2925.43(A)(4)(6)	Federal option	Nearly verbatim	§2981.14(A)
§2925.43(B)(1)	Provisional title	New concept	§2981.03(A)(1)
§2925.43(B)(2)	Contraband N/A	Repeal-unnecessary	None
§2925.43(B)(3)	Replevin, etc.	Expanded	§2981.03(C)
§2925.43(B)(4)	Financial institutions	Streamlined	§2981.03(E)
§2925.43(C)(1)&(2)	Seizure	Streamlined	§2981.03(A)
§2925.43(C)(3)&(D)	Civil vs. criminal	Streamlined	§2981.03(F)
§2925.43(E)(1)	Civil action	Nearly verbatim	§2981.05(A)
§2925.43(E)(2)	3 <sup>rd</sup> party: notice	Nearly verbatim	§2981.05(B)&(C)
§2925.43(E)(3)&(4)	3 <sup>rd</sup> party petition	Streamlined	§2981.05(D)
§2925.43(E)(5)	Forfeiture/clear title	Clarified	§2981.05(E)&(F)

<b>§2925.44(A)</b>	Distribution of property	Repeal-unnecessary	§2981.12&.13
§2925.44(B)	Disposal of property	Nearly verbatim	§2981.12(A)
§2925.44(B)(8)	Disposition of property	Made consistent	§2981.12(B)
§2925.44(B)(8)(c)(i)	Juvenile treatment 10%	Nearly verbatim	§2981.12(D)
§2925.44(C)	Financial institutions	Streamlined	§2981.03(E)
§2925.44(D)	Not used to pay fine	Nearly verbatim	§2981.12(G)
§2925.44(E)	Nonexclusive forfeiture	Repeal-unnecessary	None
<b>§2925.45</b>	Return seized property	Streamlined	§2981.03(A)(4)

<b>“CONTRABAND” &amp; STORAGE</b>			
<b>CURRENT SECTION</b>	<b>TOPIC</b>	<b>CHANGE</b>	<b>NEW SECTION(S)</b>
<b>§2933.41(A)(1) 1<sup>st</sup> pt</b>	Keep property safe	Streamlined	§2981.11(A)(1)
§2933.41(A)(1) 2 <sup>nd</sup> pt	Recordkeeping	Streamlined	§2981.11(B)
§2933.41(A)(2)	Recordkeeping	Streamlined	§2981.11(B)
§2933.41(B)	Find owner	Nearly verbatim	§2981.11(C)
§2933.41(C)(1)	Contrabd=instrumentlity	Repeal	§2981.01(B)(7), etc.
§2933.41(C)(2)	Forfeit contraband	Nearly verbatim	§2981.01(B)(3), etc.
§2933.41(D)(1)-(7)	Distribution of property	Nearly verbatim	§2981.12(A)(1)-(7)
§2933.41(D)(8)	Disposition of property	Nearly verbatim	§2981.12(B)
§2933.41(E)(1)(a)	Juvenile treatment 10%	Nearly verbatim	§2981.12(D)
§2933.41(E)(1)(b)	Money to general fund	Nearly verbatim	§2981.12(C)
§2933.41(E)(2)	Reward program 25%	Streamlined	§2981.12(F)
§2933.41(F)&(H)	Exceptions to chapter	Adds junk property	§2981.11(A)(2)
§2933.41(F)&(G)	Reward program ≠ gov’t	Nearly verbatim	§2981.12(F) 3 <sup>rd</sup> ¶
<b>§2933.42</b>	“Contraband” offenses	Repeal	§2981.01(B)(3), etc.
<b>§2933.43(A)</b>	“Contraband” offenses	Repeal	§2981.01(B)(3), etc.
§2933.43(B)(1)	72 hr. rule for vehicles	Made practical	§2981.03(D)(2)
§2933.43(B)(2)	Replevin, etc.	Expanded	§2981.03(C)
§2933.43(C)	Search, notice, etc.	Streamlined	§2981.05
§2933.43(D)(1)	Disposition of property	Prioritize victim; streamlined	§2981.13(B)
§2933.43(D)(1)(c)(i)	Same: Juv Treatmt 10%	Streamlined	§2981.13(B)(4)
§2933.43(D)(1)(c)(ii)	Same: to LE trust fund	Streamlined	§2981.13(B)(4)(b)
§2933.43(D)(1)(c)(ii) 2 <sup>nd</sup> ¶	LE trust fund: created	Nearly verbatim	§2981.13(C)(1)
§2933.43(D)(1)(c)(ii) 4 <sup>th</sup> -6 <sup>th</sup> ¶s	Same: limits on use	Streamlined	§2981.13(C)(2)
§2933.43(D)(1)(c)(ii) 7 <sup>th</sup> ¶	Same: Reports	Streamlined	§2981.13(C)(3)
§2933.43(D)(2)	Same: >1 agency	Streamlined	§2981.13(B)(4)(c)
§2933.43(D)(3)(a)&(b)	Same: Recordkeeping	Streamlined	§2981.11(B)
§2933.43(D)(3)(a)(ii)	Same: prevention share	Streamlined	§2981.13(D)

