

# ASSET FORFEITURE: NUTS and BOLTS



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## FORFEITURE

*The divestiture  
without compensation  
of property used in a  
manner contrary to the  
laws of the sovereign.*



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## WHY USE FORFEITURE?

- « *Provides additional tool against drug violators*
- « *Traditional penalty of jail time often minimal for drug crimes*
- « *Can severely and appropriately penalize defendants who receive probation or short time to serve or parole*
- « *Can reach owners of property who are not directly involved with the criminal act*
- « *Makes it more difficult for replacement leadership to continue the drug enterprise*

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## Remedial Goals

- \* Remove financial incentive
- \* Restore economic integrity to marketplace
- \* Compensate society for economic damages due to illegal activity
- \* Lessen economic and political power

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- Subsection (z) states that this Code section must be liberally construed to effectuate its remedial purposes.
  - Our Courts have held that the remedial purposes of the statute is balancing prompt disposition of property subject to forfeiture with the protection of the property rights of innocent owners. *Bettis v. State of Ga.*
  - This is not a remedial purpose but rather a procedural goal of the statute. Its remedial purpose is to dismantle drug enterprises and take the profit out of drug offense.

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## ACCOMPLISHING THE REMEDIAL GOALS

- ✘ Remove profit
- ✘ Remove instrumentalities
- ✘ Threshold question
- ✘ Cost effectiveness
- ✘ Exceptions
- ✘ Ancillary benefit

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## THEORIES OF FORFEITURE

16-13-49(d)

- ❖ Facilitation
- ❖ Proceeds
- ❖ Proximity
- ❖ Weapons

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## Seizure of Property

### ■ How do you go about seizing forfeitable property?

- Law enforcement can obtain a seizure warrant from the court allowing for the seizure of the item. (g)(1).
- Law enforcement can also seize the property without a warrant if probable cause exists to believe that the property is subject to forfeiture. (g)(2).

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### Probable Cause Hearings Under (q)(4)

- Only if no previous judicial determination of probable cause.
- Must request within 30 days after notice of seizure or lien or actual knowledge of such seizure or lien, whichever is earlier.
- Need only give DA five (5) days notice.
- If a hearing is to be held, the only issue is whether there is probable cause to believe the property is subject to forfeiture.

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## Real Property Seizures

### ■ What about real property: Can it be seized?

- Real property cannot be seized without a pre-seizure hearing. *U.S. v. James Daniel Good Real Property*, 510 US 43 (1993).

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## Forfeiture Liens Under Subsection (j)

- The District Attorney may file a lien on the real property. The lien must set forth
  - Name of the person and the description of the property,
  - The criminal or civil proceeding that has been brought under this article,
  - The amount claimed by the state,
  - The name of the court where the proceeding or action has been brought, and
  - The case number of the proceeding or action if known at the time of filing.
- A lien under this subsection applies to the described property and to one named person. A separate lien for forfeiture of property must be filed for any other person.

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## Notification to DA's Office After Seizure

- Subsection (h)(1): When property is seized pursuant to this article, the law enforcement officer seizing the same shall report the seizure, in writing, within 20 days thereof to the district attorney of the judicial circuit having jurisdiction in the county where the seizure was made.

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## Initiation of Forfeiture Proceedings

- Subsection (h)(2): Within 60 days from the date of seizure, forfeiture proceedings shall be initiated as provided for in subsection (n), (o), or (p) of this Code section.

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## Initiation of Forfeiture Proceedings

- Subsection (h)(3): If the state fails to initiate forfeiture proceedings against property seized for forfeiture by notice of pending forfeiture within the time limits specified in paragraphs (1) and (2) of this subsection, the property must be released on the request of an owner or interest holder, pending further proceedings pursuant to this Code section, unless the property is being held as evidence.

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## Initiation of Forfeiture Proceedings

- So, what if the time limits are not met?
  - Change in the previous law that if a date was missed the issue was considered jurisdictional and the complaint was dismissed. Under this code section, if one of the dates is missed, property may have to be returned to claimant but forfeiture can proceed.
  - *Green v. State of Ga.*, 250 Ga.App. 440 (2001) (20 day); *Turner v. State of Ga.*, 213 Ga.App. 309 (1994) (60 day).

