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Bill Analysis
Legislative Service Commission

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(As Reported by S. Judiciary--Criminal Justice)

Reps. Latta, McGregor, C. Evans, D. Evans, Hughes, Perry, Blessing, Combs, Domenick, Faber, Schneider, Seitz, Taylor, Wagoner, Willamowski, Yuko

BILL SUMMARY

- Creates a new Revised Code Chapter 2981., which applies to and governs both criminal and civil asset forfeitures relating to crimes other than crimes under the Motor Vehicle Law.
- Repeals many of the criminal and civil forfeiture provisions in current law regarding corrupt activity, gang activity, drugs, contraband, and Medicaid fraud in favor of the new provisions in R.C. Chapter 2981.
- Applies all of the provisions of the new R.C. Chapter 2981. to juveniles adjudicated delinquent children.
- Specifies that the purpose of forfeiture under new R.C. Chapter 2981. is to (1) provide economic disincentives and remedies to deter and offset the economic effect of offenses by seizing and forfeiting contraband, proceeds, and certain instrumentalities, (2) ensure that seizures and forfeitures of instrumentalities are proportionate to the offense committed, (3) protect third parties from wrongful forfeiture of their property, and (4) prioritize restitution for victims of offenses.
- Provides that property may not be forfeited as an "instrumentality" to the extent that the amount or value of the property is disproportionate to the severity of the offense and that the owner of the property has the burden of going forward with the evidence and the burden to prove by a

** This analysis was prepared before the report of the Senate Judiciary--Criminal Justice Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

- preponderance of the evidence that the amount or value of the property subject to forfeiture is disproportionate to the severity of the offense.
- Revises the definition of "contraband" that applies throughout the Revised Code, including the provisions regarding forfeiture of contraband.
 - Grants the state or political subdivision provisional title to property subject to forfeiture under new R.C. Chapter 2981. upon a person's commission of an offense giving rise to forfeiture, subject to third party claims and a final adjudication of criminal or civil forfeiture.
 - Allows a person with an interest in property that is subject to forfeiture and that is seized to seek conditional release of the property.
 - Clarifies that in a criminal forfeiture case, the defendant has the right to trial by jury and that in a civil forfeiture case the defendant, the state or political subdivision, and third party claimants have the right to trial by jury.
 - Permits any person, other than the offender or delinquent child whose conviction, plea of guilty, or delinquent child adjudication is the basis of the forfeiture order, who asserts a legal interest in the forfeited property to petition for a hearing to adjudicate the validity of the person's alleged interest in the property.
 - Allows a secured party or other lienholder of record that asserts a legal interest in the property, including, but not limited to, a mortgage, security interest, or other type of lien, to file an affidavit to establish the validity of the alleged right, title, or interest in the forfeited property (instead of filing a petition as described in the preceding dot point).
 - States that, after the court disposes of all petitions or affidavits filed by a third party in a civil or criminal forfeiture proceeding in favor of the state or political subdivision, the state or political subdivision has clear title to all property that is the subject of a forfeiture order, to the extent that other parties' lawful interests in the property are not infringed, and may warrant good title to any subsequent purchaser or other transferee.

- Differentiates between the disposal of unclaimed property in the custody of a law enforcement agency and the disposal of contraband, proceeds, and instrumentalities.
- Creates the offense of "interference with or diminishing forfeitable property."
- States that nothing in new R.C. Chapter 2981. precludes the head of a law enforcement agency that seizes property from seeking forfeiture under federal law, but that if property is forfeitable under the new Chapter and federal forfeiture is not sought, the property is subject only to the new Chapter.
- Gives any person who prevails in a civil action for an injury sustained because a person violated the prohibition against engaging in a pattern of corrupt activity to have a right to any property, or the proceeds of any property, criminally forfeited to the state, or against which any fine or civil penalty may be imposed.
- Makes other forfeiture law-related changes recommended by the Criminal Sentencing Commission.
- Specifies that its provisions take effect July 1, 2007, and that, if a criminal or civil forfeiture action relating to misconduct under the Criminal Code was or is commenced before July 1, 2007, and is still pending on that date, the court in which the case is pending must, to the extent practical, apply the provisions of new R.C. Chapter 2981. in the case.

TABLE OF CONTENTS

Reorganization, consolidation, and relocation.....	5
Purposes by which forfeitures are to be governed.....	5
Property subject to forfeiture	6
Contraband	6
Proceeds.....	8
Instrumentalities	9
Proportionality review regarding possible forfeiture of instrumentality	9
Protection of forfeitable property	10
Provisional title to the state or political subdivision.....	10
Seizure of forfeitable property.....	11

Court order to preserve the reachability of the property	11
Rights of parties with an interest in forfeitable property	13
Rights applicable in either a civil or criminal proceeding	13
Rights specific in a civil forfeiture case	16
Criminal forfeiture v. civil forfeiture	16
Criminal forfeiture.....	17
Property that may be forfeited.....	17
Forfeiture hearing.....	18
Civil forfeiture.....	18
Additional court orders applicable in criminal and civil forfeiture proceedings	20
Seizure order	20
Forfeiture order regarding unreachable property	20
Actions requested by the prosecutor.....	20
Rights of parties with an interest in the forfeited property.....	21
Rights specific to a criminal forfeiture.....	21
Rights specific to a civil forfeiture.....	23
No rights for the offender.....	23
Clear title to the state or a political subdivision	24
Property, forfeited and otherwise, in the custody of a law enforcement agency....	24
In general	24
Internal control policy.....	25
Cumulative report.....	25
Cumulative reports and internal control policy records are public	26
Locating persons entitled to possession of the property.....	26
Disposal of unclaimed or forfeited property	26
Disposal of unclaimed or forfeited property other than contraband, proceeds, and instrumentalities.....	26
Disposal of contraband, proceeds, and instrumentalities	30
Certificate of title.....	34
Prosecutor's record-keeping duties with respect to a criminal or civil forfeiture	34
Interference with or diminishing forfeitable property	34
Federal forfeiture	35
Right to property in a civil action brought in a corrupt activity case.....	35
Existing law.....	35
Operation of the bill.....	36
Effective date of the bill	37
Technical and conforming changes.....	37
Summary of repeals.....	38

CONTENT AND OPERATION

Reorganization, consolidation, and relocation

Current Ohio law has criminal and civil asset forfeiture provisions with respect to corrupt activity (R.C. 2923.31 to 2923.36), criminal gang activity (R.C. 2923.41 to 2923.47), felony drug abuse offenses (R.C. 2925.41 to 2925.45), contraband (R.C. 2933.41 to 2933.44), and Medicaid fraud (R.C. 2933.71 to 2933.75). The forfeiture provisions are similar in some regards but differ in many others. Instead of these separate forfeiture provisions, the bill, based on recommendations of the Ohio Criminal Sentencing Commission, reorganizes, consolidates, and relocates most of these provisions to a new chapter, R.C. Chapter 2981., that applies to asset forfeitures relating to crimes, except that, pursuant to R.C. 2981.02(C), the new chapter does not apply to forfeitures under the Motor Vehicle Law.

Current law also imposes limitations upon the application of criminal forfeiture to juveniles adjudicated delinquent children. The bill removes these restrictions and instead states that the provisions of the new R.C. Chapter 2981. apply to children who are adjudicated delinquent children for violating R.C. 2923.32 (corrupt activity) or 2923.42 (criminal gangs) or for committing an act that, if committed by an adult, would be a felony drug abuse offense. (R.C. 2152.20(B).)

