

ORIGINAL

IN THE SUPREME COURT OF OHIO

**STATE OF OHIO ex rel.
OHIO ATTORNEY GENERAL,**

Plaintiff-Appellee

v.

THE SHELLY HOLDING CO., et al.,

Defendants-Appellants.

: CASE NO. 11-0252
:
: On Appeal from the
: Court of Appeals of Ohio
: Tenth Appellate District
:
: Court of Appeals
: Case No. 09AP-938
:
:
:

**BRIEF OF AMICI CURIAE, THE OHIO CHAMBER OF COMMERCE,
OHIO AGGREGATES AND INDUSTRIAL MINERALS ASSOCIATION, FLEXIBLE
PAVEMENTS, INC., OHIO COAL ASSOCIATION, OHIO CONTRACTORS
ASSOCIATION AND ASSOCIATED GENERAL CONTRACTORS OF OHIO IN
SUPPORT OF DEFENDANTS-APPELLANTS, SHELLY MATERIALS, INC. AND
ALLIED CORPORATION**

Brian P. Barger (0018908)
(COUNSEL OF RECORD)
BRADY, COYLE & SCHMIDT, LTD.
4052 Holland-Sylvania Road
Toledo, Ohio 43623
Telephone: (419) 885-3000
Facsimile: (419) 885-1120
bpbarger@bcslawyers.com

April R. Bott (0066463)
(COUNSEL OF RECORD)
Bott Law Group LLC
6037 Frantz Road, Suite 105
Dublin, Ohio 43017
Telephone: (614) 761-2688
Facsimile: (614) 462-1914
abott@bottlawgroup.com

*Counsel for Amici Curiae, Ohio Chamber of
Commerce, Ohio Aggregates and Industrial
Minerals Association, Flexible Pavements,
Inc., Ohio Coal Association, Ohio Contractors
Association and Associated General
Contractors of Ohio*

Sarah Morrison (0068035)
Chester Willcox & Saxbe LLP
65 E. State Street, Suite 1000
Columbus, Ohio 43215
Telephone: (614) 221-4000
smorrison@cwslaw.com

*Counsel for Defendants-Appellants, Shelly
Materials, Inc. and Allied Corporation*

FILED
JUL 05 2011
CLERK OF COURT
SUPREME COURT OF OHIO

Gregg Bachmann (0039531)
(COUNSEL OF RECORD)
Gary Pasheilich (0079162)
Assistant Attorneys General
Environmental Enforcement Section
Public Protection Division
30 E. Broad Street, 25th Floor
Columbus, Ohio 43215
gary.pasheilich@ohioattorneygeneral.gov
gregg.bachmann@ohioattorneygeneral.gov

Counsel for Plaintiff-Appellee, State of Ohio

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iv

INTRODUCTION1

STATEMENT OF THE FACTS4

ARGUMENT.....4

First Proposition of Law: In A Civil Enforcement Action, The State Has The Burden Of Proof To Demonstrate By A Preponderance Of The Evidence Each And Every Day Of Violation5

Second Proposition of Law: If A Continuing Violation Of Permit Terms Can Be Inferred, A Permit Holder Must Be Given The Opportunity To Rebut The Inference.10

CONCLUSION14

PROOF OF SERVICE.....16

APPENDIX

PAGE

United States v. Peppel (S.D.Ohio, March 10, 2008), No. 3:06cr196, 2008 WL 687125A1

Ohio Environmental Protection Agency Intent to Test Form, *available at*
<http://www.epa.state.oh.us/portals/27/files/ITT.pdf>.....A9

Hearing on Sub. H.B. 153 before Senate Fin. Comm., 129th Gen. Assem. (Statement of Scott Nally, Director, Ohio Environmental Protection Agency, May 5, 2011), *available at*
<http://www.epa.state.oh.us/portals/33/documents/financetestimony52011.pdf>A15

Katherine Baicker and Mireille Jacobsen, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113 (2007)..... A19

TABLE OF AUTHORITIES

CASES

<i>Addington v. Texas</i> (1979), 441 U.S. 418, 99 S.Ct. 1804.....	8-9
<i>Cincinnati Bar Assn. v. Young</i> (2000), 89 Ohio St.3d 306, 731 N.E.2d 631.....	8
<i>Cincinnati, Hamilton & Dayton Ry. v. Frye</i> (1909), 80 Ohio St. 289, 88 N.E. 642.....	8
<i>Johns v. Univ. of Cincinnati Med. Assoc., Inc.</i> (2004), 101 Ohio St.3d 234, 2004-Ohio-824, 804 N.E.2d 19	10
<i>Ohio Valley Radiology Assocs., Inc. v. Ohio Valley Hosp. Ass'n</i> (1986), 28 Ohio St.3d 118, 502 N.E.2d 599.....	5
<i>Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary</i> (1925), 268 U.S. 510, 45 S.Ct. 571	10
<i>State ex rel. Celebrezze v. Thermal-Tron, Inc.</i> (1992), 71 Ohio App.3d 11, 592 N.E.2d 912	7
<i>State ex rel. Ohio Attorney General v. The Shelly Holding Co., et al.</i> (Sept. 2, 2009), Franklin Cty. C.P. No. 07CVH07-9702	6
<i>State ex rel. Ohio Attorney General v. The Shelly Holding Co., et al.</i> , 191 Ohio App.3d 421, 2010-Ohio-6526, 946 N.E.2d 295	6-7, 9-12
<i>Tumey v. Ohio</i> (1927), 273 U.S. 510, 47 S.Ct. 437	12
<i>United States v. Hoge Lumber Co.</i> (N.D. Ohio, May 7, 1997), No. 3:95 CV 7044, 1997 U.S. Dist. LEXIS 22359.....	7
<i>United States v. Peppel</i> (S.D. Ohio, March 10, 2008), No. 3:06cr196, 2008 WL 687125	8
<i>Vlandis v. Kline</i> (1973), 412 U.S. 441, 93 S.Ct. 2230.....	10
<i>Wheeling Steel Corp. v. Glander</i> (1949), 337 U.S. 562, 69 S.Ct. 1291	10
<i>In re Winship</i> (1970), 397 U.S. 358, 90 S.Ct. 1068.....	9

STATUTES AND REGULATIONS

R.C. 3704.06.....	6-9
R.C. 3734.13.....	8

R.C. 6111.078

Ohio Adm.Code 3745-21-10 13-14

OTHER MATERIALS

Hearing on Sub. H.B. 153 before Senate Fin. Comm., 129th Gen. Assem.
 (Statement of Scott Nally, Director, Ohio Environmental Protection Agency, May 5, 2011),
available at <http://www.epa.state.oh.us/portals/33/documents/financetestimony52011.pdf>.. 11-12

Ohio Environmental Protection Agency Intent to Test Form, *available at*
<http://www.epa.state.oh.us/portals/27/files/ITT.pdf>..... 14

Katherine Baicker and Mireille Jacobsen, *Finders Keepers: Forfeiture Laws, Policing Incentives,
 and Local Budgets*, 91 J. PUB. ECON. 2113 (2007)..... 12

INTRODUCTION

The Ohio Chamber of Commerce (“Chamber”), the Ohio Aggregates and Industrial Minerals Association (“Ohio Aggregates”), Flexible Pavements, Inc. (“Flexible”), Ohio Coal Association (“Ohio Coal”), Ohio Contractors Association (“Ohio Contractors”) and Associated General Contractors of Ohio (“AGC”) respectfully submit this brief in support of Appellants as amici curiae (collectively “Amici”). The memberships of the Amici have a great interest both individually and collectively in confirming with certainty how Ohio EPA’s regulatory and enforcement programs impact their members.

Founded in 1893, the Chamber is Ohio’s largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its more than 5,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. As an independent and informed point of contact for government and business leaders, the Chamber is a respected participant in the public policy arena. Through its member-driven standing committees and the Ohio Small Business Council, the Chamber formulates policy positions on issues as diverse as education funding, taxation, public finance, health care, workers’ compensation, and importantly, environmental regulation.

The Ohio Aggregates is a non-profit business association that represents Ohio’s mining operations, with the exception of coal. Ohio Aggregates members are essential suppliers of construction materials, both natural and manmade, such as limestone, sand and gravel, aggregates, salt, clay, shale, gypsum, industrial sand, building stone, lime, cement and recycled concrete. Statewide, the mineral and aggregate industry employs nearly 5,000 Ohioans and results in the indirect employment of another 40,000 Ohioans in supporting industries. Combined, production of crushed stone, sand and gravel and supporting industries contribute an

annual total of \$38 billion to the national economy. In Ohio, the industry's non-fuel raw mineral production alone is valued at over \$1 billion dollars. The asphalt paving and aggregate industries are highly interdependent, as nearly 95% of asphalt is comprised of aggregate materials.

Flexible is a non-profit business association comprised of approximately 90 producers, contractors, consultants, and manufacturers engaged in the Ohio asphalt pavement construction industry that live and work in every county in Ohio. The industry directly employs approximately 6,000 Ohioans with a total payroll exceeding \$300 million. The industry indirectly creates and maintains thousands more Ohio jobs. Millions of Ohioans drive every day on roads that have been paved by Flexible's members. The asphalt industry has approximately 165 asphalt plants in Ohio with nearly every plant maintaining Ohio EPA air permits that require testing

Together, Flexible and Ohio Aggregates members support infrastructure development throughout Ohio through the use of sustainable and recyclable materials. In fact, many of the major users of aggregate and asphalt are the state, counties, townships and municipalities which depend on Flexible and Ohio Aggregates members to supply products and services efficiently and cost effectively using environmentally sound processes. Aggregates mined in Ohio and asphalt produced in Ohio generally stay in Ohio and support the state economy.

Ohio Coal is a trade association of more than 90 members representing every aspect of the coal mining industry, including coal production, equipment manufacturing and supply, electric power generation, engineering, coal transportation, blasting and other similar enterprises. Its members are the backbone of the Midwest coal industry, an industry which is also the workhorse of Ohio's electric power generation. In fact, coal-based generation supplies more than 87% of Ohio's energy needs at cost-effective rates.

Ohio Contractors is a statewide business and trade association representing nearly 500 Ohio companies engaged in the heavy highway and utility industries. Ohio Contractors' members are the caretakers of Ohio's vast public works infrastructure which includes more than 116,200 miles of highways, roads and streets, 42,000 bridges and one million miles of water, sewer, energy, and telecommunication lines.

AGC is a commercial construction association that represents hundreds of large and small building contractors and subcontractors from all over Ohio. In Ohio, AGC acts as the commercial building construction industry's principal statewide representative and works to maintain the highest standards of business conduct in the contracting business and to encourage economy, efficiency and the elimination of waste in construction.

Amici's members are located throughout Ohio's 88 counties and run the gamut in size and organization; some members are small, family-owned companies whereas others are multi-national corporations. Despite these differences, Amici's members have unifying characteristics: Amici's members operate thousands of emission sources, facilities and businesses throughout Ohio that are regulated and permitted by Ohio EPA and are subject to Ohio's environmental laws and Ohio EPA's environmental enforcement program.

Amici's members must be able to operate in an environment with regulatory certainty, fairness and predictability in order to remain viable businesses. The issues of this case – the new “inference” standard of proof to show continuing noncompliance and the removal of a business's due process rights by the court– substantially harm Amici's members and all Ohio businesses. Thus, Amici have a significant interest in the outcome of this case.

STATEMENT OF THE FACTS

Amici adopt the statement of the facts set forth in the Merit Brief filed by Defendants-Appellants, Shelly Materials, Inc. and Allied Corporation (“Shelly”).