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- Property need not be returned if being held as evidence.

– Subsection (q)(1): The court, on application of the district attorney, may...take any action to seize, secure, maintain, or preserve the availability of property subject to forfeiture under this article,...whether before or after the filing of a complaint for forfeiture.

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## Inventory of Seized Property

- Law enforcement is also required, within 30 days of seizure, to conduct an inventory and estimate the value of the property seized. (m).

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## Types of Forfeiture Proceedings

- Non-judicial or administrative proceedings under subsection (n).
- In Rem forfeiture proceedings under subsection (o).
- In Personam forfeiture proceedings under subsection (p).

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## Subsection (n) Proceedings

- The estimated value of personal property seized is \$25,000.00 or less, and must not involve real estate.

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### ■ What must the D.A. do?

- Must create a Notice of Seizure.
- Notice must include:
  - A description of the property,
  - Date and place of seizure,
  - Conduct giving rise to forfeiture,
  - Violation of law alleged.
  - A statement that any claimant of such property has 30 days from the date of second publication within which to serve a claim on the D.A.

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- The Notice must be served on all owners and interest holders pursuant to subsection (i).
- The Notice must be posted in a prominent place in the courthouse.
- The Notice must be published once a week for 3 consecutive weeks in a newspaper of general circulation in the county where the seizure was made.

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■ What must a Claimant do?

- The owner or interest holder may file a claim within 30 days after the second publication of the notice of forfeiture by sending the claim to the seizing law enforcement agency and to the district attorney by certified mail or statutory overnight delivery, return receipt requested.

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Who Are Owners and Interest Holders?

- "Owner" is defined as a person, other than an interest holder, who has an interest in property and is in compliance with any statute requiring its recordation or reflection in public records in order to perfect the interest against a bona fide purchaser for value.
- "Interest holder" is defined as a secured party within the meaning of Code Section 11-9-102 or the beneficiary of a perfected encumbrance pertaining to an interest in property.

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Who Are Owners and Interest Holders?

- Georgia appellate court redefinitions:
  - A person who failed to register his vehicle under the Motor Vehicle Certificate of Title Act is not precluded from asserting a claim. *State of Ga. v. Banks.*
  - A claimant who held an unperfected security interest in a truck allowed standing to assert a claim. *Tolliver v. State of Ga.*

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## Who Are Owners and Interest Holders?

- Someone who holds a possessory interest in property also has been held to have standing as a bailee. *Jackson v. State of Ga.*
- General unsecured creditors have no standing to contest a forfeiture. *Belvin v. State of Ga.* Nor does an equitable interest in property arising from a family relationship or duty to support create standing. *Allmond v. State of Ga.*

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- The owner or interest holder may file a claim within 30 days after the second publication of the notice of forfeiture by sending the claim to the seizing law enforcement agency and to the district attorney by certified mail or statutory overnight delivery, return receipt requested.

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## Requirements of a Claim

- The claim must be signed by the owner or interest holder under penalty of perjury

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■ Claim must set forth:

- The caption of the proceedings as set forth the notice of pending forfeiture and the name of the claimant;
  - The address at which the claimant will accept mail;
  - The nature and extent of the claimant's interest in the property;
  - The date, identity of the transferor, and circumstances of the claimant's acquisition of the interest in the property;
  - The specific provision of this Code section relied on in asserting that the property is not subject to forfeiture;
  - All essential facts supporting each assertion; and
  - The precise relief sought;

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■ If a timely and sufficient claim is received by the D.A.,

- The district attorney shall file a complaint for forfeiture as provided in subsection (o) or (p) of this Code section within 30 days of the actual receipt of the claim. A person who files a claim shall be joined as a party.
- If the D.A. fails to file in time, the result may be that we are out of court. Subsection (h) doesn't apply to this time limit and it will probably be held to be jurisdictional.