Purposes by which forfeitures are to be governed

The bill creates a new "purpose clause" for forfeitures under R.C. Chapter 2981. that states that forfeitures under its provisions are to be governed by the following purposes (R.C. 2981.01(A)):

(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;¹

¹ *The bill defines "offense," for purposes of R.C. Chapter 2981., as meaning any act or omission that could be charged as a criminal offense or a delinquent act, whether or not a formal criminal prosecution or delinquent child 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. The commission of an "offense" includes the commission of a delinquent act. (R.C. 2981.01(B)(10).)*

It also defines "contraband," "proceeds," and "instrumentality," as described in subsequent parts of this analysis.

- (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";²
- (4) To prioritize restitution for victims of offenses.

Property subject to forfeiture

Under the bill, the following property (hereafter termed "forfeitable property") is subject to forfeiture to the state or a political subdivision in either a criminal or delinquency process described below in "**Criminal forfeiture**" or a civil process described below in "**Civil forfeiture**" (R.C. 2981.02(A)):

- (1) "Contraband" involved in an offense (see "**Contraband**," below);
- (2) "Proceeds" (see "**Proceeds**," below) derived from or acquired through the commission of an offense;
- (3) An "instrumentality" (see "**Instrumentalities**," below) that is used in or intended to be used in the commission or facilitation of a felony, a misdemeanor when forfeiture is specifically authorized by a state law or a municipal ordinance that creates the misdemeanor or sets forth its penalties, or an attempt to commit, complicity in committing, or a conspiracy to commit a felony or one of these misdemeanors when the use or intended use, consistent with R.C. 2981.02(B), is sufficient to warrant forfeiture under R.C. Chapter 2981. procedures and limitations.

Contraband

Definition under current law. Current law defines "contraband", as used throughout the Revised Code, as any property in the following categories (R.C. 2901.01(A)(13)):

- (1) Property that in and of itself is unlawful for a person to acquire or possess;
- (2) 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,

² *The bill defines "property," for purposes of R.C. Chapter 2981., as meaning "property" as defined in R.C. 2901.01 and any benefit, privilege, claim, position, interest in an enterprise, or right derived, directly or indirectly, from the offense (R.C. 2981.01(B)(12)).*

including, but not limited to, goods and personal property described in R.C. 2913.34(D) (property involved in the offense of "trademark counterfeiting");

(3) Property that is specifically stated to be contraband by a section of the Revised Code or by an ordinance, regulation, or resolution;

(4) 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 R.C. 2913.34(D);

(5) Any controlled substance, as defined in R.C. 3719.01, or any device, paraphernalia, money as defined in R.C. 1301.01, 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, R.C. Chapter 2925. (Drug Offense Law) or 3719. (Controlled Substance Law);

(6) Any gambling device, paraphernalia, money as defined in R.C. 1301.01, 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, R.C. Chapter 2915. (Gambling Law);

(7) 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;

(8) 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;

(9) 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;

(10) 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;

(11) 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, R.C. 2909.22, 2909.23, or 2909.24 (terrorism-related offenses), or



R.C. 2921.32 ("obstructing justice") when the offense or act committed by the person aided or to be aided as described in that section is an act of terrorism.

Definition under the bill. The bill revises the definition of "contraband" so that it means any property that is 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 (R.C. 2901.01(A)(13); as under current law, the definition applies throughout the Revised Code):

- (1) Any controlled substance, as defined in R.C. 3719.01, or any device or paraphernalia;
- (2) Any unlawful gambling device or paraphernalia;
- (3) Any dangerous ordinance or obscene material.

Prohibition against possessing contraband. Related to the definition of contraband, current R.C. 2933.42 prohibits a person from possessing, concealing, transporting, receiving, purchasing, selling, leasing, renting, or otherwise transferring any contraband. There is no penalty associated with this prohibition other than criminal forfeiture under R.C. 2933.43. R.C. 2933.43 also classifies a vessel used to transport contraband as contraband.

The bill repeals both of these provisions.

Proceeds

The bill defines "proceeds," for purposes of R.C. Chapter 2981., as meaning both of the following (R.C. 2981.01(B)(11), (undefined in current law)):

(1) 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 or any other means of exchange. "Proceeds" is not limited to the net gain or profit realized from the offense.

(2) 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 lawful costs deduction does not include any part of the overhead expenses of, or income taxes paid by, the entity providing the goods or services. The alleged offender or delinquent child has the burden to prove that any costs are lawfully incurred.

Instrumentalities

Current Ohio law states that any property used in an offense is subject to forfeiture as contraband (R.C. 2933.41(C)(1), repealed by the bill). The bill designates this type of property as an "instrumentality" and defines it, for purposes of R.C. Chapter 2981., as meaning property otherwise lawful to possess that is used in or intended to be used in an offense. An "instrumentality" may include, but is not limited to, a firearm, a mobile instrumentality, a computer, a computer network, a computer system, computer software, a telecommunications device, money, and any other means of exchange. "Mobile instrumentality" means an instrumentality that is inherently mobile and used in the routine transport of persons, including, but not limited to, any vehicle, any watercraft, and any aircraft. (R.C. 2981.01(B)(6) and (8).)

Under the bill, in determining whether an alleged instrumentality was used in or was intended to be used in the commission or facilitation of an offense or an attempt, complicity, or conspiracy to commit an offense in a manner sufficient to warrant its forfeiture, the trier of fact must consider the following factors the trier of fact determines are relevant (R.C. 2981.02(B)):

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

Proportionality review regarding possible forfeiture of instrumentality

The bill provides that property may not be forfeited as an instrumentality under its provisions to the extent that the amount or value of the property is disproportionate to the severity of the offense. The owner of the property has the burden of going forward with the evidence and the burden to prove by a preponderance of the evidence that the amount or value of the property subject to forfeiture is disproportionate to the severity of the offense. Contraband and any proceeds obtained from the offense are not subject to proportionality review. The court, in determining substantial proportionality, must consider the severity of the offense and the value of property subject to forfeiture, as described in the next paragraphs. (R.C. 2981.09(A) and (B).)

In determining the severity of the offense for purposes of forfeiture of an instrumentality, the court must consider all relevant factors including, but not limited to, the following (R.C. 2981.09(C)):

(1) 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 person whose property is subject to forfeiture;

(2) The extent to which the person whose property is subject to forfeiture participated in the offense;

(3) Whether the offense was completed or attempted.

In determining the value of the property that is an instrumentality and that is subject to forfeiture, the court must consider relevant factors including, but not limited to, the following (R.C. 2981.09(D)):

(1) The fair market value of the property;

(2) The value of the property to the person whose property is subject to forfeiture, including hardship to the person or to "innocent persons"³ if the property were forfeited.

Protection of forfeitable property

Provisional title to the state or political subdivision

The bill provides that the state or political subdivision acquires provisional title to property subject to forfeiture under R.C. Chapter 2981. upon a person's commission of an offense giving rise to forfeiture, subject to third party claims and a final adjudication of criminal or civil forfeiture under the bill's provisions, described below in "**Criminal forfeiture**" and "**Civil forfeiture**." Provisional title authorizes the state or political subdivision to seize and hold the property, and to act to protect the property, before any forfeiture proceeding. Title to the property vests with the state or political subdivision when the trier of fact renders a final forfeiture verdict or order under the bill's provisions, but that title is subject to third party claims adjudicated under the provisions regarding final forfeiture verdicts and orders. (R.C. 2981.03(A)(1).)

³ The bill defines "innocent person," for purposes of R.C. Chapter 2981., as including any bona fide purchaser of property that is subject to forfeiture, including any person who establishes a valid claim to or interest in the property in accordance with R.C. 2923.04, and any victim of an alleged offense (R.C. 2981.01(B)(5)).