§2933.43(D)(4)(a)-(c)	Federal forfeiture \$	Streamlined	§2981.14(B)
§2933.43(D)(4)(d)	Federal forfeiture \$	Repeal-unnecessary	§2981.14(B)
§2933.43(E)	Titled/registered prop.	Nearly verbatim	§2981.13(E)
§2933.43(F)	Various forfeiture rules	Repeal-unnecessary	§§2981.12 & 2981.13
§2933.43(G)	Effect of fail to comply	Streamlined	§2981.13(F)
§2933.43(H)	Not used to pay fine	Nearly verbatim	§2981.12(G)
<b>§2933.44(A)</b>	Juv treatm't definitions	Repeal-unnecessary	None
§2933.44(B)	Juvenile treatment rpts	Streamlined	§2981.12(E)

<b>MEDICAID FRAUD</b>			
<b>CURRENT SECTION</b>	<b>TOPIC</b>	<b>CHANGE</b>	<b>NEW SECTION(S)</b>
<b>§2933.71</b>	Definitions	Stay/move	§§2933.71& 2981.01(B)
<b>§2933.72(A)&amp;(B)</b>	Reachability orders	Expanded	§2981.03(B)(1)
§2933.72(B)(2) 2 <sup>nd</sup> ¶	Same: 90 day limit	Nearly verbatim	§2981.03(B)(2)
§2933.72(C)	Reachability orders	Expanded	§2981.03(B)(1)
§2933.72(C)(3) 2 <sup>nd</sup> ¶	Same: <i>ex parte</i>	Nearly verbatim	§2981.03(B)(3)
§2933.72(D)	Post-forfeiture orders	Expanded	§2981.06(B)(1)
<b>§2933.73(A)</b>	Authorizes forfeiture	Make consistent	§2981.05, etc.
§2933.73(B)	Criminal specification	Streamlined	§2981.04(A)
§2933.73(C)	Substitute property	Streamlined	§2981.06(D)
§2933.73(D)	Recordkeeping	Streamlined	§2981.11(B)
§2933.73(E)	Seizure after forfeiture	Expanded	§2981.06(A)
§2933.73(F)(2)	3 <sup>rd</sup> party:affidavit/crim.	Expanded	§2981.04(E)(1)
§2933.73(F)(3)	Same: hearing/criminal	Nearly verbatim	§2981.04(E)(3)
§2933.73(F)(4)	Same: amend order	Nearly verbatim	§2981.04(F)(1)
§2933.73(G)	Notice of forfeiture	Made earlier	§§2981.05(B) & .04(E)
<b>§2933.74(A)</b>	Post verdict process	Expanded	§2981.06(B)
§2933.74(B)(1)	Post verdict disposition	Nearly verbatim	§2981.06(E)
§2933.74(B)(1)(a)-(d)	Disposal	Repealed	§2981.12(B)
§2933.74(B)(2)	No reversion	Nearly verbatim	§2981.06(F)
§2933.74(B)(3)	Protecting property	Expanded	§2981.06(B)(1)
§2933.74(B)(4)	Recordkeeping	Expanded	§2981.11(B)
§2933.74(C)(1)	Moneys 1 <sup>st</sup> to State	Streamlined	§2981.13(B)
§2933.74(C)(2)	No reversion	Nearly verbatim	§2981.06(F)
§2933.74(C)(2)(b) ¶ 3	Moneys to AG	Similar	§2981.13(B)(4)(b)
§2933.74(C)(3)	Disposition: >1 agency	Nearly verbatim	§2981.13(C)(4)(c)
§2933.74(D)	“Law enforcement” def.	Verbatim	§2981.01(B)(4)
<b>§2933.75</b>	Lien notice, etc.	None	Same as current law