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■ If no claim is filed within 30 days after the second publication of the notice of forfeiture, all right, title, and interest in the property is forfeited to the state and the district attorney shall dispose of the property as provided in subsection (u) of this Code section.

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### What if Claim is Timely, but Insufficient?

- The filing of an insufficient claim is tantamount to no claim having been filed. *Francis v. State of Ga.* However, under *State of Ga. v. Williams*, a timely but insufficient claim may later be amended to cure the insufficiencies but only until a final court ordered disposition of the property under subsection (u) has been entered.

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### In rem Proceeding Under Subsection (o)

- Requirements for a complaint for forfeiture
  - Property shall be named as the defendant.
  - The complaint must be verified.
  - The property must be described with reasonable particularity.
  - Contain a statement that the property is located within the county or will be located within the county during the pendency of the action.
  - Contain a statement of the property's present custodian.
  - State the names of all owner(s) or interest holder(s), if known.
  - Allege the essential elements of the violation which is claimed to exist.
  - State the place of seizure.
  - Conclude with a prayer of due process to enforce the forfeiture. (o) (1).

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### Service of the Complaint

- Service is to be made as required under 9-11-4 with the exception of service by publication.
- If real property is involved or for any other reason, service by publication must be made, notice of the proceeding shall be published once a week for two successive weeks in the newspaper in which the sheriff's advertisements are published.

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## Answers to Complaint

- Only owners or interest holders may file an answer.
- A timely answer must be within 30 days of personal service or if by publication, 30 days of the date of second publication.

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## Answers to Complaint

- An answer must be verified by the owner or interest holder under penalty of perjury and in addition to complying with the general rules applicable to an answer in civil actions, the answer must set forth the same information required for a valid claim under subsection (n). (o)(3).

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## Answers to Complaint

- If no answer is filed, the state may take a judgment against the property, but the CPA relating to default judgments apply. *Ford v. State of Ga.*
- If a timely but insufficient answer is filed, it may be amended pursuant to the provisions of 9-11-15 and it will relate back to the original answer to cure the insufficiency. *Rojas v. State of Ga.*

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## Hearings Under Subsection (o)

- If an answer, which is both timely and sufficient, is filed, a hearing must be held within 60 days after service of the complaint unless continued for good cause and must be held by the court without a jury. (o)(5).
  - There is no constitutional right to a jury trial under this statute. *Swalls v. State of Ga.*
  - The burden is on the State to have the trial set within 60 days of service and the time limit is mandatory unless continued for good cause. *State of Ga. v. Henderson.*

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## Hearings Under Subsection (o)

- What is good cause?
  - Unavailability of a witness can be good cause. *Griffin v. State of Ga.*
  - Trial court's overcrowded docket also held to be good cause. *Hinton v. State of Ga.*
  - Allowing state more time to effectuate service on all potential claimants so only one hearing need be held. *State of Ga. v. Richardson.*

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## Hearings Under Subsection (o)

- If a case is continued for good cause the outermost limits of a continuance would be another 60 day period before either a hearing or another continuance granted.
- Again, the burden is on the state to have the case placed back on the calendar. *Blanks v. State of Ga.*
- This is true even if the continuance was at the request of the claimant. However, if a claimant requests a continuance and agrees to a time outside of the 60 day limit, he waives his right to complain of a violation of subsection (o)(5). *Turner v. State of Ga.*

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## Hearings Under Subsection (o)

- What if the answer is timely but insufficient?
  - The 60 day requirement does not begin to run until an answer is filed in strict compliance with the mandatory pleading requirements of (o)(3). *State of Ga. v. Alford*.

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## Counterclaims

- Subsection (x)(4) provides that except as specifically authorized by this Code section, no person claiming an interest in such property may file any counterclaim or cross-claim to any action brought pursuant to this Code section.
- An answer in a forfeiture proceeding is in the nature of a counterclaim, so that even if the State dismisses its complaint, it leaves the counterclaim still to be decided. *Boone v. Sheriff of Lowndes County*.