In any criminal or civil forfeiture action under the bill, if a property owner or third party claims lawful interest in the subject property alleged to be proceeds, the state or political subdivision has provisional title and a right to hold property if it proves both of the following by a preponderance of the evidence (R.C. 2981.03(A)(5)):

(1) The interest in the property was acquired by the alleged offender or delinquent child during the commission of the offense or within a reasonable time after that period.

(2) There is no likely source for the interest in the property other than as proceeds derived from or acquired through the commission of the offense.

The bill provides that the alleged offender or delinquent child has the burden to prove the amount of any direct costs lawfully incurred (R.C. 2981.03(A)(5)(b)).

Seizure of forfeitable property

Under the bill, a law enforcement officer may seize property that the officer has probable cause to believe is property subject to forfeiture. If a law enforcement officer seizes property that is titled or registered under law, the officer or the law enforcement agency that employs the officer must notify the property owner of the seizure. The agency must give notice to the property owner at the owner's last known address as soon as practical after the seizure and may give the notice by certified mail or orally by any means, including telephone. If the officer or agency is unable to provide the notice despite reasonable, good faith efforts, those efforts constitute fulfillment of the notice requirement. (R.C. 2981.03(A)(2).)

Court order to preserve the reachability of the property

Upon application by the prosecutor who prosecutes or brings an action that allows forfeiture under the bill (see "Criminal forfeiture" and "Civil forfeiture," below), the court in which the action is prosecuted or filed may issue an order taking any 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, an order placing a lien or lis pendens against the property, or an order appointing a receiver or trustee. The court may issue an order of this nature at any of the following times (R.C. 2981.03(B)(1)):

(1) Upon the filing of a complaint, indictment, or information alleging the property to be forfeitable property;



(2) Prior to the filing of a complaint, an indictment, or information alleging the property to be forfeitable property, if, after giving notice to all persons known to have an interest in the property and giving those persons an opportunity to be heard, the court determines that all of the following apply:

(a) There is a substantial probability the state or political subdivision will prevail on the forfeiture issue.

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

(c) The need to preserve the availability of the property outweighs the hardship on the person against whom the order is to be entered.

(3) As a condition of releasing the property based on a determination of substantial hardship, as described below in "**Conditional release.**"

Except as described in the next paragraph, if the court issues an order to preserve the reachability of the property prior to the filing of a complaint, an indictment, or information alleging the property to be forfeitable property, the court must make the order effective for not more than 90 days, but the court may extend the order if the prosecutor demonstrates that the need to preserve the reachability of the property still exists or for other good cause shown and must extend the order if an indictment, information, or a complaint is filed alleging that the property is subject to forfeiture (R.C. 2981.03(B)(2)).

A court may issue an order to preserve the reachability of property 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 90-day limit described in the preceding paragraph, the court can make this type of an order effective for not more than ten days, but the court may extend the order if the prosecutor again demonstrates that the property is subject to forfeiture and that a hearing will jeopardize the availability of the property or for other good cause shown or if the person subject to the order consents to a longer period. If a party requests a hearing on the order, the court must hold the hearing at the earliest possible time before the order expires. (R.C. 2981.03(B)(3).)

At any hearing to preserve the reachability of property, the court may receive and consider evidence and information that is inadmissible under the Rules of Evidence. The court must cause the hearing to be recorded and a transcript to be made. If property is to be seized as a result of the hearing, the recording and

transcript are not public records for purposes of the existing Public Records Law (R.C. 149.43, not in the bill) until the property is seized, except that this provision does not authorize making available for inspection any confidential law enforcement investigatory record or trial preparation record, as defined in R.C. 149.43. (R.C. 2901.03(B)(4).)

This statutory mechanism to preserve the reachability of property replaces the current provisions in the Medicaid Forfeiture Law and the Corrupt Activity Forfeiture Law (R.C. 2923.33 and 2933.72, repealed by the bill); under the bill, it applies to all property forfeitable under the bill.

Rights of parties with an interest in forfeitable property

Rights applicable in either a civil or criminal proceeding

Unlawful seizure. Under the bill, a person aggrieved by an alleged unlawful seizure of property may seek relief from the seizure by filing a motion in the appropriate court that shows the person's interest in the property, states why the seizure was unlawful, and requests the property's return. If the motion is filed before an indictment, information, or a complaint seeking forfeiture of the property is filed, the court must promptly schedule a hearing on the motion. At the hearing, the person must demonstrate by a preponderance of the evidence that the seizure was unlawful and that the person is entitled to the property. If the motion is filed by a defendant after an indictment, information, or a complaint seeking forfeiture of the property is filed, the court must treat the motion as a motion to suppress evidence. If the motion is filed by a third party after an indictment, information, or complaint seeking forfeiture of the property has been filed, the court must treat the motion as a petition of a person with an alleged interest in the subject property, as discussed below in **'Rights of parties with an interest in the forfeited property.'**" (R.C. 2981.03(A)(4), simplifying current R.C. 2923.47 and 2925.45, repealed by the bill.)

Conditional release. A person with an interest in property that is subject to forfeiture and that is seized under the bill's R.C. Chapter 2981. may seek conditional release of the property by requesting possession from the person with custody of the property. The request must demonstrate how the person meets the following requirements (R.C. 2981.03(D)(1), referencing R.C. 2981.03(D)(3)):

- (1) A possessory interest in the property;
- (2) Sufficient ties to the community to provide assurance that the property will be available at the time of trial;

(3) That failure to conditionally release the property will cause a "substantial hardship" (see below) to the claimant.

If the person with custody of the property does not release the property within 15 days after a person makes a request for conditional release, or within 7 days after a person makes the request if the property was seized as a mobile instrumentality or if the request is to copy records, the person who made the request may file a petition for conditional release with the court in which the complaint, indictment, or information is filed or, if no complaint, indictment, or information is filed, the court that issued the seizure warrant for the property. The petition must demonstrate how the person meets the requirements specified in clauses (1), (2), and (3) of the preceding paragraph and the steps the person has taken to secure release of the property from the official. Unless extended for good cause shown, the petition must be filed either within 30 days of the filing of a complaint, an indictment, or information in the forfeiture action or, if no complaint, indictment, or information is filed, within 30 days of the issuance of the seizure warrant of the property.

Except when there is probable cause that the property is contraband, 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, or except when the property is property alleged to be proceeds for which the state or political subdivision has met the burden described above in "**Provisional title to the state or political subdivision**," a court may conditionally release property subject to forfeiture to a person who demonstrates all of the requirements described in clauses (1), (2), and (3) above in the introductory paragraphs.

In determining whether a "substantial hardship" exists, the court must weigh the claimant's likely hardship from the state's or political subdivision's continued possession of the property against the risk that the property will be destroyed, damaged, lost, concealed, or transferred if returned to the claimant. The court must consider in favor of release the possibility that 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.

If the court finds that the person meets the three criteria specified above in the introductory paragraphs, the court must order the property's conditional return to the person pending completion of the forfeiture action. In issuing this order, the court must notify the person of the prohibitions against interfering with or diminishing property, as described below in "**Interference with or diminishing forfeitable property**," and may make any order necessary to ensure that the value of the property is maintained.

If personal, business, or governmental records are seized, including those contained in computer files, a person may petition the court for a prompt opportunity to copy, at the person's expense, any records that are not contraband. The court may grant the petition if the person demonstrates a possessory interest in the property and that failure to conditionally release the property will cause a substantial hardship. The court must order a competent person to supervise the copying.

If the state or political subdivision shows that the claimant's petition is frivolous, the court must deny the petition. Otherwise, the state or political subdivision may respond to the petition by submitting evidence ex parte to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending trial.

The court must decide on the petition not more than 30 days after it is filed. If the property seized is alleged to be a mobile instrumentality, the court must decide on the petition as soon as practicable within the 30-day period. If personal, business, or governmental records were seized and a person files a petition to copy the records, the court must decide on the petition as soon as practicable. In any case, the court may extend the time for deciding on the petition by consent of the parties or for good cause shown. (R.C. 2981.03(D).)