ARGUMENT

Amici understand that there are certain obligations that come with the privilege of doing business in Ohio. Environmental compliance is one of those obligations and in this light, hundreds, if not thousands, of Ohio businesses must periodically test air emissions to confirm compliance with Ohio EPA-issued air permits. If a stack test, which is a type of air emission test, shows a permit exceedance, the facility can retest, apply to change its air permit to increase the emission limits, operate differently or fix mechanical problems. It is important to know from the outset that a stack test is just a snap shot of facility emissions at the time of the testing event and rarely represents normal operating conditions.

When a follow-up test is required, the retesting typically cannot occur for several months due to the time it takes to schedule testing personnel and Ohio EPA personnel, who must witness the test. If the air permit needs to be modified to increase emission limits as a result of the initial testing, that permit change also takes several months for Ohio EPA to process. In the interim, there are work days during which our members’ facilities must be operating to keep Ohio’s economy going. Thus, the status of compliance between the time a stack test performed at maximum worst-case conditions showed an exceedance and a retest or permit change occurs is fundamental to the Amici. Should a facility be deemed to be out of compliance every single day during that entire period of time after the initial test or should the facility be allowed to show that it did not in fact operate for days, weeks, or months during the interim or show that other factors brought the facility into compliance immediately after testing?

In this case, the Tenth District held that a business is not only deemed to be out of compliance during the entire time between the initial test and the retest (a permit change was not even contemplated by the appellate court), even if operational conditions change, but that Ohio EPA need show only that the initial test showed an exceedance with any other showing of proof regarding compliance during the subsequent time period. More troubling, the Tenth District moved immediately from a finding that an inference carries the State's burden of proof to a remand to the Trial Court to assess daily penalties. In the process, the Tenth District ignored Shelly's compelling defense rebutting the inference and, by doing so, removed due process rights.

If Ohio businesses are subject to the decision of the Tenth District in this case, a decision that allows Ohio EPA to find on-going noncompliance without giving businesses the opportunity to show otherwise, then Ohio runs the very real risk of driving businesses from the state without any concomitant benefit to the environment. This case presents this Court with an opportunity to provide clear instruction to both the Ohio EPA and Ohio's regulated business community with respect to how issues of noncompliance with Ohio's environmental laws will be determined. More fundamentally, this case also has more global ramifications on regulated business throughout Ohio given the core legal matters—civil burdens of proof and due process rights—at issue here.

First Proposition of Law: In A Civil Enforcement Action, The State Has The Burden Of Proof To Demonstrate By A Preponderance Of The Evidence Each And Every Day Of Violation.

It is fundamental that, in a civil action, the plaintiff bears the burden of proof on each essential element of any claim for relief. *Ohio Valley Radiology Assocs. v. Ohio Valley Hosp. Ass'n.* (1986), 28 Ohio St.3d 118, 122, 502 N.E.2d 599. In concert, the State bears the burden of

proof in environmental enforcement matters, and Ohio law requires that the State make a “showing that such person has violated [R.C. Chapter 3704] or the rules adopted thereunder” using a preponderance of the evidence standard for each and every day for which the State seeks a liability ruling. R.C. 3704.06(B).

In the case at bar, the State did not offer, nor did the Tenth District’s reversal of the Trial Court require, testimony or any other evidence that the air permit exceedance identified during a “worst-case conditions” stack test was of a continuing nature. In the Trial Court, Shelly presented evidence that the stack test (the air emission test) was a snap shot and does not relate to day-to-day operations at any of Shelly’s facilities. The State argued, without any supporting evidence, that the violation continued after each stack test. After considering the competing arguments and the evidence Shelly offered, the Trial Court found that that the State did not meet its burden of proof because it made no showing pursuant to R.C. 3704.06 of any on-going violation. However, the Tenth District held that “*** the trial court should have concluded the violation continued until the subsequent stack test determined the plant no longer was violating the permit limits.” *State ex rel. Ohio Attorney General v. The Shelly Holding Co., et al.*, 191 Ohio App.3d 421, 2010-Ohio-6526, 946 N.E.2d 295 at ¶66 (“*Shelly II*”).

Ohio law expressly states that the duration of each and every violation must be proven by the State with actual evidence satisfying the burden of proof. R.C. 3704.06(B). In this case, the State presented no evidence to satisfy its burden before the Trial Court. Shelly never conceded that the hot mix asphalt plants at issue operated out of compliance outside of stack testing conditions. In fact, as the Trial Court determined, Shelly presented “compelling” evidence to the contrary. *State ex rel. Ohio Attorney General v. The Shelly Holding Co., et al.* (Sept. 2, 2009), Franklin Cty. C.P. No. 07CVH07-9702, at 46 (“*Shelly I*”).

This “compelling” evidence, however, was ignored by the Tenth District to support its opinion that requiring the State to prove a violation on the days between stack tests would “allow a violator to continue the harmful conduct at least until the next stack test, knowing no penalty will be imposed for the interim violations.” *Shelly II* at ¶66. The circular nature of this legal proposition, as well as the underlying assumptions used to support it, are erroneous. The Tenth District’s holding assumed there were on-going violations; however, the State presented no evidence of any on-going violations. Thus, there can be no “harm” to prevent from the continuing operations if there is, in fact, no proof of any continuing violation. Additionally, the Tenth District assumed that the State could not prove a violation if it had to satisfy anything more than an inference standard. Again, this assumption is incorrect. At trial, the State could have put on evidence of violations on days between stack tests and could have put on evidence that actual operating conditions mirrored stack testing conditions at each of Shelly’s plants; however, the State either chose not to or was not able to do so.

While the government in both *Hoge* and *Thermal-Tron*, the two cases cited by the Tenth District, presented evidence supporting violations on intervening days between stack testing events, here, in contrast, the State presented no such evidence. *United States v. Hoge Lumber Co.* (N.D. Ohio, May 7, 1997), No. 3:95 CV 7044, 1997, U.S. Dist. LEXIS 22359 at *16-17; *State ex rel. Celebrezze v. Thermal-Tron, Inc.* (1992), 71 Ohio App.3d 11, 16, 592 N.E.2d 912. By allowing the State to “prove” days of violation through a mere inference without offering any actual evidence of violation on those specific days, the Tenth District is relieving the State, as the plaintiff, of its burden of proof. *Thermal-Tron* and *Hoge* clearly do not support such a wholesale alteration of a plaintiff’s burden in contradiction of controlling Ohio law.

The impact of the Tenth District’s decision goes well beyond this single case. Ohio’s

environmental statutes, as well as many other civil statutes, require the State to carry the same burden of proof. See, R.C. 3704.06 (Ohio's air laws); R.C. 3734.13(C) (Ohio's waste laws); R.C. 6111.07 (Ohio's water laws). As such, the Tenth District's decision effectively, but unlawfully, modifies the civil burden of proof in Ohio to a "mere inference" standard; a standard that directly conflicts with long-standing Ohio law and the clear parameters set by the Ohio General Assembly.

Given the importance of maintaining consistency in the regulation of Ohio's environmental laws, an importance recognized by Ohio EPA, the State must be required to prove any violation of those laws using a preponderance of the evidence standard, rather than a "mere inference" standard. If the General Assembly had intended for this lesser standard to apply to assist the State in aggressively enforcing its air pollution control laws, R.C. 3704.06 would have reflected this intent. The Ohio General Assembly has given no indication that the use of a "mere inference" standard is sufficient to prove an on-going air permit violation. Unless a statute specifies otherwise, the plaintiff can carry its civil burden of proof only by a preponderance of the evidence. *Cincinnati, Hamilton & Dayton Ry. v. Frye* (1909), 80 Ohio St. 289, 290, 88 N.E. 642, paragraph two of the syllabus; see also *Cincinnati Bar Assn. v. Young* (2000), 89 Ohio St.3d 306, 314, 731 N.E.2d 631. To carry its burden under a preponderance standard, the State must prove its case beyond 50% certainty. See App. at A5 (*United States v. Peppel* (S.D. Ohio 2008), No. 3:06cr196, 2008 WL 687125 at *4) (Government's burden when using the preponderance standard is 50.1%).

The function of a standard of proof, as that concept is embodied "in the Due Process Clause *** is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."

Addington v. Texas (1979), 441 U.S. 418, 423, 99 S.Ct. 1804, citing *In re Winship* (1970), 397 U.S. 358, 370, 90 S.Ct. 1068 (Harlan, J., concurring). The Tenth District's holding undermines this degree of confidence, making it much easier for the State to bring a successful enforcement action against a regulated entity. This is not a decision that can or should be made by the judiciary. The Ohio General Assembly has provided a level of protection to regulated entities through the use of the preponderance of the evidence standard. To allow the Tenth District to diminish this "degree of confidence" by adopting a lower standard contravenes established law and harms defendants' due process rights. In the absence of specific direction from the Ohio General Assembly, the Tenth District's holding adopting the "mere inference" standard cannot be allowed to stand.

The adoption of such a "mere inference" standard has significant negative ramifications for Amici's members and violates the intent of the Ohio General Assembly in adopting Ohio's air pollution laws. R.C. 3704.06(B) expressly requires that the State must make a "showing" that an entity is in violation for each day the State seeks a liability ruling. The Tenth District's holding eliminates this requirement, making regulated entities much more vulnerable to State enforcement activities. The Tenth District's holding also makes Amici more vulnerable to any Ohio EPA enforcement officer with an untrained or erroneous perspective on the application of Ohio's air pollution control laws because a regulated entity could incur multi-million dollar liability based on an allegation of violation coupled with a mere inference that the violation continues without the State having to prove its case by a preponderance of the evidence. See R.C. 3704.06(C) (Imposing a civil penalty of up to \$25,000 per day of violation.). As such, this decision must not be allowed to stand.

Second Proposition of Law: If A Continuing Violation Of Permit Terms Can Be Inferred, A Permit Holder Must Be Given The Opportunity To Rebut The Inference.

If the State can meet its burden of proof with only an inference, then due process requires that a defendant be afforded the opportunity to prove the State wrong. Consequently, Shelly should have been afforded an opportunity to rebut the State's inference with contrary evidence. To determine otherwise, as the Tenth District did in *Shelly II*, removes the due process rights of a civil defendant and creates a new "irrebuttable presumption of on-going guilt" standard not found in or contemplated by either federal or Ohio law. *Johns v. Univ. of Cincinnati Med. Assoc., Inc.* (2004), 101 Ohio St.3d 234, 2004-Ohio-824, 804 N.E.2d 19, at ¶34 (internal citations omitted) ("Due process of law 'assures to every person his day in court.' It requires '[s]ome legal procedure in which the person proceeded against shall have an opportunity to defend himself.'"); *Vlandis v. Kline* (1973), 412 U.S. 441, 446, 93 S.Ct. 2230 (irrebuttable presumptions are disfavored for the purposes of constitutional due process); *Wheeling Steel Corp. v. Glander* (1949), 337 U.S. 562, 574, 69 S.Ct. 1291 (Fourteenth Amendment due process applies to corporations); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* (1925), 268 U.S. 510, 535, 45 S.Ct. 571 (due process protections extend to corporate assets).

Here, the Trial Court considered evidence presented by Shelly which challenged the State's claim of continuing violations. In contrast, the Tenth District, upon determining that mere inference of an ongoing violation was enough to carry the State's burden of proof, ordered the Trial Court on remand to calculate the number of days of violation for purposes of assessing a penalty against Shelly. *Shelly II* at ¶66. This decision gives the State an insurmountable advantage in prosecuting environmental cases as the State can now establish on-going violations and obtain civil penalties without the need to present actual evidence proving such violations continued after a discrete "worst-case conditions" stack testing event or rebutting a defendant's

proffer of evidence. The Tenth District's order to the Trial Court on remand precluded consideration any defense against the State's allegations and such a loss of due process rights has a potential for abuse.