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## Collateral Attacks

- Subsection (x)(4) states No person claiming an interest in property subject to forfeiture under this article may commence or maintain any action against the state concerning the validity of the alleged interest other than as provided in this Code section.
- Additionally, subsection (k) provides that Property taken or detained under this Code section is not subject to replevin, conveyance, sequestration, or attachment.

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## Trial Considerations

- Forfeiture actions are civil proceedings and once the state makes out a prima facie case, the burden shifts to the claimant to prove standing to contest the forfeiture and innocent ownership. *Davis v. State*.
- Burden of proof is preponderance of the evidence. Thus, subsection (v) states that an acquittal or dismissal in a criminal proceeding does not preclude civil proceedings under this article.

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## Trial Considerations

- Innocent ownership under (e):
  - A property interest shall not be subject to forfeiture under this Code section if the owner of such interest or interest holder establishes that the owner or interest holder is not legally accountable for the conduct giving rise to its forfeiture, did not consent to it, and did not know and could not reasonably have known of the conduct or that it was likely to occur. (e)(1).

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## Trial Considerations

- Statute says that owners and interest holders held to exact same standard, but compare *GMAC v. State of Ga.* with *Little v. State of Ga.* (parents of drug pusher were not innocent owners because they were aware of son's prior drug related activity and despite knowledge, only loosely restricted son's use of defendant vehicle).

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## Trial Considerations

- Vehicle exception: If the defendant property is a “conveyance for transportation” claimant cannot be innocent owner if he held the property jointly, in common, or in community with a person whose conduct gave rise to its forfeiture. (e)(1)(C).

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## Trial Considerations

- Strawman exception: Not an innocent owner if the claimant holds property for the benefit of or as nominee for any person whose conduct gave rise to its forfeiture.

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## Trial Considerations

- Marijuana and Cocaine:
  - A property interest shall not be subject to forfeiture for a violation involving only one gram or less of a mixture containing cocaine or four ounces or less of marijuana.
    - Unless the property was used to facilitate a transaction in or a purchase of or sale of a controlled substance or marijuana.
    - Actual sale is not necessary to support a forfeiture if the State shows a strong nexus between the property and alleged violation.

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## Trial Considerations

- Inferences and Presumptions:
  - The fact that money or a negotiable instrument was found in proximity to contraband or to an instrumentality of conduct giving rise to forfeiture authorizes the trier of the fact to **infer** that the money or negotiable instrument was the proceeds of conduct giving rise to forfeiture or was used or intended to be used to facilitate such conduct. (s)(2)
  - Money found 150 to 200 feet from marijuana may be inferred as proceeds of illegal conduct under this subsection. *Morris v. State of Ga.*

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## Trial Considerations

- There is a rebuttable **presumption** that any property of a person is subject to forfeiture under this Code section if the state establishes probable cause to believe that:
  - The person has engaged in conduct giving rise to forfeiture;
  - The property was acquired by the person during the period of the conduct giving rise to forfeiture or within a reasonable time after the period; and
  - There was no likely source for the property other than the conduct giving rise to forfeiture. (s)(3).

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## Constitutional Issues

- The Fourth Amendment is applicable to forfeiture proceedings.
- However, if the claimant has filed and lost a motion to suppress in the criminal case and was subsequently convicted, the claimant may not raise the issue in the forfeiture case. In *Pitts v. State*, the court held that a conviction in the underlying criminal case acts as independent evidence from the illegal seizure and renders the legality of the seizure irrelevant.

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## Constitutional Issues

- Subsection (r) states:
  - A defendant convicted in any criminal proceeding is precluded from later denying the essential allegations of the criminal offense of which the defendant was convicted in any proceeding pursuant to this Code section, regardless of the pendency of an appeal from that conviction; however, evidence of the pendency of an appeal is admissible. For the purposes of this Code section, a conviction results from a verdict or plea of guilty, including a plea of nolo contendere.