Rights of a financial institution. The bill states that nothing in the bill's R.C. 2981.03 (it contains the procedure discussed in "**Protection of forfeitable property**" and "**Rights of parties with an interest in forfeitable property**") precludes a financial institution that has or purports to have a security interest in or lien on forfeitable property from filing an action in connection with the property, prior to its disposition under the bill's provisions, to obtain possession of the property in order to foreclose or otherwise enforce the security interest or lien. However, 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 the bill's provisions, if the person who is responsible for conducting the sale has actual knowledge of the commencement of either a criminal or civil forfeiture action, and if the property is sold, then the person must dispose of the proceeds of the sale in the following order (R.C. 2981.03(E)):

(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 at which the state or political 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 criminal or civil forfeiture case or proceeding for disposition under the bill's R.C. Chapter 2981.

Rights specific in a civil forfeiture case

In a civil forfeiture case under the bill in which the state or political subdivision seeks to seize real property, the property owner may request a hearing before the seizure, and in the hearing the state or political subdivision show probable cause that the real property is subject to forfeiture. If a timely petition for pretrial hardship release is not filed, or if a petition is filed but not granted, the person may also file a claim for the release of the property under the Rules of Civil Procedure. (R.C. 2981.03(A)(3) and 2981.05(C).)

Criminal forfeiture v. civil forfeiture

Of the current forfeiture laws, only the current Drug Offense Law provisions differentiate between criminal and civil forfeiture (R.C. 2925.42 and 2925.43).⁴ Medicaid fraud forfeiture law has no criminal forfeiture, only civil (R.C. 2933.73 repealed by the bill in Section 2). The bill creates criminal and civil forfeiture procedures (discussed below in "**Criminal forfeiture**" and "**Civil forfeiture**") that are applicable to all criminal offenses, except that they do not apply to or limit forfeitures under the Motor Vehicle Law including forfeitures relating to R.C. 2903.06 and 2903.08 (the vehicular homicide and assault offenses). To the extent they do not conflict with R.C. Chapter 2981., the penalties and procedures under R.C. Chapter 2923., 2925., and 2933. remain in effect. (R.C. 2981.01(C) and 2981.02(C).)

Under the bill, a prosecutor may file a criminal forfeiture action, a civil forfeiture action, or both. If property is seized under the provisions described above in "**Protection of forfeitable property**" and a criminal forfeiture has not begun, the prosecutor of the county in which the seizure occurred must commence a civil action to forfeit that property. (R.C. 2981.03(F).)

⁴ *The provisions of R.C. 2925.42 that deal with criminal forfeiture are repealed by the bill, but the provisions in that section that allow a court to impose a fine of not more than twice the gross profits or other proceeds derived from profits or other proceeds from the felony drug abuse offense or act are unchanged from current law (R.C. 2925.42(A), (B), and (C)). R.C. 2925.43 is repealed by the bill.*

A prosecutor may file an appropriate charging instrument to seek a criminal forfeiture after a civil forfeiture action begins. Filing a charging instrument for an offense that is also the basis of a civil forfeiture action stays the civil action. (R.C. 2981.03(F), carrying over a similar provision in current drug forfeiture law at R.C. 2925.43(D)(1), repealed by the bill.)

Also, generally, any replevin, conversion, or other civil action brought concerning property subject to a criminal or civil forfeiture action under the bill's R.C. Chapter 2981. must be stayed until the forfeiture action is resolved (R.C. 2981.03(C)).

Criminal forfeiture

The bill provides that in a criminal forfeiture case under its provisions, the defendant has the right to trial by jury (R.C. 2981.08(A)).

Property that may be forfeited

Under the bill, forfeitable property may be criminally forfeited under its provisions only if the complaint, indictment, or information charging the offense or municipal violation, 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 (R.C. 2981.04(A)(1) and 2941.1417):

- (1) The nature and extent of the alleged offender's or delinquent child's interest in the property;
- (2) A description of the property;
- (3) If the property is alleged to be an instrumentality, the alleged use or intended use of the property in the commission or facilitation of the offense.

This specification must be stated at the end of the body of the indictment, count, or information, must be in substantially the form specified in statute, and may be used in a delinquent child specification. Under the bill, the trier of fact determines whether the property is subject to forfeiture. (R.C. 2941.1417.)

If any property is not reasonably foreseen to be subject to forfeiture at the time of filing the indictment, information, or complaint, the trier of fact still may return a verdict of forfeiture concerning that property in the hearing described below in "**Forfeiture hearing**," if the prosecutor, upon discovering the property to be subject to forfeiture, gave prompt notice of this fact to the alleged offender or delinquent child under Criminal Rule 7(E) or Juvenile Rule 10(B). (R.C. 2981.04(A)(2).)

These provisions regarding property that may be forfeited are similar to provisions in current law at R.C. 2923.44(B)(1), 2925.42(B)(1), and 2933.73(B), all of which are repealed by the bill (R.C. 2923.44, 2925.42, and Section 2).

Forfeiture hearing

The bill specifies that, if a person pleads guilty to or is convicted of an offense or is adjudicated a delinquent child for committing a delinquent act and the complaint, indictment, or information charging the offense or act contains a specification covering forfeitable property, the trier of fact must determine whether the person's property is to be forfeited. If the state or political subdivision proves by a preponderance of the evidence that the property is in whole or part forfeitable property, after a proportionality review if relevant, the trier of fact must return 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 or delinquent child's motion, the court must make the determination of whether the property is to be forfeited. (R.C. 2981.04(B), a new provision.)

For good cause shown, the court may consider issues of the guilt of the alleged offender or the delinquency of the alleged delinquent child separate from whether property specified as subject to forfeiture should be forfeited (R.C. 2981.04(A)(3)).

If the court enters a verdict of criminal forfeiture, the court imposing sentence or disposition, in addition to any other sentence authorized by R.C. Chapter 2929. (the Criminal Sentencing Law) or any disposition authorized by R.C. Chapter 2152. (the Delinquent Child Law), must order that the offender or delinquent child forfeit to the state or political subdivision the offender's or delinquent child's interest in the property. The property, then, vests with the state or political subdivision subject to the claims of third parties. The court may issue any additional order to affect the forfeiture, including, but not limited to, those orders described below in "**Additional court orders applicable in criminal and civil forfeiture proceedings.**" (R.C. 2981.04(C).)

These criminal forfeiture procedures are similar to the current Gang Law and Drug Offense Law forfeiture procedures.

Civil forfeiture

The bill allows the prosecutor of the political subdivision in which forfeitable property is located to commence a civil forfeiture action by filing in the court of common pleas of the county in which the property is located a complaint requesting an order that forfeits the property to the state or a political subdivision. A civil action to obtain civil forfeiture may be commenced regardless of whether

the adult or juvenile offender has pleaded guilty to, been convicted of, or been adjudicated a delinquent child for the act that is the basis of the order. If the property seized, as discussed above in "Protection of forfeitable property," includes property alleged to be a mobile instrumentality or includes personal, business, or governmental records, a civil forfeiture action must be brought within 30 days of seizure. Otherwise, the action must be brought within 60 days of seizure. In either case, the period within which the action shall be brought may be extended by agreement of the parties or by the court for good cause shown. In a civil forfeiture action, the defendant, the state or political subdivision, and third party claimants have the right to trial by jury. (R.C. 2981.03(F), 2981.05(A), and 2981.08(B).)

However, prior to or upon the commencement of a civil forfeiture action, the prosecutor must 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 must 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. The prosecutor must 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. (R.C. 2981.05(B).)

