



# Ohio Legislative Service Commission

## Bill Analysis

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### **S.B. 236**

131st General Assembly  
(As Introduced)

**Sens.** Jordan, Eklund, Obhof, Seitz, Thomas, Skindell, Tavares

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## **BILL SUMMARY**

### **Elimination of civil forfeiture**

- Eliminates the civil forfeiture process, meaning that the state or a political subdivision must pursue forfeiture only through the criminal process with the prosecution of the underlying offense.
- Repeals all of the provisions in the Forfeiture Law and related law that pertain to civil forfeiture of property.
- Specifies that property may be forfeited only if the defendant is convicted of an offense or the juvenile is adjudicated a delinquent child for committing an act that would be an offense if committed by an adult, and adds a purpose to the law governing forfeiture to the same effect.

### **Seized property**

- Modifies the procedure in which a person aggrieved by an alleged unlawful seizure of property may file a motion showing the person's interest in the property, and places on the state or political subdivision the burden of proof by a preponderance of the evidence that the seizure was lawful.
- Modifies the timeline for deciding a petition by a person with an interest in seized property for its conditional release.

### **Criminal forfeiture**

- Repeals the provision that allows the court, for good cause shown, to consider issues of guilt of the alleged offender or the delinquency of the alleged delinquent child separate from whether property should be forfeited.

- Changes the burden of proof required for the state or political subdivision to establish that property is subject to forfeiture from a preponderance of the evidence to clear and convincing evidence.
- Expands the contents of a petition by a third party claimant asserting a legal interest in the property and places the burden on the prosecutor to establish by clear and convincing evidence that the assertion of such legal interest does not apply to the claimant.
- Changes the burden of proof required for a prosecutor to prove that a lienholder asserting a legal interest in the property does not possess such interest from a preponderance of the evidence to clear and convincing evidence.
- Places on the state or political subdivision the burden of proof by clear and convincing evidence that the amount or value of the instrumentality ordered forfeited is proportionate to the severity of the offense.
- Expands the factors the court is required to consider in determining the severity of the offense.
- Requires the state or political subdivision to demonstrate by clear and convincing evidence specified conditions for the court to order forfeiture of any other property of the offender or delinquent child if the property ordered forfeited is unreachable.

### **Disposal of forfeited property**

- Requires the written internal control policy of a law enforcement agency with custody of forfeited property to include an itemized list of the specific expenditures from the sale proceeds of the property.
- Specifies that one of the purposes for the use of an agency's appropriate forfeiture fund includes the purchase of personal safety equipment or apparel instead of "for other law enforcement purposes" under current law.
- Provides that, of the remaining amounts from the sale of forfeited property or from forfeited proceeds, 10% must be applied to community addiction services providers and 90% to the prosecutor's law enforcement trust fund and specified funds supporting the agency that substantially conducted the investigation.

### **Federal forfeiture**

- Prohibits the transferring of property seized by a law enforcement agency or prosecuting authority to any federal law enforcement authority or agency for federal

forfeiture purposes unless the value of the property exceeds \$50,000, excluding the potential value of the sale of contraband.

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## CONTENT AND OPERATION

### Overview of the bill

The bill modifies the Forfeiture Law by eliminating civil forfeiture, changing seizure procedures, shifting the burden of proof and revising evidence requirements for criminal forfeiture, making changes to the disposal of forfeited property and the disposition of funds, and restricting the transfer of forfeited property to a federal agency.

### Elimination of civil forfeiture

#### Underlying offense

Continuing law permits the offense that is the basis of forfeiture to be any act or omission that could be charged as a criminal offense or a delinquent act, including any felony or misdemeanor. However, the bill eliminates the civil forfeiture process, meaning that the state or political subdivision must pursue forfeiture only through the criminal process with the prosecution of the underlying offense. It explicitly states that property subject to forfeiture may be forfeited only if the defendant is convicted of an



offense or the juvenile is adjudicated a delinquent child for committing an act that would be an offense if committed by an adult.<sup>1</sup>

### **Repealed provisions**

Because the bill eliminates the civil forfeiture process, it repeals the following provisions pertaining to civil forfeiture:<sup>2</sup>