## Appendix 2: ASSET FORFEITURE ACTIVITY IN OHIO

By Jeff Harris & Fritz Rauschenberg (2000)

To measure the impact of asset forfeitures on Ohio's justice system, the Commission staff studied reports submitted to the Attorney General. We looked at the extent to which Ohio's law enforcement community used asset forfeiture laws, and the effect the revenue has on justice system decision making. While there is a great deal of legal research on forfeitures, and seizure activity has been researched in other states, this was the first broad empirical analysis of forfeitures in Ohio.

### Data Collection

Most policing agencies must report asset forfeitures to the AG (including municipal, township, and university police departments; county sheriffs and prosecutors; regional drug task forces; park rangers; the Highway Patrol; and various other State agencies). The reports include both the number and type of specific assets forfeited. In addition, each agency reports on its Law Enforcement Trust Fund, or comparable fund, that accounts for forfeitures.

In 1999, Commission staff collected forfeiture data reported between 1995 and 1998. To better compare data, amounts received by agencies were adjusted to 1992 dollars for much (but not all) of this analysis. The number of autos, guns, and homes reported seized by agencies each year was also included, but assets seized under Federal law were not. State law requires that forfeiture data be submitted only for corrupt activities, drunken driving, and drug offenses.

### Forfeitures Reported in Ohio

The table shows the total forfeiture amounts reported between 1995 and 1998. Ohio's law enforcement community seized \$24,553,380 in assets over a four-year period, amounting to 56.5¢ per resident annually.

#### Total Assets Seized by Ohio's Law Enforcement Community

Year	Total Forfeitures (adjusted for inflation)	Autos	Guns	Homes
1995	\$5,501,037	624	2,573	8
1996	\$5,847,274	781	1,469	6
1997	\$6,852,504	622	1,981	5
1998	\$6,352,565	736	1,992	7

In comparison, the staff estimates that misdemeanor fines generate about \$170 million annually, dwarfing forfeiture numbers.

While aggregate figures are relatively stable across the four-year study, forfeitures reported by individual agencies were much more erratic from year to year. While inconsistent reporting practices may explain some variations (*e.g.*, the Cleveland Police Department changed its reporting format in 1996), they fail to account for all of the change in reported activity. Rather, variations are largely the result of luck. The frequency with which traffic stops and drug investigations yield assets often lies outside the control of most policing agencies.

### **Comparing Ohio with Federal DEA Forfeitures**

Ohio’s forfeiture activity was dwarfed by the amount of seizures reported for the same period by the U.S. Drug Enforcement Administration (DEA). This table shows the amounts seized by the DEA through its enforcement of Federal drug laws nationwide. Ohio’s annual seizure activity represents an average proportion of only 1.24% of the amount of assets forfeited by the Federal agency. Ohio comprises approximately 4.15% of the U.S. population.

#### **Comparing Ohio and DEA Seizures**

<b>Year</b>	<b>Total Adjusted DEA Seizures</b>	<b>Total Ohio Seizures</b> (Adjusted for inflation)	<b>Ratio of Ohio to Federal Activity</b>
1995	\$596,646,445	\$5,501,037	0.92%
1996	\$445,795,622	\$5,847,274	1.31%
1997	\$483,929,956	\$6,852,504	1.42%
1998	\$451,052,243	\$6,352,565	1.41%
Total	\$1,977,424,266	\$24,553,380	1.24%

The DEA’s reported forfeitures include assets seized through Federal enforcement activities in drug corridor states like Florida, Texas, and California. Interdiction efforts in these states often result in large-scale narcotics seizures, in turn netting valuable assets.

Several Federal agencies seize assets in addition to the DEA, including the Federal Bureau of Investigation, the Internal Revenue Service, the Customs Service, Coast Guard, etc. We did not study their forfeitures.