The bill requires the court to issue a civil forfeiture order if it determines that the prosecutor has proved by a preponderance of the evidence that the property is forfeitable property, and, after a proportionality review if necessary, the trier of fact specifically describes the extent of the property to be forfeited. A civil forfeiture order must 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 political subdivision and make due provision for the interest in that property of any other person, when appropriate. The court may issue any additional order to affect the forfeiture, including, but not limited to, those orders described below in "Additional court orders applicable in criminal and civil forfeiture proceedings." (R.C. 2981.05(D).)

This civil forfeiture provision consolidates, streamlines, and modifies the current civil forfeiture provisions contained in the Gang Law (R.C. 2923.45), the Contraband Law (R.C. 2933.43), the Drug Offense Law (R.C. 2925.43), and the Medicaid Fraud Law (R.C. 2933.73), all of which are repealed by the bill.

Additional court orders applicable in criminal and civil forfeiture proceedings

Seizure order

When a civil or criminal forfeiture order is entered under the bill, the court, if necessary, must order an appropriate law enforcement officer to seize the forfeited property on conditions that the court considers proper. Also, if necessary, the court must 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 of the property. The court must deliver the order by personal service or certified mail. (R.C. 2981.06(A).)

Forfeiture order regarding unreachable property

The bill requires a court that issues a civil or criminal forfeiture order to order forfeiture of any other property of the offender up to the value of the unreachable property if any of the following circumstances describe any property subject to criminal or civil forfeiture (R.C. 2981.06(D)):

- (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.

Actions requested by the prosecutor

The bill also allows the court that issues a criminal or civil forfeiture order, upon the petition of the prosecutor who prosecuted the underlying offense or act or brought the civil forfeiture action, to do any of the following with respect to property that is the subject of the forfeiture order (R.C. 2981.06(B)):

- (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;
- (2) Authorize the payment of rewards to persons who provide information resulting in forfeiture of the property under the bill from funds provided under the citizen's reward program;

(3) Authorize the prosecutor to settle claims;

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

(5) 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.

The court, consistent with the Civil Rules and upon application by the prosecutor, 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. The purpose of this order is 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. (R.C. 2981.06(C).)

Rights of parties with an interest in the forfeited property

Rights specific to a criminal forfeiture

After the entry of a criminal forfeiture order under the bill, the prosecutor must 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 must give notice of the forfeiture that remains subject to the claims of third parties and proposed disposal of the forfeited property to any person known to have an interest in the property. The prosecutor also must publish notice of the forfeiture that remains subject to the claims of third parties and proposed disposal of the forfeited property once each week for two consecutive weeks in a newspaper of general circulation in the county in which the property was seized. (R.C. 2981.04(D).)

Any person, other than the offender or delinquent child whose conviction or plea of guilty or delinquency adjudication is the basis of the forfeiture order, who asserts a legal interest in the forfeited property may petition the court that issued the criminal forfeiture order for a hearing to adjudicate the validity of the person's alleged interest in the property. The petition must be filed within 30 days after the final publication of notice or the person's receipt of notice, be signed by the petitioner under the penalties for falsification specified in existing R.C. 2921.13 (not in the bill), and describe 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. (R.C. 2981.04(E)(1).)

Instead of filing a petition as described in the preceding paragraph, if a person described in that paragraph is a secured party or other lienholder of record that asserts a legal interest in the property, including, but not limited to, a mortgage, security interest, or other type of lien, the person may file an affidavit to establish the validity of the alleged right, title, or interest in the forfeited property. The affidavit must contain averments that the secured party or other lienholder acquired its alleged right, title, or 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 offense that was the basis of the forfeiture order, in good faith, and without the intent to prevent or otherwise impede the state or political subdivision from seizing or obtaining a forfeiture of the property. The affidavit must be filed within 30 days after the earlier of the final publication of notice or the receipt of notice.

Generally, an affidavit filed as described in the preceding paragraph constitutes prima-facie evidence of the validity of the affiant's alleged interest in the property. The affidavit constitutes conclusive evidence of the validity of the affiant's interest in the property, 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 the hearing that the affiant does not possess the alleged interest in the property or that the affiant had actual knowledge of facts pertaining to the offense or delinquent act that was the basis of the forfeiture order.

The bill provides that any subsequent purchaser or other transferee of property forfeited under a criminal forfeiture order takes the property subject to the continued validity of the interest of the affiant. (R.C. 2981.04(E)(2).)

Upon receipt of a petition or affidavit under the provisions described above, the court is required to hold a hearing to determine the validity of the petitioner's interest in the property that is the subject of the criminal forfeiture order or, if the affidavit was challenged, to determine the validity of the affiant's interest in the property. To the extent practicable and consistent with the interests of justice, the court must hold the hearing within 30 days after the filing of the petition or within 30 days after the prosecutor files the motion challenging the affidavit. The court may consolidate the hearing with a hearing on any other petition or affidavit that is filed by an interested party and that relates to the property that is the subject of the forfeiture order.

At the hearing described in the preceding paragraph, the petitioner or affiant may testify, present evidence and witnesses on the petitioner's or affiant's behalf, and cross-examine witnesses for the state or political subdivision. Regarding a petition, the state or political subdivision may present evidence and witnesses in rebuttal and in defense of its claim to the property and may cross-examine witnesses for the petitioner. Regarding an affidavit, the prosecutor may

present evidence and witnesses and cross-examine witnesses for the affiant. In addition to the evidence and testimony presented at the hearing, the court also must consider the relevant portions of the record in the criminal or delinquent child case that resulted in the forfeiture order. (R.C. 2981.04(E)(3).)

If the hearing described above involves a petition, the court must 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 (R.C. 2981.04(F)(1)):

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

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

The court also must 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 (R.C. 2981.04(F)(2)).

Rights specific to a civil forfeiture

The bill provides that a person with an interest in the property subject to civil forfeiture under its provisions may petition the court to release the property, and the court must consider the petition, as described above in **'Rights of parties with an interest in forfeitable property.'** 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 for the release of the property under the Rules of Civil Procedure. The court has responsibility for disposing of any petitions that are timely filed. (R.C. 2981.05(C).)

No rights for the offender

Under the bill, any interest in property not exercisable by, or transferable for value to, the state or political subdivision expires and does not revert to the offender who forfeited the property. The offender or delinquent child is not eligible to purchase the property at a sale under the bill's R.C. Chapter 2981. (R.C. 2981.06(F).)

Clear title to the state or a political subdivision

The bill provides that, if the court disposes of all petitions or affidavits timely filed by a third party in a civil or criminal forfeiture proceeding in favor of the state or political subdivision, the state or political subdivision has clear title to the property that is the subject of a civil or criminal forfeiture order, but only to the extent that other parties' lawful interests in the property are not infringed. To the extent that the state or political subdivision has clear title to the property, the state or political subdivision may warrant good title to any subsequent purchaser or other transferee. After this grant of clear title, the prosecutor must direct disposition of the property, making due provisions for the rights of innocent persons. (R.C. 2981.04(G), 2981.05(E), and 2981.06(E).)

Any income accruing to or derived from 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, political subdivision, or third parties (R.C. 2981.06(G)).