- Requiring the prosecutor of the county in which the property was seized to commence a civil forfeiture action if a criminal forfeiture has not begun;
- Fixing the times within which a civil forfeiture action must be brought if property seized includes a mobile instrumentality or personal, business, or governmental records;
- Permitting a prosecutor to file a charging instrument seeking criminal forfeiture after a civil forfeiture is begun and staying the civil action if the charged offense is also the basis of the civil forfeiture;
- Authorizing a civil forfeiture regardless of whether the offender has been convicted of, or the child has been adjudicated delinquent for, the act that is the basis of the forfeiture order;
- Requiring the prosecutor to find, and give notice of the civil forfeiture to, persons with an interest in the property;
- Permitting a person with an interest in the property to petition the court for a conditional release of the property under the Forfeiture Law or a claim for its release under the Civil Rules;
- Requiring the court to issue a civil forfeiture order if it determines that the prosecutor has proved by a preponderance of the evidence that the instrumentality is subject to forfeiture and, after a proportionality review, the trier of fact specifically describes the extent of the property to be forfeited;
- If the court disposes of all petitions in favor of the state or political subdivision, providing that the state or political subdivision has clear title to the property, but only to the extent that other parties' lawful interests in the property are not infringed;

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<sup>1</sup> R.C. 2981.01(B)(10), 2981.03(F), 2981.04(A), and repeal of R.C. 2981.05.

<sup>2</sup> R.C. 2981.03(F), 2981.08(B), and 2981.13(B)(2), and repeal of R.C. 2981.05.



- Granting the right to a jury trial to the defendant, the state or political subdivision, and third party claimants;
- Providing that moneys acquired from the sale of forfeited property or any forfeited proceeds in a civil case be applied to satisfy any recovery ordered for the person harmed.

The bill also repeals existing provisions pertaining to the filing of a corrupt activity lien notice and *a lis pendens* in conjunction with a civil forfeiture action.<sup>3</sup> And the bill makes corresponding changes in other provisions of the Forfeiture Law.<sup>4</sup>

### **Purposes of forfeiture**

The bill adds an additional purpose governing forfeitures under Ohio law. The new purpose is to prohibit the forfeiture of a person's property unless the person has been convicted of an offense or adjudicated a delinquent child for committing an act that would be an offense if committed by an adult.<sup>5</sup> Continuing law sets forth the following purposes governing forfeitures under Ohio law:<sup>6</sup>

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

### **Seized property**

#### **Initial seizure**

Under the bill, if the state or a political subdivision seeks to seize real property, the prosecutor must file a motion in the appropriate court to request a hearing before the seizure and must notify the property owner of the motion. The court must hold the

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<sup>3</sup> R.C. 2923.36.

<sup>4</sup> R.C. 2981.02, 2981.03, 2981.06, 2981.08, 2981.12, and 2981.13.

<sup>5</sup> R.C. 2981.01(A)(5).

<sup>6</sup> R.C. 2981.01(A).

hearing not sooner than 14 days after the motion is filed. The court must grant the motion if the state or political subdivision demonstrates by a preponderance of the evidence that the real property is subject to forfeiture. The bill repeals the current procedure, applicable only in a civil forfeiture case, which requires the property owner to request a hearing at which the state or political subdivision must show probable cause that the real property is subject to forfeiture.<sup>7</sup>

If a person aggrieved by an alleged unlawful seizure of property files a motion showing the person's interest in the property and the motion is filed before the indictment or complaint seeking forfeiture is filed, the bill requires the court to schedule a hearing not later than 14 days after the motion is filed. Current law requires the hearing to be scheduled promptly. The bill places the burden of proof on the state or political subdivision. The state or political subdivision must demonstrate by a preponderance of the evidence that the seizure was lawful and the person is not entitled to the property. The burden under current law is on the person to prove by a preponderance of the evidence that the seizure was unlawful and the person is entitled to the property.<sup>8</sup>

### **Conditional release of property**

The bill modifies the time for a court to decide a petition by a person with an interest in seized property for its conditional release. The court must decide on the petition not more than 14 days after the petition is filed. If the property seized is alleged to be a mobile instrumentality, the court must decide on the petition not more than seven days after it is filed. Current law generally requires a petition to be decided within 30 days, and specifies that it must be decided as soon as practicable within the 30-day period if the seized property is a mobile instrumentality. If personal, business, or governmental records were seized and a person files a petition to copy the records, current law requires the court to decide on the petition as soon as practicable. The bill retains this language, but specifies that the decision must be made not later than 30 days after the petition is filed. In any case, the court may extend the time for deciding on the petition up to 30 days for good cause shown.<sup>9</sup>

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<sup>7</sup> R.C. 2981.03(A)(3).