Contrary to the Tenth District's decision, due process requires courts to consider evidence like the evidence presented by Shelly. For example, Ohio EPA's own Air Division Chief testified that stack tests, like those performed at Shelly, are only a snapshot of actual emissions on a single, particular day and actual day-to-day emissions are influenced by a number of factors, including fuel usage and material usage. Shelly Supp. at 35-36 (Hodanbosi Tr. 1591-1592). Shelly's management then testified that operations at its hot mix asphalt plants do not mirror stack test conditions. Shelly Supp. at 40-41 (Mowrey Tr. 1862-1863). Shelly also presented evidence that its hot mix asphalt plants do not operate seven days a week, even in the busy summer season, and stop operating during the winter months. Shelly Supp. at 38 (Shively Tr. 1653); Shelly Supp. at 39 (Mowrey Tr. 1813); Shelly Supp. at 15 (Prottegeier Tr. 161).

In the face of such compelling, undisputed evidence presented by Shelly during a lengthy trial, the Tenth District nonetheless broadly held that air pollution violations continue from one stack test until a subsequent stack test. *Shelly II* at ¶66. Thus, regardless of the evidence presented by a defendant, the Tenth District has determined that such a defendant will still be deemed to be in non-compliance. This new irrebuttable standard created by the Tenth District violates fundamental rights of due process of civil defendants under more than just Ohio's air law and is a perilous holding that cannot be allowed to stand.

The Tenth District's holding is also worrisome to Amici's members because of Ohio EPA's non-traditional funding system. Ohio EPA receives essentially no General Revenue Funds from the taxpayers of the state, the only exception being funds for the testing of auto

emissions in the Cleveland-Akron area. App. at A15 (Testimony of Scott Nally, Director, Ohio EPA). As such, Ohio EPA receives its funding from “federal funds and fees paid by regulated entities.” Id. Penalties against regulated businesses for violations of Ohio’s environmental laws are payable to the State.

The U.S. Supreme Court has previously expressed due process concerns when a fine is imposed by the entity reliant on those fines for funding. See *Tumey v. Ohio* (1927), 273 U.S. 510, 535, 47 S.Ct. 437 (due process violated by fine imposed by mayor-judge whose compensation as judge was derived from, and whose city coffers—for which he was responsible—largely depended on, revenue from fines). Although *Tumey* involved a judge making final decisions on fines that would directly benefit him, the principle underlying the *Tumey* decision is applicable here. The Tenth District’s holding, when combined with other aspects of the State’s enforcement scheme, in effect, will make the State the sole arbiter determining whether and how much of a fine will be levied regardless of a defendant’s evidence that a violation used as a basis for a civil penalty did not occur.

Due process concerns are further implicated when the relationship between funding sources and enforcement incentives are examined. In fact, a study of such relationships has revealed that enforcement activities increase where a government entity keeps a portion of revenue from enforcement activities. App. at A22-A23, A43 (Baicker and Jacobsen at 2-3, 23) (analyzing monetary incentives in the provision of public goods, and specifically, the sharing provisions of asset forfeiture laws). In fact, this increased enforcement is especially prevalent when “the legal hurdles *** are lower.” App. at A21 (Baicker and Jacobsen at 1) (Asset forfeiture proceedings do not require a criminal conviction using the beyond a reasonable doubt standard). In *Shelly II*, the Tenth District established a lower legal standard that will allow the

State to collect more fines without concern that a regulated defendant will be able to put up a defense. This, unfortunately, could incentivize the State to engage in still more enforcement actions, without having to meet the burden of proof that a violation actually occurred.

The length of time that violations are deemed “continuing in nature” is also concerning to the Amici. Ohio EPA regulations require that a regulated entity provide a notice of intent to test or retest to Ohio EPA at least thirty days in advance of the testing date. Ohio Adm.Code 3745-21-10(A)(3). In practice, however, retesting events generally occur months after the initial stack test due to difficulties in coordinating both Ohio EPA observers and testing personnel. The notice requirements, coupled with the Tenth District’s holding, means that once a regulated entity fails a stack test, it is impossible for the regulated entity to show compliance or avoid a continuing violation and mounting compliance fines, until at least thirty days and sometimes months after an intent to test is submitted to Ohio EPA. This is the case even where a defendant has evidence that its normal operations do not match stack testing conditions or that a facility did not operate at times during the days or months following a failed stack test.

Smaller companies will be especially burdened by the Tenth District’s holding combined with the thirty day advance notification regulatory requirement and the practical difficulties of quickly coordinating a retest. Small businesses that do not have in-house stack testing capabilities will not only be forced to bear the significant cost of the retest, but will also be dependent on an outside contractor to schedule the stack test and dependent on Ohio EPA personnel to make themselves available to witness the test so that the regulated business can come out from under the threat of continuing enforcement fines. Notably, such intent to test is a comprehensive document that requires businesses to compile a large amount of information. The complexity of this document ensures that a regulated business cannot immediately file an intent

to test after receiving notice of a failed stack test from Ohio EPA. See Ohio Adm.Code 3745-21-10(A); App. at A9-A14 (Ohio EPA Intent to Test Form, *available at* <http://www.epa.state.oh.us/portals/27/files/ITT.pdf>). This complexity adds to the time it will take a regulated entity to schedule a subsequent stack test, which, again, further increases the fine the State is able to collect, even though the State only proved that the regulated entity was in violation on one specific day. Such a result is not the certainty Ohio business needs.

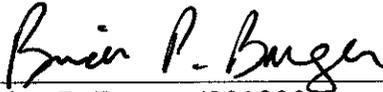
CONCLUSION

If the Tenth District's holding is allowed to stand, the State will be incentivized to increase enforcement actions and seek significant civil penalties against regulated businesses with no evidence of continuing violations. In addition to the changed standard of proof, the Tenth District decision prevents courts from considering defense evidence which would stop the accrual of such civil penalties. In effect, the Tenth District's decision allows the State to collect several months' worth of civil penalties when the State must only show one day of violation. Pursuant to the Tenth District's holding, the State can collect its fine even if the regulated entity can show, as Shelly did at trial, that it was not operating on some of the days that a violation is alleged to have occurred and was not operating in the same manner in which the stack test was performed.

The Tenth District's "guilty with no ability to prove yourself innocent" decision not only changes the State's civil burden of proof standard and obstructs a defendant's ability to overcome the inference of continuing violation with actual evidence, it also discourages businesses from establishing operations in Ohio. As such, Amici urge this Court to reverse the decision of the Tenth District Court of Appeals.

Respectfully submitted,

BRADY, COYLE & SCHMIDT, LTD



Brian P. Barger (0018908)
4052 Holland-Sylvania Road
Toledo, Ohio 43623
Telephone: (419) 885-3000
Facsimile: (419) 885-1120
bpbarger@bcslawyers.com

*Counsel for Amici Curiae, Ohio Chamber of Commerce,
Ohio Aggregates and Industrial Minerals Association,
Flexible Pavements, Inc., Ohio Coal Association, Ohio
Contractors Association and Associated General
Contractors of Ohio*

PROOF OF SERVICE

I certify that a copy of this Brief of Amici Curiae in Support of Defendant-Appellants was sent by ordinary U.S. mail postage prepaid on July 5th, 2011 to:

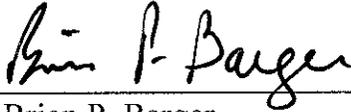
Attorneys for Defendants-Appellants, Shelly Material, Inc. and Allied Corporation:

April R. Bott
BOTT LAW GROUP LLC
6037 Frantz Road, Suite 105
Dublin, Ohio 43017

Sarah Morrison
CHESTER, WILLCOX & SAXBE LLP
65 E. State Street, Suite 1000
Columbus, Ohio 43215

Attorneys for Plaintiff-Appellee, The State of Ohio:

Gregg Bachmann
Gary Pasheilich
Assistant Attorneys General
Environmental Enforcement Section
Public Protection Division
30 E. Broad Street, 25th Floor
Columbus, Ohio 43215



Brian P. Barger

Counsel for Amici Curiae, Ohio Chamber of
Commerce, Ohio Aggregates and Industrial
Minerals Association, Flexible Pavements,
Inc., Ohio Coal Association, Ohio Contractors
Association and Associated General
Contractors of Ohio

Not Reported in F.Supp.2d, 2008 WL 687125 (S.D. Ohio)
 (Cite as: 2008 WL 687125 (S.D. Ohio))

C

Only the Westlaw citation is currently available.

United States District Court,
 S.D. Ohio,
 Western Division.
 UNITED STATES of America, Plaintiff,
 v.
 Michael E. PEPPEL, Defendant.
 No. 3:06cr196.
 March 10, 2008.

F. Arthur Mullins, Federal Public Defender, Neil Frank Freund, Adam Christopher Armstrong, Bryan Joseph Mahoney, Freund Freeze & Arnold, Dayton, OH, for Michael E. Peppel.

Dwight K. Keller, United States Attorney's Office, Dayton, OH, for Plaintiff.

OPINION RESOLVING THE QUESTION OF WHETHER THE DEFENDANT HAS MET HIS BURDEN OF ESTABLISHING THE NEED FOR A HEARING, DURING WHICH THE GOVERNMENT WOULD HAVE THE BURDEN OF DEMONSTRATING PROBABLE CAUSE TO BELIEVE THAT THE PROCEEDS FROM THE SALE OF HIS SHARES OF VUTEX STOCK ARE FORFEITABLE; DECISION AND ENTRY SUSTAINING GOVERNMENT'S MOTION FOR STATUS CONFERENCE (DOC. # 83)
 WALTER HERBERT RICE, District Judge.

*1 Defendant Michael Peppel ("Defendant" or "Peppel") is charged in the Superseding Indictment (Doc. # 54) with 32 separate counts, including numerous counts of wire, mail and securities fraud and money laundering. In addition, the Government seeks the forfeiture of real and personal property, alleging that the property was involved in Defendant's alleged criminal activities or is traceable to such criminal activity. See Superseding Indictment (Doc. # 54) at 44; (Doc. # 65) at 49.^{FN1} In particular, the Government contends that, among other

property, five parcels of real estate and the sum of \$425,000, which Defendant realized from the sale of his shares of stock in Vutex, LLC ("Vutex"), are forfeitable. *Id.* According to the Government, this property is subject to forfeiture in accordance with 18 U.S.C. § 981(a)(1)(C), because it "constitutes or is derived from proceeds traceable to" his alleged offenses of wire, mail and securities fraud. *Id.* at 44. Alternatively, the Government contends that the five parcels of real property and the proceeds from the sale of the Vutex stock are subject to forfeiture under 18 U.S.C. § 982(a)(1), because those assets were "involved in" the money laundering offenses allegedly committed by him or "traceable to such property."^{FN2} *Id.* at 49.

FN1. The Superseding Indictment is Doc. # 54; however, two of its pages, numbers 46 and 49, have been filed under seal as Doc. # 65.

FN2. The Superseding Indictment also cites 28 U.S.C. § 2461. That statute merely sets forth procedures to be followed in forfeiture proceedings.