### **Summary of Ohio Forfeiture Activity**

Municipal police departments, together with county sheriffs, forfeited most of the assets seized in Ohio during our study period. The large

proportion of activity represented by municipal police and county sheriffs' departments is unsurprising given the fact that most of the State's residents rely upon these agencies for police services.

### 1998 Forfeitures by Agency Type

(Not adjusted for inflation; Includes some double counting of autos and guns)

Agency	Total Amount	Autos	Guns	Homes
Municipal Police	\$3,695,916	581	1767	4
County Sheriffs	\$1,565,495	120	174	3
County Prosecutors	\$1,535,075	328	288	2
State Agencies	\$1,332,416	n/a	N/a	n/a
Drug Task Forces	\$576,221	14	1	0
Township Police	\$130,539	9	34	0
Other	\$68,389	12	14	0
<b>Total</b>	<b>\$8,904,051</b>	<b>1,064</b>	<b>2,278</b>	<b>9</b>

### Relationship of Forfeiture Revenue to Agency Expenditures

A common criticism of forfeiture laws is that they encourage law enforcement to make organizational and investigation decisions based on the availability of forfeitable assets. To get at this, we paired population and police expenditure figures published by the U.S. Census Bureau (which reports non-capital police expenditures for larger law enforcement agencies) with seizure data.

**Municipalities.** The results suggest that State asset forfeiture has a small effect on large municipal police department budgets. Forfeitures were less than 1% of the agencies' total expenditure levels over the four years studied.

We focused on the larger municipal police departments in the table below. The amount forfeited per capita was higher for smaller municipal agencies. But we did not have adequate police expenditure data to draw conclusions.

### Forfeiture Activity Vs. Total Municipal Police Expenditures

Municipal Police Department (P.D.)	Average Total Received as a Proportion of Total Expenditures (1995-1998)
Akron P.D.	0.30%
Canton P.D.	0.46%
Cincinnati P.D.	0.58%
Cleveland P.D.	0.46%
Columbus P.D.	0.23%

Dayton P.D.	0.08%
Parma P.D.	0.49%
Toledo P.D.	0.50%
Youngstown P.D.	0.33%

**County Sheriffs.** Over the four-year period, most sheriffs also reported forfeitures comprising less than 1% of total expenditures. A few reported slightly higher percentages. While forfeitures as percent of budget were higher than for large cities, the proportion still was small.

**Forfeiture Activity Versus Total County Sheriff Expenditures**

<b>Sheriff's Office</b>	<b>Average Total Received as a Proportion of Total Expenditures (1995-1998)</b>
Ashtabula Co.	0.00%
Butler Co.	1.79%
Clark Co.	0.29%
Clermont Co.	0.13%
Columbiana Co.	0.24%
Cuyahoga Co.	1.21%
Fairfield Co.	0.22%
Franklin Co.	1.11%
Greene Co.	0.11%
Hamilton Co.	1.34%
Lake Co.	0.16%
Lorain Co.	0.26%
Lucas Co.	0.36%
Mahoning Co.	0.38%
Medina Co.	0.01%
Montgomery Co.	0.21%
Portage Co.	3.64%
Richland County	0.40%
Stark County	0.69%
Summit County	1.61%
Trumbull County	0.02%
Warren County	0.10%
Wayne County	0.02%
Wood County	0.03%

**Drug Task Forces.** The third agency type analyzed, regional drug task forces, had the greatest proportional amount of forfeiture revenue in relation to expenditures. Regional drug task forces are single-purpose multi-jurisdictional agencies charged only with enforcing drug laws. They

are typically comprised of personnel and resources contributed from various local and State agencies, receiving 75% of their funding from Federal grants with the remaining 25% coming from local sources.

The amount seized by drug task forces through asset forfeiture averaged 28.3% of their total expenditure levels. Moreover, the annual seizure amount sometimes approximated or exceeded agency expenditures, particularly when there was a large seizure during a year.

Why did forfeiture revenue represent a significantly larger amount of drug task force budgets (compared to other police agency types in the same period)? Drug task forces are more focused on forfeiture generating activities. Task forces target high level dealers who more often have valuable, forfeitable assets. Also, task force overhead costs are often accounted in another police agency's budget, which has the effect of lowering reported operating costs. This makes the proportion of their budget arising from forfeiture proceeds to become more pronounced.