Property, forfeited and otherwise, in the custody of a law enforcement agency

In general

The bill enacts R.C. 2981.11 (which largely contains provisions of existing law codified at R.C. 2933.41, repealed by the bill) to specify that 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 must be kept safely by the agency, pending the time that it no longer is needed as evidence or for another lawful purpose. However, the bill's R.C. Chapter 2981., including the custody provisions of R.C. 2981.11 and the disposition provisions discussed below in "**Disposition of property**," do not apply to any of the following (R.C. 2981.11(A)(2)):

- (1) Vehicles subject to forfeiture under the Motor Vehicle Law, generally;
- (2) Abandoned junk motor vehicles or other property of negligible value;
- (3) 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 of, or that is identified by the Department as having little value;
- (4) Animals taken, and devices used in unlawfully taking animals, under existing R.C. 1531.20, not in the bill;
- (5) Controlled substances sold by a peace officer in the performance of the officer's official duties under existing R.C. 3719.141, not in the bill;

(6) Property recovered by a township law enforcement agency under existing R.C. 505.105 to 505.109, not in the bill;

(7) Property held and disposed of under an ordinance of the municipal corporation or under existing R.C. 737.29 to 737.33, not in the bill, except that a municipal corporation that has received notice of a citizens' reward program and disposes of property under an ordinance must pay 25% of any moneys acquired from any sale or auction to the citizens' reward program.

Internal control policy

Each law enforcement agency that has custody of any property in the manner described above, other than property in any of the seven categories described above, must adopt and comply with a written internal control policy that does all of the following (R.C. 2981.11(B)(1)):

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

(2) Provides for keeping detailed records of the disposition of the property. The records must include, but not be limited to, both of the following:

(a) 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 (the record may not identify or enable identification of the individual officer who seized any item of property);

(b) The general types of expenditures made with amounts that are gained from the sale of the property and that are retained by the agency, including the specific amount expended on each general type of expenditure, except that the policy may not provide for or permit the identification of any specific expenditure that is made in an ongoing investigation.

(3) Complies with the internal control policy requirements related to a law enforcement trust fund or similar fund described below in **Required reports**, if the agency has such a fund.

Cumulative report

The bill requires each law enforcement agency that during any calendar year has any seized or forfeited property described above under "**Property, forfeited and otherwise, in the custody of a law enforcement agency**" in its custody, including amounts distributed under R.C. 2981.13 (see "**Disposal of contraband, proceeds, and instrumentalities**," below) to its law enforcement trust fund or a similar fund created for the State Highway Patrol, Department of Public

Safety, or State Board of Pharmacy, to 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 its internal control policy for that calendar year. The agency must send a copy of the cumulative report to the Attorney General not later than March 1 in the calendar year following the calendar year covered by the report. (R.C. 2981.11(B)(2).)

Not later than April 15 in each calendar year in which cumulative reports are sent to the Attorney General, as described in the preceding paragraph, the Attorney General must send to the Senate President and the Speaker of the House of Representatives a written notice that indicates that the Attorney General received reports that cover the previous calendar year, that the reports are open for inspection under the existing Public Records Law, and that the Attorney General will provide a copy of any or all of the reports to the President or the Speaker upon request (R.C. 2981.11(B)(4)).

Cumulative reports and internal control policy records are public

The bill specifies that the records kept under the internal control policy it requires must be open to public inspection during the agency's regular business hours. Also, the bill requires the internal control policy and each report received by the Attorney General to be a public record open for inspection under the existing Public Records Law. (R.C. 2981.11(B)(3).)

Locating persons entitled to possession of the property

The bill requires a law enforcement agency with custody of property to 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 and to briefly describe the nature of the property in custody and invite persons to view and establish their right to it. (R.C. 2981.11(C).)

Disposal of unclaimed or forfeited property

Disposal of unclaimed or forfeited property other than contraband, proceeds, and instrumentalities

Under the bill, any unclaimed or forfeited property in the custody of a law enforcement agency, other than property in any of the seven categories of excluded property described above in **Property, forfeited and otherwise, in the custody of a law enforcement agency,**" must be disposed of by order of any court

of record that has territorial jurisdiction over the political subdivision that employs the law enforcement agency as follows (R.C. 2981.12(A) and (B), containing substantially the same provisions as R.C. 2923.46 and 2933.41 and replacing R.C. 2933.74, all of which are repealed by the bill):

(1) Drugs must be disposed of pursuant to existing R.C. 3719.11, which is not in the bill (generally destroyed or delivered to the Department of Health), 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) 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 (see below). The agency must destroy other firearms and dangerous ordnance or send them to the Bureau of Criminal Identification and Investigation for destruction by the Bureau.

(3) Obscene materials must be destroyed.

(4) Beer, intoxicating liquor, or alcohol seized under the Liquor Law must be sold by the Division of Liquor Control if the Division determines that it is fit for sale or must be 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, must adopt rules to provide for the distribution to state or local law enforcement agencies upon their request. Any beer, intoxicating liquor, or alcohol that the Division determines to be unfit for sale must be destroyed.

(5) Money received by an inmate of a correctional institution from an unauthorized source or in an unauthorized manner must be returned to the sender, if known, or deposited in the inmates' industrial and entertainment fund of the institution if the sender is not known.

(6) Any forfeited mobile instrumentality may be given to the law enforcement agency that initially seized the mobile instrumentality for use in performing its duties, if the agency wants the mobile instrumentality. The agency takes the mobile instrumentality subject to any security interest or lien on the mobile instrumentality.

(7) Vehicles and vehicle parts forfeited under R.C. 4549.61 to 4549.63 (relating to tampering with vehicle identification numbers) 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 must be destroyed and sold as junk or scrap.

(8) 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 as described in paragraph (9).

(9) All other property not described above or under the bill's R.C. 2981.11(A)(2), may be used by the law enforcement agency in possession of it, with court approval. If the property 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 appropriate.

If property ordered forfeited as contraband, proceeds, or instrumentalities is to be sold as provided in this section of the analysis, the prosecutor must cause notice of the proposed sale to be given in accordance with law (R.C. 2981.13(A)).

Deposit of any moneys acquired from a sale. With respect to beer, intoxicating liquor, or alcohol that is sold, if any tax imposed under the Liquor Law has not been paid in relation to the beer, intoxicating liquor, or alcohol, any moneys acquired from the sale must first be used to pay the tax. All other money collected by a sale is to be paid into the state treasury. (R.C. 2981.12(A)(4).)

As described above, if money received by an inmate of a correctional institution from an unauthorized source or in an unauthorized manner is not returned to the sender, the money must be deposited in the inmates' industrial and entertainment fund of the institution (R.C. 2981.12(A)(5)).

If property that is sold was in the possession of the law enforcement agency in relation to a delinquent child proceeding in a juvenile court, 10% of any moneys acquired from the sale must be applied to one or more alcohol and drug addiction treatment programs that are certified by the Department of Alcohol and Drug Addiction Services. A juvenile court cannot specify a program unless the program is in the same county as the court or in a contiguous county. However, if no certified program is located in any of those counties, the juvenile court may specify a certified program anywhere in Ohio. The remaining 90% of the proceeds or cash are to be disposed of as provided in the next paragraph. (R.C. 2981.12(D).)

If a law enforcement agency is notified by a board of county commissioners that the board has recognized a citizens' reward program, the agency must pay 25% of any forfeited proceeds or cash derived from each sale of disposed property

to the citizens' reward program for the exclusive use of paying rewards. No part of the funds may be used to pay expenses associated with the program. If a citizens' reward program that operates in more than one county or in another state in addition to Ohio receives such funds, the funds may only be used to pay rewards for tips and information to law enforcement agencies concerning offenses committed in the county from which the funds were received. The bill specifies that receiving funds under this provision or the bill's R.C. 2981.11 does not make the citizens' reward program a governmental unit or public office for purposes of the Public Records Law. (R.C. 2981.12(F).)

If the moneys acquired from a sale are not subject to one of the above disposition provisions, the moneys acquired from the sale must be placed in the General Revenue Fund of the state, or the general fund of the county, the township, or the municipal corporation of which the law enforcement agency involved is an agency (R.C. 2981.12(C)).

No property forfeited under the bill's provisions can 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 (R.C. 2981.12(G)).