An ongoing dispute between the parties in this prosecution is whether the Defendant will be permitted to use the proceeds from the sale of his shares of Vutex stock and the five parcels of real property to pay the costs of his defense. This Court addressed that issue in its Decision of September 5, 2007 (Doc. # 48), concluding therein that Peppel was entitled to a hearing, during which the Government would have the obligation of proving the existence of probable cause to believe that those assets were subject to forfeiture. To reach that conclusion, this Court relied upon the decision of the Sixth Circuit in *United States v. Jamieson*, 427 F.3d 394 (6th Cir.), cert. denied, 547 U.S. 1218, 126 S.Ct. 2909, 165 L.Ed.2d 937 (2006). Therein, the Sixth Circuit noted that the District Court, in order to determine whether a defendant was entitled to such a hearing, had applied the two-part test, adop-

Not Reported in F.Supp.2d, 2008 WL 687125 (S.D. Ohio)
 (Cite as: 2008 WL 687125 (S.D. Ohio))

ted by the Tenth Circuit in *United States v. Jones*, 160 F.3d 641 (10th Cir.1998), and that it had no "quarrel" with the use of that test. *Id.* at 406-07. In *Jones*, the Tenth Circuit held:

We think the proper balance of private and government interests requires a post-restraint, pre-trial hearing but only upon a properly supported motion by a defendant. Due process does not automatically require a hearing and a defendant may not simply ask for one. As a preliminary matter, a defendant must demonstrate to the court's satisfaction that she has no assets, other than those restrained, with which to retain private counsel and provide for herself and her family.... A defendant must also make a prima facie showing of a bona fide reason to believe the grand jury erred in determining that the restrained assets "constitute[] or [are] derived, directly or indirectly, from gross proceeds traceable to the commission of the [health care] offense."

*2 160 F.3d at 647 (brackets in the original and citation omitted). In its earlier Decision (Doc. # 48), this Court concluded that the Defendant had made both of those showings.

On October 19, 2007, this Court conducted an oral and evidentiary hearing, which was directed at the first branch of the *Jones* test, to wit: whether the defendant has "demonstrate[d] to the court's satisfaction that she has no assets, other than those restrained, with which to retain private counsel and provide for herself and her family." *Id.* Although the Court had previously decided that this showing had been met (*see* Doc. # 47 at 9-10), that issue was revisited, because the Government had previously indicated that it was going to dismiss the five parcels of real estate from its civil forfeiture proceeding, *United States v. 9520 Cutler Trace, Dayton, Ohio*, Case No. 3:07cv217 ("*9520 Cutler Trace*"), thus raising the possibility that the five parcels constituted or, upon sale, could constitute assets with which to retain private counsel or to provide for himself and his family.^{FN3} The Government has, in fact, not dismissed said five parcels from the for-

feiture litigation. In addition, the Court permitted the Defendant to submit a memorandum and to proffer evidence in support of the second prong of the *Jones* test, to wit: a prima facie showing of a reason to believe that the Grand Jury erred in determining that the restrained assets, the proceeds from the sale of the shares of Vutex stock, constituted gross proceeds traceable to the commission of the alleged money laundering offense. Parenthetically, in its September 5th Decision, this Court had concluded that, although Defendant had not made the "strongest showing," he had met his obligation under the second prong of *Jones*, in large measure, because the proceeds from the sale of the shares of Vutex stock had not even been mentioned in the Indictment (Doc. # 3). *See* Doc. # 48 at 10. That reasoning became moot, with the filing of the Superseding Indictment (Doc. # 54), within which the sale of those shares is alleged to constitute money laundering and the forfeiture of those proceeds is expressly requested. In light of that altered landscape, this Court herein once again addresses the previously resolved question of whether Peppel has made the showings required under *Jones*. As a means of analysis, the Court begins by focusing on the Defendant's financial wherewithal, following which it turns to the question of whether he has established the second prong of the *Jones* test.

FN3. This Court specifically identified those five parcels in its Decision of September 5, 2007. *See* Doc. # 48 at 2. That specific identification will not be repeated herein, although they include the Defendant's residence in Centerville, Ohio, as well as two adjoining lots and two farms located in Waynesville, Ohio.

First, the *Jones* court held that, in order to be entitled to a hearing during which the Government would be required to prove the existence of probable cause, a defendant must "demonstrate to the court's satisfaction that she has no assets, other than those restrained, with which to retain private counsel and provide for herself and her family." 160

Not Reported in F.Supp.2d, 2008 WL 687125 (S.D. Ohio)
 (Cite as: 2008 WL 687125 (S.D. Ohio))

F.3d at 647. Herein, as earlier indicated, this issue was revisited during the October 19th oral and evidentiary hearing, because the Government had previously indicated that it was going to dismiss the five parcels of real estate from *9520 Cutler Trace*. In fact, the Government has not requested that the five parcels be dismissed from that forfeiture action.^{FN4} On the contrary, during this time, the Government has merely requested that the Court stay that civil forfeiture litigation, pending the resolution of this prosecution. *See* Doc. # 32 in *9520 Cutler Trace*. Accordingly, since the five parcels of real estate are, as a *practical matter*, not assets available to the Defendant, there exists no reason for questioning the current validity of this Court's conclusion in its Decision of September 5, 2007 (Doc. # 48), that the Defendant had met his burden with respect to the first prong of the *Jones* test. Based upon that Decision, therefore, this Court concludes that the Defendant has met his burden with respect to that prong of the applicable test, to wit: that he has no assets, other than those restrained, with which to retain private counsel and provide for himself and his family.

FN4. Those five parcels of real estate are also listed in the Superseding Indictment, as property subject to forfeiture. *See* Doc. # 54 at 45 and 47. The Government has not requested that the Superseding Indictment be amended to delete the request to forfeit this property.

*3 Moreover, even if the Government had dismissed the five parcels of real estate from *9520 Cutler Trace*, this Court would, nonetheless, conclude that the Defendant has met his burden with respect to the first prong of the *Jones* test. Defense of this complex prosecution, which raises a number of complicated accounting issues, will be expensive. This Court reached that conclusion in its September 5th Decision. *See* Doc. # 48 at 9. The evidence presented during the October 19th evidentiary hearing merely reinforced that conclusion. In particular, Charles Faruki ("Faruki"), a local attor-

ney with extensive experience in complex civil and criminal matters, testified that attorney's fees in a prosecution such as this would, in his opinion, range between approximately \$2,700,000 and about \$3,000,000.^{FN5} *See* Doc. # 62 at 38. Without indicating that it concurs with Faruki that attorney's fees in a prosecution such as this will be in that range, his testimony certainly confirms the Court's conclusion that the defense herein will be expensive.

FN5. Faruki also testified that retaining the requisite expert witnesses for trial would cost between \$310,000 and \$597,000. *See* Doc. # 62 at 38.

Arrayed against the expense of defending this prosecution are the Defendant's assets. In an exhibit he filed in March of this year, he identified his equity in the five parcels of real estate as being approximately \$550,000. *See* Doc. # 31 at Ex. C. However, based upon the testimony of Andrew Gaydosh ("Gaydosh"), a real estate broker, and given the current state of the real estate market, this Court finds that the Defendant would not be able to realize a significant amount from the sale of the five parcels of real estate, with which to fund his defense, because it would not be possible to sell those parcels on an immediate enough basis in order to use the equity realized as a result for that purpose. Indeed, Gaydosh testified that it would take at least six months to a year to sell the real estate. *See* Doc. # 62 at 84-85. Moreover, based upon Gaydosh's testimony, this Court finds that Peppel would not be able to fund his defense by borrowing against the equity in the five parcels. Gaydosh testified that the current climate for real estate loans, coupled with the facts that the Defendant is without employment and under indictment would make such a loan impossible. Accordingly, this Court would find that the Defendant's equity in the five parcels of real estate, together with any other assets he possesses, would not be sufficient to pay for his defense in this prosecution, *even if* the Government had carried through with its representation and dis-

Not Reported in F.Supp.2d, 2008 WL 687125 (S.D. Ohio)
 (Cite as: 2008 WL 687125 (S.D. Ohio))

missed those parcels from 9520 Cutler Trace.^{FN6}

FN6. The Government has argued that the Defendant has the obligation of demonstrating that he has *no* assets available to use for defense, other than those restrained. That assertion is predicated upon the use of that language by the Tenth Circuit in *Jones*. See 160 F.3d at 647 (noting that the defendant must demonstrate that “she has no assets, other than those restrained, with which to retain private counsel and provide for herself and her family”). This Court cannot agree with the Government that the foregoing language means that Peppel has failed to meet his burden under the first prong of *Jones*, if he possesses any assets. In *Jamieson*, the Sixth Circuit used language which calls into question the validity of such an argument. See 427 F.3d at 407 (indicating that “due process should be honored when a defendant’s Sixth Amendment right to counsel of choice is threatened by virtue of the restraint of his funds”). Herein, counsel of Peppel’s choice is so threatened, regardless of the fact that it is not possible to say that he has *no* assets.

Second, the *Jones* court also required that the defendant “make a prima facie showing of a bona fide reason to believe the grand jury erred in determining that the restrained assets constitute or are derived, directly or indirectly, from gross proceeds traceable to the commission of the offense.” *Jamieson*, 427 F.3d at 406 (quoting *Jones*). The Defendant has filed an *in camera* memorandum, under seal,^{FN7} in support of his contention that he has made the requisite prima facie showing with respect to the proceeds from the sale of his shares of Vutex stock.^{FN8} See Doc. # 68. However, before discussing the Defendant’s arguments therein, it must be emphasized that the Government is not seeking the forfeiture of any funds or other assets held by Vutex. Rather, it seeks to restrain Defend-

ant’s use of the proceeds he received from the sale of his shares of that entity’s stock, proceeds which are in his possession.

FN7. Although filed under seal, the Defendant’s memorandum (Doc. # 68) has not been provided to the Government. At the conclusion of the October 19th hearing, this Court permitted the Defendant to submit this memorandum *in camera*, because the Government did not have the right to respond to that memorandum and, thus, did not need to see it. See Doc. # 63 at 153. In addition, the Court noted that an *in camera* filing would allow the Defendant to avoid disclosing to the Government his defense to the existence of probable cause, which could prejudice him at a probable cause hearing, if such a hearing were to be held. *Id.* at 154. In this Decision, this Court concludes that the Defendant has failed to make the necessary prima facie showing. Therefore, there will not be a probable cause hearing, and any disclosure of the contents of the Defendant’s memorandum by the Court, in this opinion, can not prejudice the Defendant’s defense at such a non-existent hearing.

FN8. It bears noting that the Court has previously concluded that, with respect to the five parcels of real estate, the Defendant made a prima facie showing that the Grand Jury erred in concluding that his down payments and a portion of the percentage increase in the value of each parcel, attributable to the down payment therefor, were forfeitable. See Doc. # 48 at 11. See also *supra* at 2-3. Nothing has been presented to this Court in the interim which could alter that conclusion.