### **A Profit Motive for Law Enforcement?**

**The Criticism.** Critics of asset forfeiture policies argue that they encourage agencies to pursue asset forfeitures for the revenue they provide, at the expense of other important law enforcement activities.

For example, there was a forfeiture of over \$380,000 in 1997 by a small agency serving the rural southeast portion of a county. It would be surprising if that seizure did not impart some degree of influence on that agency's decisions about what kinds of cases to pursue. Jensen and Gerber<sup>1</sup> called this condition "policing for profit" as forfeiture revenues allow agencies to become more autonomous:

Depending on the magnitude of revenue they obtain through asset forfeitures, the public loses some degree of control over police agencies through the regular budget allocation process.... The problem is basically one of accountability. The police department has income for which there is little external control.... Generally speaking, as the ability of the police to generate external resources increases, the capacity of the elected officials to maintain control of the agency decreases.

One can argue that, despite the irregular nature of forfeiture revenue, agency decision-makers are influenced by the benefits resulting from seizure revenues, and therefore tend to rely on such revenue as a source of discretionary funding.

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<sup>1</sup> Jensen, Eric, and Jurg Gerber. The Civil Forfeiture of Assets and the War on Drugs: Expanding Criminal Sanctions while Reducing Due Process Protections. *Crime & Delinquency*. July, 1996: 421-434.

Evidence of such a phenomenon at the Federal level arose in *United States v. James Daniel Good Real Property et al.*, argued before the United States Supreme Court in 1993. Justice Kennedy, writing the majority opinion, cited a 1990 memo distributed to United States Attorneys by the U.S. Attorney General urging an increase in the volume of forfeitures:

To meet the Department of Justice's annual budget target...we must significantly increase [forfeiture] production.... Failure to achieve the \$470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990'.

A similar organizational mindset could exist in some parts of Ohio. Several small agencies and drug task forces reported large per capita forfeiture revenue. The Linndale Police Department, for example, reported the largest per capita amount of forfeiture activity over the four years studied. High levels of seizure activity might encourage aggressive forfeiture activities at the expense of other law enforcement priorities. (Linndale also was recognized in a previous Sentencing Commission study as being exceptionally aggressive in its pursuit of traffic fines. The 1997 study traced 82% of the city's general fund monies back to traffic fines levied by its Mayor's Court.)

In addition to evidence of assertive asset forfeiture programs, the notion that policing agencies in Ohio are influenced by revenue motives in their decision-making processes is supported by the degree of latitude afforded to administrators in expending seized monies. In their 1995 study, Benson, Rasmussen, and Sollars<sup>2</sup> found that police administrators enjoy "considerable discretion in how they allocate the resources they control, and monitoring generally does not limit their discretion in any substantial way."

**Using Seized Assets.** Proceeds from seized assets under Ohio law are held by law enforcement agencies in trust funds separate from the State, county, or municipal treasury. Keeping this money separate allows law enforcement to use it for secret investigations, drug buys, and the like. It also allows agencies to support projects and equipment that otherwise would not be available.

Current §2933.43 contains reporting standards and a requirement that county prosecutors receive a portion of forfeited assets. It specifies these uses of proceeds derived through seizure:

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<sup>2</sup> Benson, Bruce L., David W. Rasmussen, and David L. Sollars. "Police Bureaucracies, Their Incentives, and the War on Drugs." *Public Choice*. 1995: 21-45.

- (1) Pay for protracted or complex investigations or prosecutions;
- (2) Provide technical training or expertise;
- (3) Provide matching funds to obtain Federal grants;
- (4) Support local D.A.R.E. or similar drug education programs; or
- (5) Other law enforcement purposes that the agency executive determines to be appropriate.

The last option gives agency administrators broad discretion in using forfeited monies.

In their 1995 study, Benson, Rasmussen, and Sollars found a modest relationship between non-capital expenditures and forfeitures. They argued that forfeiture revenues drove police agency decisions.

This...belies the potentially large impact of asset forfeiture on decision making, since only a small fraction of non-capital expenditures are probably available for the discretionary purchases of perks.... Relatively small amounts of money from seized assets can mean substantial increases in discretion.

They argued that even if they made up a small part of the total police agency budget, they could have a distorting influence because they make up a much larger portion of an agency's discretionary budget.