Reports from treatment programs that receive money. Each alcohol and drug addiction treatment program that receives in any calendar year forfeited money under the bill must 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 must file the report on or before March 1 in the calendar year following the calendar year in which the program received the money. The report must 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 can identify, or enable a person to determine the identity of, any person served by the program. (R.C. 2981.12(D).)

Additionally, each certified alcohol and drug addiction treatment program that receives in any calendar year money as the result of a juvenile forfeiture order⁵ under the bill must file an annual report for that calendar year with the

⁵ "Juvenile-related forfeiture order" means any forfeiture order issued by a juvenile court under R.C. 2981.04 or 2981.05 and any disposal of property ordered by a court under R.C. 2981.11 regarding property that was in the possession of a law enforcement agency in relation to a delinquent child proceeding in a juvenile court (R.C. 2981.12(E)).

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 must file the report on or before March 1 in the calendar year following the year in which the program received the money. The report must 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 can identify or enable a person to determine the identity of anyone served by the program. (R.C. 2981.12(E), relocated from current R.C. 2933.44, repealed by the bill.)

Disposal of contraband, proceeds, and instrumentalities

In general. Generally, the bill provides that property ordered forfeited as contraband, proceeds, or instrumentalities under the bill's R.C. Chapter 2981. is to be disposed of, used, or sold as described above in "**Disposal of unclaimed or forfeited property other than contraband, proceeds, and instrumentalities.**" However, R.C. 2981.13, enacted by the bill, specifies the following distribution order for the gains realized from the sale of contraband, proceeds, or an instrumentality (R.C. 2981.13(B), which generally follows current R.C. 2933.43(D)(1), repealed by the bill and replaces the disposal provisions in R.C. 2923.35 and 2925.44, repealed by the bill):

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

(2) 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) Third, to pay the balance due on any security interest preserved under the bill's R.C. Chapter 2981.;

(4) Fourth, the remaining amounts must be applied as follows:

(a) If the forfeiture was ordered by a juvenile court, 10% to one or more certified alcohol and drug addiction treatment programs as described above in "**Deposit of any moneys acquired from a sale**";

(b) If the forfeiture was ordered in a juvenile court, 90%, and if the forfeiture was ordered in a court other than a juvenile court, 100% 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; 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; the Medicaid Fraud Investigation and Prosecution Fund; or the Treasurer of State for deposit into the Peace Officer Training Commission Fund⁶ 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) If more than one law enforcement agency is substantially involved in the seizure of forfeited property, the court ordering the forfeiture must equitably divide the amounts, after calculating any distribution to the law enforcement trust fund of the prosecutor, among the entities that the court determines were substantially involved in the seizure.

Restrictions on the use of moneys acquired from a sale distributed to the various funds. The bill places multiple restrictions on the use of funds distributed from the sale of contraband, proceeds, and instrumentalities (relocated from existing R.C. 2933.43(D)(1), which is repealed by the bill). First, the bill specifies that amounts distributed to any municipal corporation, township, or park district law enforcement trust fund (which are required to be established under the bill) must 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 (R.C. 2981.13(C)(1).)

Second, the bill prohibits the allocation of any amounts to a fund created by the bill 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 may be expended only in accordance with that policy and, unless another provision applies, only for the following purposes (R.C. 2981.13(C)(2)(a)):

(1) To pay the costs of protracted or complex investigations or prosecutions;

⁶ With the exception of the Board of Pharmacy Drug Law Enforcement Fund created by R.C. 4729.65, each of these funds is created by existing 2933.43(D)(1)(c)(ii), which the bill repeals. The bill relocates this provision to 2981.13(C)(1).

(2) To provide reasonable technical training or expertise;

(3) 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;

(4) To pay the costs of emergency action taken under existing R.C. 3745.13, not in the bill, 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;

(5) 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.

Third, with respect to the Board of Pharmacy Drug Law Enforcement Fund, the fund may only be expended in accordance with the written internal control policy adopted by the Board and only in accordance with R.C. 4729.65, except that it also may be expended to pay the costs of emergency action taken under existing R.C. 3745.13 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 (R.C. 2981.13(C)(2)(b)).

Fourth, the bill prohibits 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 (all of which are established or required to be established under the bill) from being used to meet the operating costs of the State Highway Patrol, the Investigative Unit of the Department of Public Safety, the State Board of Pharmacy, any political subdivision, or any office of a prosecutor or county sheriff that are unrelated to law enforcement (R.C. 2981.13(C)(2)(c)).

Fifth, the bill requires that forfeited moneys paid into the state treasury be deposited into the Peace Officer Training Commission Fund to be used by the Commission only to pay the costs of peace officer training (R.C. 2981.13(C)(2)(d)).

Required reports. The bill requires that any of the following offices or agencies that receive amounts from the sale of contraband, proceeds, or instrumentalities during any calendar year must file a report with the specified entity, not later than January 31 of the next calendar year, verifying that the moneys were expended only for the authorized purposes and specifying the

amounts expended for each authorized purpose (R.C. 2981.13(C)(3), relocated from R.C. 2933.43(D)(1), which is repealed by the bill):

- (1) Any sheriff or prosecutor must file the report with the county auditor.
- (2) Any municipal corporation police department must file the report with the legislative authority of the municipal corporation.
- (3) Any township police department, township police district police force, or office of the constable must file the report with the board of township trustees of the township.
- (4) Any park district police force or law enforcement department must file the report with the board of park commissioners of the park district.
- (5) The Superintendent of the State Highway Patrol must file the report with the Attorney General.
- (6) The Executive Director of the State Board of Pharmacy must file 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 R.C. 4729.65.
- (7) The Peace Officer Training Commission must file a report with the Attorney General, verifying that cash and forfeited proceeds paid into the Peace Officer Training Commission Fund during the prior calendar year were used by the Commission during the prior calendar year only to pay the costs of peace officer training.

Additionally, 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 must provide that at least 10% of the first \$100,000 of amounts deposited during each calendar year in the agency's law enforcement trust fund, and at least 20% of the amounts exceeding \$100,000 that are so deposited, must be used in connection with community preventive education programs. The manner of use is to 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 must specify the amount deposited during each calendar year in the portion of that amount that was

used as provided in the preceding paragraph, and the programs in connection with which the portion of that amount was so used. (R.C. 2981.13(D), relocated from R.C. 2933.43(D)(3), which is repealed by the bill.)

No effect on the validity of the seizure. The bill states that any failure of a law enforcement officer or agency, prosecutor, court, or the Attorney General to comply with the provisions described above regarding disposal of contraband, proceeds, or instrumentalities in relation to any property seized does not affect the validity of the seizure and is not to be considered the basis for suppressing any evidence resulting from the seizure, provided the seizure itself was lawful (R.C. 2981.13(F), relocated from repealed R.C. 2933.43(G)).

Certificate of title

The bill provides that upon the sale, under R.C. 2981.12 or 2981.13, of any property that is required by law to be titled or registered, the state must 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 must issue an appropriate certificate of title or registration. (R.C. 2981.13(E), relocated from R.C. 2933.43(E), which the bill repeals.)

Prosecutor's record-keeping duties with respect to a criminal or civil forfeiture

The bill requires the prosecutor to maintain an accurate record of each item disposed of pursuant to a criminal or civil forfeiture action under the bill's provisions. The record may not identify or enable the identification of the officer who seized the property. The record is a public record open for inspection under the Public Records Law. (R.C. 2981.03(G).)

Interference with or diminishing forfeitable property

The bill creates a new criminal offense named "interference with or diminishing forfeitable property." A person commits "interference with or diminishing forfeitable property" when the person destroys, damages, removes, or transfers property that is subject to forfeiture or otherwise takes any action in regard to property that is subject to forfeiture with purpose to do any of the following (R.C. 2981.07(A)):

- (1) Prevent or impair the state's or political subdivision's lawful authority to take the property into its custody or control under R.C. Chapter 2981. 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 R.C. Chapter 2981.