*4 In that memorandum, the Defendant asserts that the allegedly tainted funds he used to purchase his shares of Vutex stock were deposited in a Vutex account with contributions from other investors and

Not Reported in F.Supp.2d, 2008 WL 687125 (S.D. Ohio)
 (Cite as: 2008 WL 687125 (S.D. Ohio))

then transferred to Vutex's capital account, into which other funds were deposited and from which funds were withdrawn. Defendant points out that the allegedly tainted funds which he used to purchase his shares of Vutex stock were commingled with untainted funds in a Vutex account for over three and one-half years. Based upon those factual assertions, which this Court accepts for present purposes, the Defendant contends that "it would be impossible to trace the Vutex stock-sale proceeds to criminal conduct that purportedly occurred years before." *Id.* at 18. In support of that premise, Peppel relies upon *United States v. Voigt*, 89 F.3d 1050 (3d Cir.), *cert. denied*, 519 U.S. 1047, 117 S.Ct. 623, 136 L.Ed.2d 546 (1996), wherein the Third Circuit held, *inter alia*, that the District Court had erroneously ordered the forfeiture of the defendant's jewelry, as assets traceable to the proceeds of his criminal activity, in other words as tainted funds. The defendant had transferred the tainted funds into a bank account, into which untainted funds had previously been deposited. Thereafter, more untainted funds were deposited into the account and funds were withdrawn. Thus, the tainted funds had been commingled with untainted funds in that bank account. It was from that account the defendant withdrew the funds that were used to purchase the jewelry which the Government contended was traceable to the tainted funds. In concluding that the funds were not so traceable, the Third Circuit wrote:

We hold that the term "traceable to" means exactly what it says. In light of our holding on the burden of proof, this means that the government must prove by a preponderance of the evidence that the property it seeks under § 982(a)(1) in satisfaction of the amount of criminal forfeiture to which it is entitled has some nexus to the property "involved in" the money laundering offense. For example, if the defendant receives \$500,000 cash in a money laundering transaction and hides the cash in his house, the government may seize that money as property "involved in" the money laundering offense. If the defendant purchased a

\$250,000 item with that money, the government may seek the remaining cash as "involved in" the offense, whereas the item purchased is subject to forfeiture as property "traceable to" property involved in the money laundering offense.

Where the property involved in a money laundering transaction is commingled in an account with untainted property, however, the government's burden of showing that money in the account or an item purchased with cash withdrawn therefrom is "traceable to" money laundering activity will be difficult, if not impossible, to satisfy. While we can envision a situation where \$500,000 is added to an account containing only \$500, such that one might argue that the probability of seizing "tainted" funds is far greater than the government's preponderance burden (50.1%), such an approach is ultimately unworkable. As the Seventh Circuit, speaking through Judge Easterbrook, has observed, a bank account is simply a number on a piece of paper:

*5 Bank accounts do not commit crimes; people do. It makes no sense to confiscate whatever balance happens to be in an account bearing a particular number, just because proceeds of crime once passed through that account.... An "account" is a name, a routing device like the address of a building; the money is the "property" [for purposes of the forfeiture statute]. Once we distinguish the money from its container, it also follows that the presence of one illegal dollar in an account does not taint the rest-as if the dollar obtained from [money laundering activity] were like a drop of ink falling into a glass of water.

[*United States v.*] \$448,342.85, 969 F.2d 474, 476 (7th Cir.1992).

Id. at 1087 (footnotes omitted).^{FN9}

FN9. The *Voigt* court remanded the matter in order for the District Court to determine whether the jewelry was forfeitable as sub-

Not Reported in F.Supp.2d, 2008 WL 687125 (S.D. Ohio)
 (Cite as: 2008 WL 687125 (S.D. Ohio))

stitute property. Herein, Peppel argues that substitute property cannot be restrained prior to conviction, a proposition which this Court accepts for present purposes.

In determining whether *Voigt* supports Defendant's claim that he has made the requisite prima facie showing, the Court begins its analysis with the firm understanding that the Government is not seeking to forfeit funds or other assets belonging to Vutex; rather, the focus of the Government's desire are funds received by the Defendant from the sale of his Vutex stock, funds which are in his possession. Without questioning the legal principles enunciated by the *Voigt* court, that decision does not cause this Court to conclude that the proceeds the Defendant received from the sale of his shares of Vutex stock are not traceable to his alleged criminal activity. In *Voigt*, the defendant commingled tainted and untainted funds in one bank account, using some of the funds therein to purchase the jewelry the Government was seeking to forfeit. Herein, by contrast, the Defendant's contention that he has made the requisite prima facie showing, and, thus, is entitled to a hearing, is based upon the premise that *Vutex* commingled the tainted funds he had used to purchase his shares of stock with money others had invested in that entity and other untainted money, received after he had purchased his shares of stock. Defendant does not contend that *he* commingled the allegedly tainted funds used to purchase the shares of Vutex stock, in an account which contained other assets of his which were not tainted. In other words, the Defendant contends that he has made the requisite prima facie showing, because *Vutex*, the recipient of his allegedly tainted funds, commingled that money with untainted funds it had received from others, rather than arguing that, after *he* had commingled tainted and untainted funds, he used those commingled funds to purchase the shares of Vutex stock. If the Government were trying to forfeit funds belonging to Vutex (as opposed to proceeds in Defendant's possession), *Voigt* would arguably support his position. However, since the Government is not seeking to

forfeit funds belonging to Vutex, for *Voigt* to support Defendant's assertion that he has made a prima facie showing, the Third Circuit would have to have held that the jewelry was not forfeitable, because the jeweler commingled the tainted funds the defendant had used to purchase it with untainted funds that other customers had used to purchase other jewelry. Most decidedly, the Third Circuit did not infer that the jewelry would not have been forfeitable under those circumstances. In *United States v. Bornfield*, 145 F.3d 1123 (10th Cir.1998), cert. denied, 528 U.S. 1139, 120 S.Ct. 986, 145 L.Ed.2d 935 (2000), the Tenth Circuit, citing *Voigt*, held:

*6 In contrast, property "traceable to" means property where the acquisition is attributable to the money laundering scheme rather than from money obtained from untainted sources. See *United States v. Voigt*, 89 F.3d 1050, 1084-87 (3d Cir.) ("We hold that the term 'traceable to' means exactly what it says."), cert. denied, 519 U.S. 1047, 117 S.Ct. 623, 136 L.Ed.2d 546 (1996); *United States v. Saccoccia*, 823 F.Supp. 994, 1005 (D.R.I.1993), aff'd by 58 F.3d 754, 785 (1st Cir.1995) (agreeing with district court's reasoning), cert. denied, 517 U.S. 1105, 116 S.Ct. 1322, 134 L.Ed.2d 474 (1996). In other words, proof that the proceeds of the money laundering transaction enabled the defendant to acquire the property is sufficient to warrant forfeiture as property "traceable to" the offense.

Id. at 1135.

Herein, the Defendant took allegedly tainted funds from an account at Melrose Capital Advisors, LLC, which he used to purchase the shares of Vutex stock. Peppel has not asserted that *he* commingled those tainted funds with untainted funds in the Melrose account, before he purchased that stock. Rather, he relies solely on the fact that *Vutex* commingled his allegedly tainted funds with untainted money it received from other sources. It bears emphasis that the Defendant has cited no authority in support of the proposition that funds tainted by a money laundering scheme cease to be

Not Reported in F.Supp.2d, 2008 WL 687125 (S.D. Ohio)
 (Cite as: 2008 WL 687125 (S.D. Ohio))

traceable to that scheme, because those funds are commingled with untainted funds by the person who receives them from the money launderer, in exchange for other assets. In the absence of such authority, this Court is not able to agree with Peppel that the money he received from the sale of his Vutex stock is not traceable to his alleged money laundering, because Vutex commingled the allegedly tainted funds he used to purchase that stock with untainted money it received from other sources. Therefore, Peppel has failed to make a prima facie showing that the Grand Jury "misfired" by finding the existence of probable cause to believe that Defendant's tainted funds (*i.e.*, the proceeds from his money laundering) enabled him to acquire the shares of Vutex stock, even though Vutex commingled those tainted funds with untainted funds it received from others. The Government is not seeking to forfeit funds in the possession of Vutex; rather, it is seeking the funds in the Defendant's possession, which he received in exchange for the sale of the shares of his Vutex stock. Indeed, the Government alleges in the Superseding Indictment that the Defendant sold those shares of stock to third-parties. *See* Doc. # 54 at 42-44. Therefore, he has failed to demonstrate that he is entitled to a hearing, during which the Government would be required to establish probable cause to believe that the proceeds from the sale of the shares of Vutex stock are traceable to his alleged criminal activity.

FN10

FN10. In his post-hearing memorandum (Doc. # 68), the Defendant also recounts the facts concerning the Government's failure to seek forfeiture of his shares of Vutex stock or the proceeds from the sale of same earlier in this prosecution, given that it has been aware of his ownership of that asset for nearly three years. If the Defendant contends that the Government's failure in that regard, alone, is sufficient to establish the requisite prima facie case, this Court cannot agree. In its Decision of September 5th, this Court relied on the fact

that the shares of Vutex stock had not even been mentioned in the Indictment (Doc. # 3), to conclude that the Defendant had met his obligation under the second prong of the *Jones* test. *See* Doc. # 48 at 10. The Court did not intimate that mere delay alone was sufficient. Moreover, the Defendant has failed to cite authority to support the proposition that delay in seeking forfeiture, alone, is sufficient to establish the necessary prima facie case.

In addition, the Defendant has cited what he asserts were violations of the U.S. Attorney's Manual, which affected the evidence presented to the Grand Jury. Assuming for sake of argument that Peppel contends those asserted violations serve as the basis for concluding that he has made the necessary prima facie showing, this Court rejects that proposition. In *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), the Supreme Court held that an indictment is not subject to challenge, because it is not supported by competent or adequate evidence. This Court concludes that it would violate the logic of *Costello* to hold that a defendant can make the requisite prima facie showing required by *Jones*, by demonstrating that the Grand Jury heard incompetent evidence, *i.e.*, evidence that was introduced in violation of the U.S. Attorney's Manual.

Also pending herein is the Government's Motion for a Status Conference (Doc. # 83). The Court sustains that motion and has conducted one such call and has scheduled another conference call for Monday, March 10, 2008, at 1:30 p.m. During that conference call, Defendant's counsel should initially inform the Court as to whether they wish the Court to conduct a hearing, during which the Government will have the burden of establishing prob-

Not Reported in F.Supp.2d, 2008 WL 687125 (S.D. Ohio)
(Cite as: 2008 WL 687125 (S.D. Ohio))

able cause to believe that his down payments for and the portion of the percentage increase in the value of each of the five parcels, attributable to the down payment therefor, are subject to forfeiture. Given the evidence presented during the October 19th oral and evidentiary hearing, it may well be that the Defendant has decided that the difficulty in disposing of those parcels of property means that they are not a practical source for the payment of costs of defense.^{FN11} In addition, the question of representation of the Defendant is to be resolved and anticipated motion practice in this prosecution discussed, if Peppel is to continue to be represented by current counsel.

FN11. In its earlier Decision, this Court concluded that the Defendant had made both of the showings required by *Jones*, as they relate to the five parcels of real estate. No event has since occurred which could cause this Court to revisit its conclusion in that regard.

S.D. Ohio, 2008.
U.S. v. Peppel
Not Reported in F.Supp.2d, 2008 WL 687125
(S.D. Ohio)

END OF DOCUMENT

GENERAL TESTING AND REPORTING REQUIREMENTS

Ohio EPA requires that an Ohio Intent to Test ("ITT") form be filed with the appropriate Ohio EPA representative at least 30 days (or more if required by regulation) prior to the testing event. If a test witness is required by Ohio EPA, witnesses are scheduled on a first-come-first-served basis, so test date flexibility may be necessary. Ohio EPA expects to see the required testing and sample recovery/analysis performed per the applicable methods, without any modifications. If ANY modification to the specified test methods, as published, is planned, the modification is required to be detailed in the ITT with justification as to why the modification is necessary. ~~Alternate procedures spelled out within a given method are considered modifications and must also be noted on the ITT.~~ All proposed modifications are subject to the approval of Ohio EPA, and depending on the nature of the modification, Ohio EPA may require the testing company or facility to obtain written approval of the modification from USEPA. Do not expect Ohio EPA to approve any modifications on-site, or without adequate advance notice.