<sup>8</sup> R.C. 2981.03(A)(2) and (4).

<sup>9</sup> R.C. 2981.03(D)(6).



## **Criminal forfeiture**

### **Separate consideration of guilt**

The bill repeals the provision of existing law that allows the court, for good cause shown, to consider issues of guilt of the alleged offender or the delinquency of the alleged delinquent child separate from whether property should be forfeited.<sup>10</sup>

### **Burden of proof**

The bill requires that if the person is convicted of, or adjudicated delinquent on the basis of, the underlying offense, the state or political subdivision must establish by clear and convincing evidence that the property is subject to forfeiture. Current law requires the state or political subdivision to prove that the property is subject to forfeiture by a preponderance of the evidence.<sup>11</sup>

### **Third party claimants**

A person, other than the offender or delinquent child, may file a petition asserting a legal interest in the property. The bill requires the petition to include a statement that one of the following conditions applies:<sup>12</sup>

(1) The petitioner has a legal interest in the property that renders the forfeiture order completely or partially invalid because the legal interest was vested in the petitioner, rather than the offender or delinquent child, or was superior to any interest of that offender or delinquent child, at the time of the commission of the offense or delinquent act;

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

The bill places on the prosecutor the burden of proof by clear and convincing evidence that the applicable condition alleged by the petitioner as described above does not apply to the petitioner. Under current law, the petitioner has the burden of proof by a preponderance of the evidence that the alleged condition applies.<sup>13</sup>

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<sup>10</sup> R.C. 2981.04(A)(3).

<sup>11</sup> R.C. 2981.04(B).

<sup>12</sup> R.C. 2981.04(E)(1)(d).

<sup>13</sup> R.C. 2981.04(F)(1).



If a person, other than the offender or delinquent child, is a secured party or other lienholder of record that asserts a legal interest in the property and files an affidavit establishing that interest, the affidavit generally constitutes conclusive evidence of the affiant's interest in the property. The government may refute that evidence if the prosecutor files a motion challenging the affidavit and establishes by clear and convincing evidence (instead of a preponderance of the evidence under current law) that the affiant does not possess the interest or had actual knowledge of facts pertaining to the offense or delinquent act.<sup>14</sup>

### **Proportionality review**

Under continuing law, property may not be forfeited as an "instrumentality" to the extent that the property's value or amount is disproportionate to the severity of the offense. The bill provides that the state or political subdivision has the burden of going forward with the evidence and the burden to prove by clear and convincing evidence that the amount or value of the property is proportionate to the severity of the offense. Under current law, 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 is disproportionate to the severity of the offense.<sup>15</sup>

Continuing law defines "instrumentality" as property otherwise lawful to possess that is used or intended to be used in an offense.<sup>16</sup>

The bill expands the factors that the court is required to consider in determining the severity of the offense to include the extent to which the property was used in committing the offense and the sentence imposed for committing the offense. The relevant factors to be considered under current law are: (1) the seriousness of the offense and its impact on the community, (2) the extent to which the person participated in the offense, and (3) whether the offense was completed or attempted.<sup>17</sup>

### **Unreachable property**

The bill modifies current law by requiring the court to order forfeiture of any other property of the offender or delinquent child up to the value of the unreachable

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<sup>14</sup> R.C. 2981.04(E)(2)(c).

<sup>15</sup> R.C. 2981.09(A).

<sup>16</sup> R.C. 2981.01(B)(6).

<sup>17</sup> R.C. 2981.09(C).



property if the state or political subdivision demonstrates by clear and convincing evidence that any of the following conditions describe the property to be forfeited:<sup>18</sup>

- It cannot be located with due diligence.
- Subject to the bill's provision below, it has been transferred, sold, or deposited with a third party.
- It has been placed beyond the court's jurisdiction.
- It has been substantially diminished in value or commingled with other property and cannot be divided without difficulty or undue injury to innocent persons.