Generally, "interference with or diminishing forfeitable property" is a misdemeanor of the first degree. However, if the value of the property is \$500 or more but less than \$5,000, "interference with or diminishing forfeitable property" is a felony of the fifth degree. If the value of the property is \$5,000 or more but less than \$100,000, "interference with or diminishing forfeitable property" is a felony of the fourth degree. If the value of the property is \$100,000 or more, "interference with or diminishing forfeitable property" is a felony of the third degree. (R.C. 2981.07.)

Federal forfeiture

The bill states that nothing in its R.C. Chapter 2981. precludes the head of a law enforcement agency that seizes property from seeking forfeiture under federal law. However, if the property is forfeitable under R.C. Chapter 2981. and federal forfeiture is not sought, the property is subject only to R.C. Chapter 2981.

Any law enforcement agency that receives moneys from a sale of forfeited property under federal law must 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 federal forfeiture moneys, the appropriate official must 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. (R.C. 2981.14, incorporating portions of current R.C. 2933.43(D)(4) and 2923.45(B)(3), repealed by the bill.)

Right to property in a civil action brought in a corrupt activity case

Existing law

Existing law, unchanged by the bill, allows certain persons who are injured or threatened with injury by the offense of "engaging in a pattern of corrupt activity" to institute a civil proceeding in an appropriate court seeking relief from any person whose conduct violated or allegedly violated the offense. If such a plaintiff proves the violation by a preponderance of the evidence, the court, after making due provision for the rights of innocent persons, may grant relief by entering any appropriate orders to ensure that the violation will not continue or be repeated. The orders may include, but are not limited to, orders that (R.C. 2923.34(B) and (C)):

(1) Require the divestiture of the defendant's interest in any enterprise or in any real property;

(2) Impose reasonable restrictions upon the future activities or investments of any defendant in the action, including, but not limited to, restrictions that prohibit the defendant from engaging in the same type of endeavor as the enterprise in which the defendant was engaged in when the offense occurred;

(3) Order the dissolution or reorganization of any enterprise, if the Attorney General intervenes;

(4) Order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any department or agency of the state, if the Attorney General intervenes;

(5) If the Attorney General intervenes, order the dissolution of a corporation organized under the laws of this state, or the revocation of the authorization of a foreign corporation to conduct business within this state, upon a finding that the board of directors or an agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of the offense of engaging in a pattern of corrupt activity, and that, for the prevention of future criminal conduct, the public interest requires the corporation to be dissolved or its license revoked.

The plaintiff also has a cause of action for triple the actual damages the person sustained (R.C. 2923.34(E)).

Operation of the bill

In addition to the orders that may be entered and damages that may be awarded under existing law, the bill also allows any person who prevails in a civil action brought under the Corrupt Activity Law to have a right to any property, or the proceeds of any property, criminally forfeited to the state, as described above in "**Criminal forfeiture**," or against which any fine or civil penalty may be imposed. Under the bill, the right of any person who prevails in this type of civil action, other than a prosecuting attorney performing official duties under "that section" (apparently, the section pertaining to criminal forfeiture), to forfeited property, property against which fines and civil penalties may be imposed, and the proceeds of that property is superior to any right of the state, a municipal corporation, or a county to the property or the proceeds of the property, if the civil action is brought within 180 days after the entry of a sentence of forfeiture, a fine, or civil penalty. The right is limited to the total value of the treble damages, civil penalties, attorney's fees, and costs awarded to the prevailing party, less any restitution received by the person. (R.C. 2923.34(M)(1).)

If the aggregate amount of claims of persons who have prevailed in a civil action brought under the Corrupt Activity Law against any one defendant is greater than the total value of the treble fines, civil penalties, and forfeited property paid by the person against whom the actions were brought, all of the persons who brought their actions within 180 days after the entry of a sentence or disposition of forfeiture, fine, or the entry of a civil penalty, first receive a pro rata share of the total amount of the fines, civil penalties, and forfeited property. After the persons who brought their actions within the specified 180 day period have satisfied their claims out of the fines, civil penalties, and forfeited property, all other persons who prevailed in civil actions pursuant to this section receive a pro rata share of the total amount of the fines, civil penalties, and forfeited property that remains in the custody of the law enforcement agency or in the corrupt activity investigation and prosecution fund. (R.C. 2923.34(M)(2).)

Effective date of the bill

The bill states that its provisions described above take effect on July 1, 2007. The bill also provides that, if a criminal or civil forfeiture action relating to misconduct under the Criminal Code was or is commenced before July 1, 2007, and is still pending on that date, the court in which the case is pending must, to the extent practical, apply the provisions of the bill's R.C. Chapter 2981. in the case. (Section 4.)

Technical and conforming changes

Because the bill repeals and amends many provisions of current law that deal with forfeitures, the following sections of the Revised Code are included in the bill to change references to various forfeiture laws: R.C. 9.92, 109.85, 309.08, 311.07, 1506.35, 2909.08, 2913.34, 2913.421, 2923.01, 2923.31, 2923.34, 2923.36, 2923.41, 2923.42, 2925.03, 2925.14, 2927.02, 2929.18, 2930.11, 2933.75, 2935.03, 2945.44, 3719.11, 3719.141, 3719.21, 3729.13, 3743.68, 3745.13, 4301.29, 4301.45, 4301.53, 4305.13, 4503.233, 4503.234, 4510.41, 4511.195, 4549.62, 4549.63, 4728.04, 4729.65, 5735.121, 5739.15, 5743.082, and 5743.112.

Also, the bill amends many provisions of current law that deal with forfeitures to conform them to the bill's forfeiture provisions enacted in R.C. Chapter 2981. These provisions, many of which are discussed in earlier parts of this analysis, are: R.C. 2152.20(B), 2923.32, 2923.34(A), 2923.41(G) to (K), 2923.44, and 2925.42.

Summary of repeals

The bill repeals the following R.C. sections (most are discussed in earlier parts of this analysis):

- R.C. 2923.33 (regarding a motion and order to preserve the reachability of property in a corrupt activity case);
- R.C. 2923.35 (disposition of property forfeited in a corrupt activity case);
- R.C. 2923.45 (property subject to civil forfeiture in a criminal gang forfeiture action);
- R.C. 2923.46 (disposition of property in a criminal gang forfeiture action);
- R.C. 2923.47 (motion for return of seized property in a criminal gang forfeiture action);
- R.C. 2925.41 (definitions applicable in a drug forfeiture action);
- R.C. 2925.43 (civil drug forfeiture action);
- R.C. 2925.44 (disposition of property forfeited in a drug action);
- R.C. 2925.45 (motion alleging seizure was unlawful in a drug forfeiture action);
- R.C. 2933.41 (disposition of property held by law enforcement);
- R.C. 2933.42 (offenses involving contraband);
- R.C. 2933.43 (seizure of contraband);
- R.C. 2933.44 (annual report by an alcohol and drug treatment program receiving juvenile-related forfeiture);
- R.C. 2933.71 (definitions applicable to a Medicaid forfeiture);
- R.C. 2933.72 (order to preserve the reachability of property in a Medicaid forfeiture action);
- R.C. 2933.73 (Medicaid forfeiture action);

- R.C. 2933.74 (disposal of property and protection of rights in a Medicaid forfeiture action).

HISTORY

ACTION	DATE
Introduced	05-04-05
Reported, H. Criminal Justice	06-16-05
Passed House (95-4)	06-21-05
Reported, S. Judiciary--Criminal Justice	---

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