Incomplete ITTs may be returned for more information.

Below are commonly overlooked testing and reporting requirements. Please review test methods being proposed in the ITT for a complete listing of the requirements that are expected to be met.

TEST EVENT REQUIREMENTS:

All testing

- All field data sheets are to be filled out in pen, not pencil.
- Correction fluid is not permissible on any data sheet. Changes or mistakes are to be corrected with a single line strikeout, and initialed by the person making the change.
- All applicable pre-survey work should be available for review on-site.
- Testing must be scheduled so it can be completed within a normal workday (8:00 am - 4:30 pm). At the discretion of Ohio EPA, other test times may be available, but must be pre-approved. In addition, Ohio EPA expects that testing must begin no later than 12:00 p.m. on the scheduled date, unless an alternative testing time has been pre-approved by Ohio EPA. It is the responsibility of the facility and the stack-testing consultant to ensure that this happens. If testing has not begun by noon, Ohio EPA staff may leave the facility unless, in their professional opinion, the start of testing is imminent. At the point when Ohio EPA staff leave the facility because testing has not begun, the testing shall be rescheduled to a mutually agreed upon date and time.
- Tests must be completed such that each applicable "units of the standard(s)" can be determined.
- All method required leak checks are expected to be completed pursuant to the method(s) being used.
- All Reference Method data being recorded electronically on site must be available in hard-copy form, or on media supplied by personnel completing the testing in a .PDF format.
- For testing that occurs with no Ohio EPA witness present, Ohio EPA reserves the right to require that a copy of all field data collected during a testing event be sent via email in a .PDF format within 24 hours of the end of the testing event.
- Test runs must be made consecutively (back to back), and completed within 24-hour of the start of the test, unless Ohio EPA has pre-approved an alternate test schedule.
- For emissions units that have multiple stacks or outlets, all stacks or outlets must be tested simultaneously for emissions rate determinations. Destruction efficiency determinations require all inlet and outlet points be tested simultaneously.
- It is understandable that a test may need to be postponed due to circumstances that would not allow representative conditions to be established, such as recent maintenance or modification, equipment failure, or the absence of key personnel. However, concern that a test will result in a determination of non-compliance is not a valid reason for postponement, and a facility decision to postpone without a valid reason may result in enforcement action against the facility.

Methods 1-4

- Stack diameter and sample point measurements must be available for review and verification on-site.
- Documentation of compliance with the specifications displayed in Figures 2-2, 2-3, 2-4, 2-7, and 2-8 of EPA Method 2 must be available for review on-site.
- The time of dry molecular weight analysis must be recorded per EPA Method 3, Section 8.2.4
- For emission rate corrections, O₂/CO₂ measurements are made utilizing an instrumental analyzer or an Orsat analyzer in which the time of analysis is recorded as per EPA Method 3B, Section 8.2.4.

- A meter box check must be performed prior to testing per Section 9.2 of Method 5, and a copy of the meter box calibration made available on-site.
- On-site determination of Method 4 moisture content is required.
- Good condition, indicating-type silica gel must be used for Method 4 moisture determinations. Water in the bottom of the silica gel impinger, or indications of breakthrough in the silica gel, will invalidate the associated test run.

Methods 5, 6, 8 and 29/Isokinetic

- Nozzles used during testing must be made available for on-site verification that Method 5, Section 6.1.1.1 specifications are being met.
- Paperwork indicating that thermocouple and barometric pressure readings are within Method 5 specifications must be available on-site and included in the test report.
- Filter temperature must be monitored by a thermocouple that is in contact with the sample gas stream per EPA Method 5, Section 6.1.1.7. This temperature must also be recorded at a frequency in keeping with other sample train temperatures.
- Equipment must be available to allow for the on-site recovery of the sample probe, impingers and the nozzle.
- All samples recovered for off-site analysis must be sealed and labeled, and a "record of custody" must be completed prior to leaving the site.
- Solutions must be labeled with preparation date and time to confirm compliance with EPA Method 6, Section 7.1.3 / Method 8 Section 7.1.4 / Method 29, Section 7.3.2 requirements.
- Probe temperatures must be recorded.

Method 7E

- On-site NOx converter check pursuant to Section 8.2.4 (or an Ohio EPA prior approved alternative NOx converter check) must be completed prior to each emissions unit-testing event.

Method 9

- Visible emission readers must have photo identification and a copy of their current Method 9 certification paperwork, available for review on-site.

Method 18

- Method 18 spike recoveries must be performed per the specification of the applicable section.
- Spike and recovery analysis must be performed for compliance methane analysis for subtraction from a total VOC number.

Method 25/25A

- The methodology selected for the measurement of VOC must be in accordance with USEPA Emission Measurement Center Guidance Document 033 (GD-033).

Method 26

- The filter temperature must be maintained at 248 degrees Fahrenheit or above.

All Instrumental test methods

- Copies of all reference method calibration gas certifications must be available for review on-site. Ambient air, scrubbed or otherwise, will not be allowed for use as a calibration standard (zero air generators will be allowed, however.)
- If a calibration gas dilution system is utilized, Emission Measurement Technical Information Center Test Method 205 (EMTIC TM-205) must be performed, on site, to validate system performance prior to testing. Calibration gas dilution systems shall not be used for 40 CFR Part 75 testing events.

Compliance testing using instrumental test methods 6C, 7E, 10 and 20 (and test method 3A when data is being used for anything other than molecular weight determinations)

- With the sample train in the testing configuration, response time tests completed in accordance with test method 7E, Section 8.2.6, must be completed prior to stratification testing, and data must be available for review on site.
- Stratification testing in accordance with test method 7E, Section 8.1.2, must be completed prior to each testing event, and data must be available for review on site.
- All sampling points as dictated by the results of the stratification test are required to be sampled. The sampling time at each point is required to be two times the response time. (Please note that this may cause compliance test runs to last for more than 60 minutes, depending on the response times and the number of points that must be sampled.)

Relative accuracy test audits ("RATA")

- Relative accuracy determinations are required for each unit of the standard.
- Flow and molecular weight determinations, where required to convert data to units of the standard, are required for each RATA run.
- Moisture determinations are required for each RATA run. Ohio EPA may approve the use of one moisture determination for two RATA runs, depending on the type of source/process, but prior approval is required.
- The use of multi-hole sample probes will not be allowed.

REPORTING REQUIREMENTS:

In addition to the above-mentioned conditions, please note that Ohio EPA must receive test results in a report format consistent with the USEPA Emission Measurement Center Guidance Documents 042 and 043 (GD-042 and GD-043) within 30 days of the test event unless additional time is allowed pursuant to permit conditions or rule requirements that have not been incorporated into the permit. Acceptable test reports must contain the following:

All test reports

- Testing data reported in units of the applicable standard(s).
- Names and contact information for all members of the test team.
- Facility representative name and contact information.
- Emission unit identification(s), including Ohio EPA assigned emissions unit I.D.
- Copies of all field data sheets and measurements.
- Copies of the completed "record of custody" for all samples removed from the testing site - if applicable.
- Full outside laboratory reports with supporting documentation (please call if greater than 25 pages long) - if applicable.
- Copies of all relevant emissions unit process/operational data.
- All formulas used in calculating emission rates if different than specified in the applicable reference methods.
- An explanation of all disruptions encountered during the test period, (i.e., Meter box changes, process shutdowns, broken glassware, etc.)
- All applicable pre-survey work should be included in the final test report.
- Production records and parametric monitoring data recorded during testing must be included in the final report.

Methods 1-4

- Copies of the calibrations performed on all Pitots, meter boxes, thermocouples, barometers, balances, and nozzles used during testing and analysis.
- Copies of the certificates verifying the accuracy of the equipment utilized to calibrate the meter boxes and thermocouples utilized during testing.

Method 5

- Copies of the gravimetric analysis performed on the particulate matter samples complete with laboratory conditions (ambient temperature, barometric pressure, humidity, and time of measurement).

Method 7E

- Copies of the on-site converter check performed per EPA Method 7E, Section 8.2.4.

Method 25/25A

- Test results must be reported in terms of actual VOC, and not VOC as carbon or propane, unless specified by the permit.

All continuous emission monitoring system ("CEMS") Methods

- Copies of all gas certification sheets for every calibration gas utilized.
- Response times for every analyzer in the configuration utilized in the field (EPA Method 7E, Section 8.2.6).

All RATA reports must also include:

- The make, model and serial number of each analyzer that is part of the facility CEMS being tested.
- 7-day drift check data for all CEMS that are undergoing initial certification.
- Linearity data, where required, for all CEMS that are undergoing initial certification.
- Relative accuracy determinations must be reported in each required units of the standard(s) for which the CEMS are being used to demonstrate compliance.
- Facility process data indicating that the facility operated at 50 percent or more of the normal load (EPA Performance Specification 2, Section 8.4.1).

Failure to follow the above guidance may result in Ohio EPA rejecting all or part of the associated test or testing results.

INTENT TO TEST NOTIFICATION (One Emissions Unit Per Sheet)

Agency use only	
Date Received	Assigned

Facility Premise No. _____ Proposed Test Date _____
 Emissions Unit PTI No. _____ Proposed Start Time _____
 SCC Number _____

A. Facility Contact Information:

Name _____
 Address _____
 Contact Person _____
 Telephone (O) _____ (Cell) _____
 E-mail _____

Testing Firm Information:

Name _____
 Address _____
 Contact Person _____
 Telephone (O) _____ (Cell) _____
 E-mail _____
 Address _____
 Telephone (O) _____ (Cell) _____

B. Test Location Information:

Name _____
 Contact Person _____

C. Test Plan and Emissions Unit Information Table: List the applicable information under each respective column heading.

Emission Unit # / Description	Control Equipment	Monitoring Equipment	Pollutant(s) to be Tested	EPA Test Method(s)	Number of Sampling Points	Total Time for Sample Run	Number of Sampling Runs

Are any modifications, or alternatives as spelled out within the test methods, being proposed? Yes No If "no", then no modifications or alternatives, however minor, will be accepted. If yes, list each test method and section being modified, and attach a detailed modification description and justification: _____

Source is testing to comply with (check all that apply): State PTI State PTO Title V NSPS MACT BIF Title IV Other (explain) _____

D. What is the maximum rated capacity or throughput of the emissions unit given in its permit-to-install or permit-to-operate? _____

Has the facility scheduled production or throughput so that the emissions unit can be operated at the maximum capacity given in its permit-to-install or permit-to-operate during the test? Yes No If no, attach explanation. _____

Specify how the operating rate will be demonstrated during testing: _____

Sampling Location(s): Inlet Outlet Simultaneous Will Cyclonic flow check(s) be conducted? Yes No

Fuel Sampling: Coal - Proximate Ultimate Other If other, specify: _____

Emission rate to be calculated using: F-Factor Ultimate Coal Analysis Other If other, specify: _____

Has any maintenance or parts replacement been performed on the emissions unit or the control equipment within the last year? Yes No

If yes, briefly describe: _____

(Note: Some maintenance, such as installing new filter bags in a baghouse, or replacing the activated carbon in an adsorber, may disqualify the emissions unit from a performance test until a sufficient amount of time has elapsed to ensure a test which will be representative of normal operations.)

E. Sample Train Calibration: All affected measuring and monitoring equipment should be calibrated within 60 days of the scheduled testing.

THE FOLLOWING ADDITIONAL INFORMATION SHALL BE SUBMITTED AS ATTACHMENTS:

F. Sample Train Information:

- A schematic diagram of each sampling train.
- The type or types of capture media to be used to collect each gas stream pollutant. (Include filter specification sheets)
- Sample probe type, (e.g., glass, teflon, stainless steel, etc.)
- Probe cleaning method and solvent to be used, if applicable.