**Do Agencies Focus on Forfeiture Producing Activities?** Some law enforcement agencies in Ohio realize considerable revenue from asset forfeiture. Reliance on this revenue, in theory, can create an environment where seizure activity can unduly influence decisions by agency policy-makers.

Benson, Rasmussen, and Sellers argued that the development of asset forfeiture laws allow "local law enforcement agencies to generate revenues...not limited by the inter-bureaucratic competition for resources that arises in the local budgeting process".

Devoting an agency's resources to policing activities such as drug enforcement, which are the likeliest to net assets, may cause efforts in other areas like property crime investigation to suffer. Quantitative research methods can gauge the extent to which agencies' funding levels depend upon forfeiture revenue.

In their 1995 study, Benson, Rasmussen, and Sollars created a statistical model to evaluate the budgetary impact of asset seizures on policing agencies in Florida. The authors found that:

The relative allocation of state and local law enforcement resources [had] shifted dramatically towards drug enforcement, the major source of asset confiscations.... [This] reallocation of policing resources to control drug use actually explains a substantial portion of the percentage increase in property crime in Florida between 1984 and 1989.

We tested whether Ohio’s policing agencies allot a disproportionate share of their resources towards forfeiture-generating activities, using the same methodology as Benson, Rasmussen, and Sollars.

The statistical model assumed that police operating expenditure is driven by: crime rate; per capita income; wealth (measured by property value); the amount sized via forfeiture; the number of drug arrests; and the number of other arrests.

In our analysis, the number of arrests and reported crime were more important factors in police budgets than the relative wealth or income of a community. However, asset forfeiture played a part. Also, the relationship with non-drug (and therefore non-asset seizure producing) cases was negative. This means that enforcement agencies spent more money when they focused less on property and violent crime enforcement and more on drug enforcement.

The Commission staff’s empirical analysis supports the notion that asset forfeiture leads police agencies to alter the kinds of cases they work on. This is consistent with the results of previous research in Florida<sup>3</sup>.

<sup>3</sup>**Estimates of the determinants of police non-capital expenditures**

This table is included for those readers who pay attention to the details of sophisticated statistical analysis. It shows the positive, statistically significant relationship between crime rate, drug arrests, and asset forfeitures and police budgets. It also shows the negative, statistically significant relationship between non-drug arrests and agency budgets.

<b>Variable</b>	<b>Unstandardized Coefficients (B)</b>	<b>Standardized Coefficients (Beta)</b>	<b>t</b>	<b>Sig.</b>
Constant	-1.6E + 07		-.613	.545
Per capita reported crimes, 1995	7,636.33	.583	3.531	.001
Per capita reported income, 1995	-1,073.07	-.152	-.612	.546
Median property value, 1995	340.87	.280	1.038	.308
Per capita reported forfeitures, 1995	20,342,361	.279	2.128	.042
Per capita reported drug arrests, 1995	5.82E + 09	.648	3.954	.000
Per capita reported all other arrests, 1995	-9.6E + 08	-.602	-3.613	.001
Adjusted R <sup>2</sup>	.557			
F-statistic	8.134			
N	35			

**The Other Side of the Coin.** The foregoing analysis can be criticized in a number of ways. First, it does not take into account the positive outcomes of forfeitures, namely the breaking up of criminal organizations, which can perhaps be done more effectively by forfeitures than with other law enforcement methods. It would be very difficult to empirically analyze whether forfeitures succeed on this account because public records are not available on the number and extent of criminal organizations in Ohio's communities.

Second, this analysis does not take into account precisely how the money is used. While there is broad legal discretion in using forfeiture revenue, much of the money goes back to drug enforcement, which alters the cause and effect proposed by this analysis. For example, forfeited cash can often be used as part of further investigations as buy money. Forfeiture proceeds can be used for purposes such as drug education that do not necessarily profit the police agency directly, yet would be seen as "profits" in this analysis.

Third, the empirical findings here might not be as cynical as Benson, Rasmussen, and Sollars imply in their discussion. Rather the same results could indicate that police agencies are responding to the priorities set for them by Federal, State, and local policy makers who emphasize drug enforcement. And those police agencies that are more successful at drug enforcement are rewarded with larger budgets. In short, forfeiture revenue augments legitimate law enforcement activities.