If property subject to a forfeiture order has been transferred, sold, or deposited with a third party, the court must order forfeiture of that property instead of ordering the forfeiture of other unreachable property if the state or political subdivision demonstrates by clear and convincing evidence that the property was transferred, sold, or deposited in violation of the offense of interference with or diminishing forfeitable property. That offense is committed under continuing law by any person who destroys, damages, removes, or transfers property subject to forfeiture or otherwise takes any action in regard to such property with purpose to: (1) prevent or impair the state's or political subdivision's lawful authority to take the property into its custody or control or to continue holding the property, (2) impair or defeat the court's continuing jurisdiction over the person and property, or (3) devalue property that the person knows, or has reasonable cause to believe, is subject to Ohio forfeiture proceedings.<sup>19</sup>

The bill provides that current law's requirements dealing with third party claimants, as modified by the bill, apply to other property forfeited, other than unreachable property.<sup>20</sup>

## **Disposal of forfeited property**

### **Internal control policy**

A law enforcement agency that has custody of forfeited property must adopt and comply with a written internal control policy regarding the use of that property. The bill revises the information that must be included regarding the usage of forfeited

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<sup>18</sup> R.C. 2981.06(D)(1).

<sup>19</sup> R.C. 2981.06(D)(2) and 2981.07, not in the bill.

<sup>20</sup> R.C. 2981.06(D)(3).



property to include an itemized list of the specific expenditures made with amounts gained from the sale of the property and retained by the agency, including the specific amount expended on each expenditure. Current law requires the list to specify the general types of expenditures instead of specific expenditures.<sup>21</sup>

Continuing law requires forfeited funds to be expended only in accordance with the agency's internal control policy and for specified purposes. The bill specifies that one of these purposes is the purchase of personal safety equipment or apparel, instead of for "other law enforcement purposes" that the appropriate official or agency determines to be appropriate.<sup>22</sup>

### **Disposition of funds**

The bill expands the existing provision requiring that if the property was in possession of a law enforcement agency in relation of a delinquent child proceeding, 10% of the moneys acquired from the sale of the property must be applied to community addiction services providers, to apply also to property in possession of a law enforcement agency in relation to a criminal proceeding.<sup>23</sup> Any moneys acquired from a sale of forfeited contraband or instrumentality and any forfeited proceeds must be applied in the order prescribed under current law. The bill provides that any remaining amounts after payment of specified costs must be applied as follows:<sup>24</sup>

- 10% to one or more community addiction services providers;
- 90% to the law enforcement trust fund of the prosecutor and to any of specified funds supporting the law enforcement agency that substantially conducted the investigation.

Under current law, if the forfeiture was ordered by a juvenile court, 10% of the remaining moneys are applied to community addiction services providers and 90%, and if the forfeiture was ordered by a court other than a juvenile court, 100% to the law enforcement trust fund of the prosecutor and to any of specified funds supporting the law enforcement agency that substantially conducted the investigation.<sup>25</sup>

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<sup>21</sup> R.C. 2981.11(B)(1)(b)(ii).

<sup>22</sup> R.C. 2981.13(C)(2)(a)(v).

<sup>23</sup> R.C. 2981.12(D).

<sup>24</sup> R.C. 2981.13(B)(4).

<sup>25</sup> R.C. 2981.13(B)(4).

## Federal forfeiture

The bill prohibits a law enforcement agency or prosecuting authority from directly or indirectly transferring any property seized by the agency or authority to any federal law enforcement authority or other federal agency for purposes of forfeiture under federal law unless the value of the seized property exceeds \$50,000, excluding the potential value of the sale of contraband. This prohibition is an exception to current law's provision that nothing in Ohio's forfeiture laws precludes the head of a law enforcement agency that seizes property from seeking forfeiture under federal law.<sup>26</sup>

## Technical correction

The bill corrects an incorrect cross-reference in the definition of "innocent person" in the Forfeiture Law.<sup>27</sup>

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## HISTORY

ACTION	DATE
Introduced	10-27-15

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<sup>26</sup> R.C. 2981.14(A) and (B).

<sup>27</sup> R.C. 2981.01(B)(5).