G. Laboratory Analysis:

- A description of the laboratory analysis methods to be used to determine the concentration of each pollutant.

H. Description of Operations:

- A description of any operation, process, or activity that could vent exhaust gases to the stack being tested. This shall include the description and feed rate of all materials capable of producing pollutant emissions used in each separate operation. Maximum process weight rate, or coating rate, and parameters such as line speed, VOC content etc. should be specifically documented with calculations to confirm worst case scenario emissions.

Note 1: All compliance demonstration testing shall be performed at maximum rated capacity as specified by the equipment manufacturer, or at the maximum rate actually used in the emissions unit operation, whichever is greater, or at any other rate as agreed upon with Ohio EPA.

Note 2: If the emissions unit is not operated at maximum capacity, or as close as possible thereto, the emissions unit might be derated to the production capacity achieved during testing.

I. Stack and Vent Description:

- A dimensional sketch or sketches showing the plan and elevation view of the entire ducting and stack arrangement. The sketch should include the relative position of all processed or operations venting to the stack or vent to be tested. It should also include the position of the ports relative to the nearest upstream and downstream gas flow disturbance or duct dimensional change. The sketches should include the relative position, type, and manufacturer's claimed efficiency of all gas cleaning equipment.
- A cross sectional dimensional sketch of the stack or duct at the sampling ports, showing the position of sampling points. In case of a rectangular duct, show division of duct into equal areas.
- For fugitive emissions testing, a sketch illustrating the specific emissions points to be observed must be included.

J. Safety:

- Describe all possible safety hazards including such items as the presence of toxic fumes, high noise levels, areas where eye protection is required, etc. Note: Conditions considered unsafe at the time of the test will cause postponement.



**Environmental
Protection Agency**

John R. Kasich, Governor
Mary Taylor, Lt. Governor
Scott J. Nally, Director

**Testimony of Scott Nally
Director, Ohio EPA
Before the
Senate Finance Committee**

May 5, 2011

Good morning, Chairman Widener, Ranking Member Skindell, and members of the Committee; I am Scott Nally, Director of the Ohio Environmental Protection Agency. I am very pleased to be here this morning, and I thank you for the opportunity to testify on Substitute H.B. 153, the biennial budget for FY 2012-13.

I present to you today a fiscally responsible budget; one that reflects the current economic climate while allowing us to maintain our essential operations as we continually look for more innovative, efficient, and effective tools to carry out our work. I would also like to emphasize I strongly believe that we must strike a balance between our role of protecting the environment while allowing for economic development. Ohio EPA plays a significant role in the economic vitality of our state and, as I have stated publically many times, I feel strongly that those two objectives are not mutually exclusive.

Budget overview

Funding for Ohio EPA comes predominately from federal funds and fees paid by regulated entities. We receive almost no General Revenue Fund (GRF) dollars with one exception – the testing of auto emissions in the Cleveland-Akron area.

Even though we are not dependent on GRF, I feel it is my obligation to Ohio taxpayers to propose a fiscally responsible budget. It is important to be financially accountable and transparent and to illustrate to the regulated community that we are good stewards of the funds we receive. Therefore, Ohio EPA's FY 2012 requested funding level was \$187.9 million (11.8% below FY 2011), and \$184.2 million in FY 2013, an additional 2% below -- totaling a 13.8% reduction over the biennium.

There are no fee increases in Ohio EPA's FY 2012 – 2013 budget. In order meet our budget goals, 53 positions will be eliminated through vacancies, attrition and the reorganization of the Hazardous Waste Management Division into two of the Agency's other divisions. Consolidating permitting, inspections and enforcement for both solid and hazardous waste into one division, (the newly named Division of Materials and Waste Management), and moving the cleanup components of the hazardous waste division into what is now the Division of Environmental Response and Revitalization, will make Ohio EPA more efficient.

Additional savings will be realized from lower contracting costs in the successful scrap tire program which has now completed cleanups at most of the known, large abandon scrap tire dumps in Ohio. Contracting costs are also lower in the motor vehicle emissions testing program as a result of competitive bidding. Ohio EPA's legal advertising savings plan for FY 2012 – 2013 coincides with Governor Kasich's statewide initiative included in the budget to streamline the public noticing process which will result in significant budget reductions for Ohio EPA.

As I stated earlier, financial accountability is important and this budget provides transparency and provides a true reflection of actual costs. In the past, Ohio EPA has relied upon internal funding transfers to reimburse programs for the cost of services provided within the Agency. Our FY 2012 – 2013 budget adds clarity to Ohio EPA's actual costs by eliminating a significant amount of those intra-agency funding transfers and the associated appropriation authority for those transfers. In place of the current reimbursement process, the original cost will be paid directly from the appropriate program or fund.

Budget Concerns

I would like to bring to your attention a concern with Sub. H.B. 153, adopted in the House Finance Committee involving the current E-Check program. This program is currently being conducted in 7 counties in northeast Ohio as a result of the federal moderate nonattainment status for ozone in that area. Unfortunately, U.S.EPA is currently in the process of finalizing a revised lower ozone standard which should be in place late this summer. That standard could very likely result in significantly more counties joining northeast Ohio in that moderate nonattainment status, triggering the federal requirement for emissions testing.

I have committed to providing legislators with all of Ohio's options for achieving air attainment. Given the lower standard and the significant challenges with meeting the federal standard, I need to be able to have all options available to the agency, including the type of emission testing program we will have into the future where the federal mandate exists. For the following reasons, I request that the language from the Executive version of H.B. 153 be reinstated:

- The amended language allows for only a decentralized program which will provide less emission reduction credits than the current centralized program. I need to be able to maintain utmost flexibility to allow all potential bidders to participate to determine what program is the most cost-effective, convenient, and reliable for both motorists and the state;
- the amended language eliminates the requirement that the contractor send reminders to owners whose vehicles are subject to the E-Check every two years prior to the

registration renewal. Lack of notification could result in owners forgetting to complete E-Check testing prior to the visit to BMV;

- the amended language only requires a “substantially similar” ozone precursor reduction instead of the “same” ozone precursor reduction as is currently achieved by the program. While the newly added language includes a provision for emissions analyzers to be BAR-97 certified, there is no requirement for the decentralized stations to purchase this testing equipment. These analyzers are needed to test vehicles older than 1996. Losing these vehicles from the testing program could result in lost emission credit reductions of as much as 48%. Those lost reductions would need to be made up by other means such as more stringent emission controls on industries or implementing low-RVP vehicle fuel; and
- the amended language requires legislative approval to expand the program to other counties that might become federally mandated to adopt a testing program when the federal ozone standard lowers. Current law grants us the authority to conduct testing where the program is federal mandated.

Program Initiatives

I would like to share with you a number of priorities I have established since starting as Director at Ohio EPA that reflect my desire to enable the economy to grow while encouraging and improving environmental compliance. The following are a brief overview of a few of the initiatives we will work on at our Agency.

- “In-lieu Fee” Program – Ohio EPA is working with the U.S. Army Corps of Engineers and ODNR to help projects that have evaluated their options for wetland avoidance and minimization, and are still faced with a need to mitigate for some wetland impacts to make their project successful. By paying an “in-lieu fee,” the applicant is relieved of the burden of finding a mitigation project while the appropriate mitigation still occurs, providing a greater chance of success with similar ecological benefits.
- Permitting efficiencies – I am seeking opportunities to permit facilities through the increased use of permits-by-rule and general permits. In particular, I have asked my Division of Air Pollution Control to work with sectors of industry to utilize these tools in a manner that helps both the Agency as well as the regulated facility to operate in compliance.
- Eliminate permit backlog – We are working to prioritize and streamline our operations to efficiently manage and reduce our permitting backlog. I have asked the permit teams to develop a JV bench to build their strength by working on less complicated permits, allowing the A team to focus on the larger, more complex and time-intensive permits.
- IT initiatives and Compliance Assistance – I am asking my Office of Compliance Assistance and Pollution Prevention (OCAPP), as well as the IT Division, to provide tools to the regulated community to train them on the services we offer to help them achieve

compliance. This includes additional on-line reporting and permitting, like we do for water quality monitoring data and hazardous waste reporting. Additionally, our goal is to have on-line fee payment for solid waste fees in place by June 30th with others to follow. In addition, I am very pleased to announce that Ohio EPA recently received confirmation of the approval of our CROMERR application which will allow for electronic signatures by permit applicants.

- Grand Lake Saint Marys – I have been working with the Governor's office, the Ohio Department of Natural Resources, and the Ohio Department of Agriculture to develop a coordinated and multi-faceted plan to improve water quality at the lake by reducing phosphorous levels through the use of a variety of tools.
- Brownfields redevelopment – While the Ohio Department of Development takes the lead in pursuing opportunities for economic redevelopment, I am very interested in offering our agency's assistance to help facilitate creative ways of addressing environmental and economic redevelopment challenges that communities face. We need to look at target programs to help solve these urban blight problems.
- Marcellus and Utica Shale – I have been working with the Governor's office, Department of Development, and the Ohio Department of Natural Resources to develop a coordinated plan for permitting and managing the potential growth of this natural gas exploration in Ohio. I want to be clear that ODNR has regulatory jurisdiction for sites involving shale drilling, but USEPA has made it clear that this is an enforcement target for them. Therefore, as a state, we need to pool our resources together as an "all hands on deck" group effort to successfully respond to this issue.
- Expedited Settlement Program (ESP) – Given my priority of compliance first, I am initiating modifications to the current enforcement process to help drive quicker compliance. Historically, the existing enforcement options have been time consuming and resource intensive for both the agency and the regulated entity. By developing new steps to be used early in the enforcement process, I hope to resolve uncomplicated cases expeditiously, putting a facility on notice of a problem, and quickly achieving compliance.

Conclusion:

I have high expectations for the positive impact Ohio EPA can have on the environment and the business climate in our state. I will make sure we are good stewards of the funds we receive and that our regulatory programs are organized and equipped to efficiently manage the work we need to do to make Ohio a great place to work and live. Your support is an important part of this process and we welcome your input. Thank you for your time and I welcome any questions you may have about Ohio EPA.

###

**FINDERS KEEPERS:
FORFEITURE LAWS, POLICING INCENTIVES, AND LOCAL BUDGETS***

April 27, 2004

Katherine Baicker
Dartmouth and NBER

Mireille Jacobson
University of California, Irvine

*The authors thank Amitabh Chandra, Tom Chang, Julie Cullen, Alan Durell, Erzo Luttmer, Sendhil Mullainathan, David Rasmussen, Bruce Sacerdote, Antoinette Schoar, and Douglas Staiger for helpful discussions. We are especially grateful to Nancy Becker Bennett, Nancy Kniskern, Letty Kress, Craig Rockenstein, Karen Ziegler and other officials in Arizona, California, Florida, Michigan, New York, and Pennsylvania for making data available. We also thank Justin McCrary for graciously making all of his data on mayoral election cycles available and Bruce Benson, David Mast, and David Rasmussen for sharing their data on state forfeiture sharing rules. David Rasmussen for sharing his data on state forfeiture sharing rules. Baicker gratefully acknowledges research support by the Rockefeller Center at Dartmouth. All remaining mistakes are our own.