Fourth, keep in mind that total revenue to police agencies from asset forfeiture in Ohio is dwarfed by the total collected for State and local treasuries through traffic enforcement.

### **Do Offenders "Buy Their Way Out" of Prison Time?**

**The Criticism.** County prosecutors are afforded wide latitude in their decisions regarding charging crimes and asset forfeiture. A prominent defense attorney called forfeited assets a form of legal bribery. Are prosecutors recommending lighter sentences in return for uncontested forfeitures? We analyzed the question.

If offenders are able to "buy their way out" of tougher sentences by relinquishing their interests in property, evidence would show statistical relationships between amounts forfeited to policing agencies and likelihood or length incarceration for drug offenders. In its most extreme

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example, the more assets forfeited in a county, the fewer high level offenders would go to prison.

**The Finding.** Rigorous statistical analysis indicates that the relationships suggested by the “buyout” hypothesis do not exist. Both high-level drug offenses and drug trafficking offenses have a stronger statistical relationship with amounts forfeited than do lower level possession offenses or drug offenses in general. Ohio apparently takes high-level drug offenders’ assets *and* imprisons them. The system does not seem to trade forfeitures for reduced sentences.

## **Conclusions**

Ohio’s law enforcement community used forfeiture laws to obtain over \$24 million between 1995 and 1998. The greatest amount of seizures arose from activity reported by municipal police and county sheriffs’ departments. This amount suggests that policing agencies throughout the State use the asset forfeiture provisions available to them in the Revised Code. However, the collective amount of seized assets in Ohio is small compared to the value of assets forfeited nationally during the same period by the Federal DEA. Therefore, any effects of State forfeitures (both positive and negative) are less dramatic than Federal forfeitures.

In the aggregate, most types of policing agencies in Ohio realized fairly constant revenue from asset forfeiture. However, proceeds reported by individual agencies tended to be much more erratic from year to year, suggesting that the amounts of forfeiture revenue are largely the result of chance, *i.e.*, how many forfeitable cases occur in a given year in the jurisdiction.

Despite their unpredictable character, forfeitures made up a larger portion of some county sheriffs’ and many regional drug task forces’ budgets, particularly at the smaller agency level. On the other hand, large urban police departments had small forfeiture proceeds relative to their budgets. Their annual adjusted total received per expenditure figures were less than one percent across the four years studied.

Regional drug task forces were found to recoup larger amounts of their annual expenditures through asset seizure. This makes sense since they focus on higher-level drug crimes. Asset forfeiture revenue generally was a larger part of a police budget in small jurisdictions.

Under the Revised Code, policing agency administrators handle forfeiture proceeds with considerable discretion. So long as a share of the funds is

used for education, police administrators can use additional funds for many law enforcement purposes.

Given the size of forfeiture revenues relative to some small agencies' budgets and the fact that administrators are afforded considerable discretion in spending seizure proceeds, it has been argued that forfeitures potentially distort the motivations and decisions underlying law enforcement activities. Forfeitures have created the opportunity for law enforcement agencies' to purchase items that would otherwise be unobtainable through traditional budget funding streams.

Replicating an earlier study in Florida, we showed that policing agencies that tended to allocate resources towards drug arrests forfeitures (and away from other arrests) got larger budgets (all other things being equal). This indicates that a profit motivation perhaps existed within those agencies' decision-making processes. However, that does not mean the motives are illegitimate. And it is likely that the agencies are responding to the priorities of budget setting policy makers.

Seizure revenue was not related to decreased numbers of serious drug offenders entering State prisons. Thus, there is little evidence that offenders "buy" more lenient sentences by forfeiting assets.

Incarceration, community supervision, or fines can be effective against individual criminals. But they are less useful in stemming crimes by larger organizations, where criminal foot soldiers are easily replaced. Drug networks, rackets, and gangs come to mind. And they do not always separate the offender from the instrumentalities of crime. A drunken driver's automobile, for instance.

So policy makers turned to sanctions that disrupt criminal organizations (such as asset forfeiture) and that deny offender(s) the instruments used to commit crimes (such as forfeiting chronic drunken drivers' car). But that's not all. Forfeiture laws shift these assets from offenders to law enforcement agencies, which, in turn, use them to nab more offenders.