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## Constitutional Issues

- The privilege against self incrimination applies in civil proceedings. But, if the privilege is invoked, an inference against the claimant's interest can be drawn by the factfinder. *Sanders v. State*.
- There is no blanket refusal to answer questions either. The claimant must invoke as to each question asked by the prosecutor and to establish that a real danger of incrimination exists as to each question put to the claimant.
- Rule applies to discovery requests as well.

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## Constitutional Issues

- So, if you as the prosecutor want to call the claimant in your case in chief, two things are necessary:
  - The claimant's attendance must be secured. In other words, he needs to be subpoenaed because in a civil case, the claimant does not have to attend.
  - The prosecutor must specifically state that he is calling the claimant for purposes of cross-examination. OCGA Section 24-9-81.

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## Constitutional Issues

- A claimant may seek a stay of the civil proceeding under subsection (w) rather than invoking his 5th A. right in his answer to the complaint. *Clemons v. State*. But subsection (w) states for good cause shown, the court may stay civil forfeiture proceedings during the criminal trial resulting from a related indictment or information alleging a violation of this article.

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## Constitutional Issues

- The excessive fines Clause of the Eighth Amendment is also applicable to forfeiture cases.
  - In *Austin v. US*, 509 US 602 (1993), the USSC held that the 8th A. Excessive Fine Clause is applicable to civil in rem forfeitures. But, the Court declined to adopt a test, deciding to leave it to the lower courts to determine a test for “excessiveness”. A federal district court in Calif. created a three prong test and in 1994 this was the test adopted by our Supreme Court in *Thorpe v. State of Ga*. This test adopts a proportionality test i.e. if the forfeiture is proportionate to the offense then it is okay, but if it is disproportionate, it is excessive.

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## Constitutional Issues

- In 1998, the USSC decided *US v. Bajakajian*, 524 US 321, which revisited *Austin* and determined that when evaluating forfeitures under the 8th Amendment, a civil forfeiture will only rise to the level of excessiveness if it is grossly disproportional to the gravity of the offense. Thus, the test adopted in *Thorpe* was no longer viable.

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## Constitutional Issues

- Last year, our Supreme Court in *Howell v. State of Georgia*, 283 Ga. 24, finally got around to “superseding” *Thorpe* with the three-part test of *von Hofe v. United States*, 492 F.3d 175, 186 (2<sup>nd</sup> Cir. 2007).

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## Constitutional Issues

- Asserting an Eight Amendment Claim
  - There is no automatic right to a review of a forfeiture under the 8th A. It must be raised before the trial court or it is waived.
  - If it is raised, the burden is on the claimant to show the value of the property for 8th A. consideration.
  - If a 8th A. claim is properly raised, the trial court should make findings of fact and conclusions of law regarding this issue.

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## Constitutional Issues

- No 6th Amendment right to counsel. *Portee v. State*.

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## Post Trial Matters

- Attorney's fees:
  - Section (t)(3) states that the court shall order a claimant who fails to establish that a substantial portion of the claimant's interest is exempt from forfeiture under subsection (e) of this Code section to pay the reasonable costs relating to the disproving of the claim which were incurred by the state, including costs for investigation, prosecution, and attorneys' fees.

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## Post Trial Matters

- Distribution under subsection (u):
  - Real property may be sold by any commercially feasible means or disposed of in any manner the court deems just.
  - A D.A.'s Office may receive up to 10 percent of the forfeiture pool if the office gets prior approval from the county government.
  - Any order of distribution must be submitted by the D.A. to the trial court for approval.

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## Post Trial Matters

- Distribution under subsection (u):
  - After payment of costs, the forfeiture pool is to be distributed pro rata to the state and local law enforcement agencies according to the role they played.
  - One exception, any amount distributed as a result of state law enforcement involvement may not exceed 25% of the forfeiture pool and does not go to the agency but rather into the general coffers of the State.

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## Post Trial Matters

- Distribution under subsection (u):
  - All money distributed to local law enforcement must go to the local government to be passed through to the law enforcement agency. Can't receive more than one third of total budget.
  - In-kind distributions are okay.

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QUESTIONS? ? ? ? ?

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*Thank You*

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