ABSTRACT

In order to encourage anti-drug policing, both the federal government and many state governments have enacted laws that allow police agencies to keep a substantial fraction of assets that they seize in drug arrests. By adjusting their own allocations to police budgets, however, county governments can effectively undermine these incentives, capturing the additional resources for other uses. We use a rich new data set on police seizures and county spending to explore the reactions of both local governments and police to the complex incentives generated by these laws. We find that local governments do indeed offset the seizures that police make by reducing their other allocations to policing, undermining the statutory incentive created by the laws. They are more likely to do so in times of fiscal distress. Police, in turn, respond to the real net incentives for seizures, once local offsets are taken into account, not simply the incentives set out in statute. When de facto policies allow police to keep the assets they seize, they seize more. These findings have strong implications for the effectiveness of using financial incentives to solve agency problems in the provision of public goods in a federal system: agents respond to incentives, but so do intervening governments, and the effectiveness of federal and state laws in influencing agents' behavior is limited by the ability of local governments to divert funds to other uses.

INTRODUCTION

In an effort to induce police to do more anti-drug policing, both the federal government and many state governments introduced laws in the 1980s that allow police agencies to keep a substantial fraction of assets that they seize in drug arrests. This practice, known as drug-related civil asset forfeiture, has been a source of considerable controversy, as the legal hurdles for forfeiture are lower than for criminal conviction and those subject to seizures can find it difficult to recover their property, even when they are found innocent of related criminal charges.¹ Many claim (and our data confirm) that for some localities forfeitures have become a major revenue source for local police and prosecutors. Thus, law enforcement agencies may be motivated not only by the desire to deter the crime, but also by the added incentive of potential proceeds from anti-crime policing.

Agency problems in the provision of public goods (and the strategies for solving them) are certainly not unique to policing. Local school boards may try to undo the effects of state-level school finance reforms, while teachers may not adopt the curriculum dictated by the school board.² Welfare caseworkers may not strictly enforce the eligibility criteria included in welfare reform. There are a number of different strategies for solving these agency problems. In some circumstances, perfect contracts or laws can be written. When perfect contracts or laws are not possible (such as when the agents' actions are unobservable or multi-year commitments cannot be made), however, incentives may be used to induce the desired behavior. This strategy has been more commonly used in the private sector, but monetary incentives are used increasingly in

¹ Although this is a common criticism of forfeiture laws (See Benson, Rasmussen, and Sollars (1995); Blumenson and Nilsen (1998); Mast, Benson, and Rasmussen (2000); and Worrall (2001)), this behavior is consistent with the laws' intent. Law enforcement officials maintain that asset forfeiture is a powerful tool that allows them to "disrupt the 'working capital' of criminal organizations" (Stellwagen 1985) and "take the profit out of crime" (Cassella 1997), thereby deterring future drug crimes as well as punishing current criminals.

² See Baicker and Gordon (2004).

the provision of public goods – as in the sharing provisions of asset forfeiture laws.

The reactions of local governments to these laws highlight a fundamental problem in the use of incentives to solve agency problems in the provision of public goods in a federal system. When several levels of government are involved in the provision of public goods, they may have competing goals and constraints. In this case, while the states may have introduced incentives to induce anti-drug policing, county governments also have jurisdiction over police policy and police budgets. Counties have the ability to adjust their allocations to police, in effect undoing the incentives created by the state.

This paper explores the effect of the incentives created by asset forfeiture laws on the behavior of both local governments and agents. We analyze the effect of asset forfeiture laws on police behavior, local budgets, and the relationship between the two. The relationship between police seizures and local allocations to the police budget is more complex than a naïve interpretation of the statutes would suggest. While the laws were designed to increase anti-drug policing by creating monetary rewards for seizures, some states' laws explicitly acknowledge that local governments could (but should not!) reduce their own allocations to police in response.³ Moreover, local governments may be more likely to do this in some circumstances (such as when under fiscal distress) than in others. Police may respond to the *de jure* incentives created by the laws, or to the *de facto* incentives in place after county off-setting behavior is taken into account.

We use new and original data on drug-related seizures combined with detailed data on county budgets to answer two sets of questions. First, do asset forfeiture laws really increase law enforcement budgets, or do local governments act to undo those incentives with offsetting

changes in police budgets? Are they more likely to do so when they face tighter budget constraints? Second, how do police change their seizure behavior in response to seizure laws? Do they respond to the gross or the net incentives created by the laws?

We find that local governments do indeed partially offset police seizures by reducing their own allocations to those police budgets the following year. Total police resources thus do not increase by as much as a simple estimate of their gross seizures would suggest. We find that counties in some states and in some circumstances offset a much greater fraction of police seizures than others. For example, the presence of a budget deficit causes counties to reduce their allocations in response to seizures much more – and to allocate those funds toward spending on programs like public welfare. To disentangle the effect of county offsetting from police reactions to changes in their budgets, we use data on the timing of mayoral elections, which, as suggested by Levitt (1997) and McCrary (2002), is systematically associated with an increase in resource allocations to police. We find that police responses to these (anticipated) budget windfalls are relatively small compared to our estimates of county budgetary offsets. Our estimates of large county budget offsets in response to seizures are thus robust to the potential endogeneity of police seizures.

We also find that the *net* incentives created by forfeiture policies influence the behavior of the targeted government agents. To the extent that law enforcement agencies *do* get to keep assets they seize, they respond by changing their pattern of policing and increasing seizures. Police devote substantially more of their effort to anti-drug policing when their net revenues from the activity are higher. These findings are consistent with previous studies by Benson, Rasmussen, and Sollars (1995) and by Mast, Benson, and Rasmussen (2000), which suggest that

³ In fact, while many state laws such as Michigan's include provisions explicitly stating that proceeds from asset forfeiture are not meant to supplant funds normally provided to police by counties, these provisions are clearly

federal and state seizure laws change policing behavior. Our analysis refines these estimates by distinguishing between de jure statutory sharing rules and the de facto net proceeds that police keep (after other government offsets) on the intensity of anti-drug policing, yielding much sharper estimates and a more complete picture of responses to complex incentives.

Together, these findings have strong implications for the effectiveness of using financial incentives to solve agency problems in the provision of public goods in a federal system. Police respond to incentives, but so do intervening governments. The effectiveness (and costliness) of federal and state laws in influencing agents' behavior is limited by the ability of local governments to divert funds to other uses.

BACKGROUND ON FORFEITURE

Private assets can be seized through both state and federal asset forfeiture laws.⁴ Understanding the relationship between these laws clarifies the net incentives faced by police, and thus their effect on both police budgets and policing activity.

Federal drug-related civil forfeiture law dates back to the Comprehensive Drug Abuse Prevention and Control Act of 1970. Since then, the authority of law enforcement agencies to seize assets has expanded greatly, from property used directly in the commission of a drug crime to that equal in value to "forfeitable assets that are no longer available" (Blumenson and Nilsen 1998, p. 45). In 1984, with the passage of the Comprehensive Crime Control Act, the federal government established an "Equitable Sharing" provision, whereby state and local agencies could request that the Department of Justice "adopt" and then return or share in a drug-related

unenforceable.

⁴ Under federal law, assets can be seized in three ways: (1) administratively, meaning they are uncontested and no formal proceeding is required; (2) in a civil proceeding, meaning the property is contested and the government has

asset seizure. The explicit motivation for this provision was to provide law enforcement at all levels with an incentive to pursue drug crimes.

DOJ's "success" in seizing assets in the early 1980s and its introduction of the equitable sharing program brought asset forfeiture policies to the attention of state governments. Many states responded by passing their own civil forfeiture laws or by simply tapping in to existing laws on the books.⁵ State forfeiture laws vary widely, however, in the fraction of seizures returned to the local agency, the way different types of property are treated, and the restrictions on use of funds. Some states return the bulk of funds to the seizing agency, while others contribute them to a general law enforcement fund, earmark them for specific uses, or pool them with general revenues. A few states have specific constitutional provisions requiring seized assets be devoted to education (e.g. Indiana and Missouri). Several others have recently passed reform measures further limiting the fraction of seizures that police can keep (e.g. Nevada) or outlawing forfeiture without a criminal conviction (e.g. Oregon).⁶ These restrictions are in part a response to reports of forfeiture-related abuses, which abound in both the popular press (e.g. Dillon 2000) and the academic literature (Blumenson and Nilsen 1998).⁷

Despite the specific sharing provisions laid out in statute, both federal and state agencies can exercise significant discretion in determining sharing. Local agencies themselves can

filed a civil complaint against the seized property; or (3) in a criminal proceeding, meaning a forfeiture count is included in the indictment of a criminal case.

⁵ See Blumenson and Nilsen 1998 for a thorough overview of state laws.

⁶ Nevada's law, which took effect in October 2001, requires that 70 percent of an agency's proceeds above \$100,000 be turned over to its county school district. The Oregon law, passed by referendum in November 2000, prohibits the forfeiture of property without a criminal conviction. Utah, Arkansas, and Missouri have also adopted reforms. See Blumenson and Nielsen (2001) and Di Eduardo (2001) for discussion of some of these reforms.

⁷ The Civil Asset Forfeiture Reform Act (CAFRA) of 2000 further reigns in law enforcement's ability to seize real property under federal law by, among other things, shifting the burden of proof from property owners to the government and, barring exigent circumstance, requiring an order of forfeiture for the seizure of real property. It leaves intact, however, procedures for the seizure of cash, financial instruments, and conveyances (Short 2002). It also does nothing to alter the most controversial aspect of civil asset forfeiture laws: by requiring only proof by a "preponderance of evidence," a defendant's cash and property can be forfeited even if he is acquitted of criminal drug charges, which must meet the far tougher standard of proof "beyond a reasonable doubt."

typically choose whether to process a seizure through state authority or to have it adopted by the DOJ. At first glance, one would assume that the agency would choose the route with the more generous statutory sharing provision (which varies across states and time, according to the provisions and timing of state laws). Conversations with specific state agencies (detailed below), however, suggest that the DOJ often makes “deals” with local agencies to adopt seizures, and that state agencies with discretion over the disposition of seized assets are also often willing to negotiate with local agencies.

What is clear, however, is that local law enforcement agencies have the opportunity to increase their budgets through drug-related civil forfeitures. Indeed, the federal government once touted such “benefits” of forfeiture (see Stellwagen and Wylie 1985) and opinion data suggest law enforcement understood the message. Worrall (2001) conducted a survey to determine local agencies’ perceptions of the role of asset forfeiture in their budgets. He finds that 30 to 45 percent of law enforcement executives agree that “civil forfeiture is necessary as a budgetary supplement.” This study addresses the budgetary implications of forfeiture policies more quantitatively, by examining the actual relationship between seizures and local law enforcement budgets.

Several previous studies have examined the effect of seizure laws on local law enforcement behavior (with the prevailing claim being that local police respond to incentives by seizing more), but most of these studies do not adequately control for policy endogeneity or draw inferences about the broader budgetary implications of forfeiture policies. Benson, Rasmussen, and Sollars (1995) find a positive correlation between police seizures and police expenditures in a cross-section of some Florida agencies, but the causal connection is not clear. Mast, Benson and Rasmussen (2000) find a positive correlation between the statutory sharing in forfeiture laws

and drug arrests as a fraction of total arrests in large cities.⁸ They have no data on the magnitude of seizures, examining instead state-year level variation in the fraction of seized assets police retain by statute. In this study, we use data on actual seizures to investigate the effect of these laws and net sharing on police behavior. We next present a conceptual framework and empirical strategy for understanding how state and federal forfeiture policies might affect both the budgetary decisions of county governments and the law enforcement activity of local police.

CONCEPTUAL FRAMEWORK AND EMPIRICAL STRATEGY

The choices faced by states, counties, and police agencies can be thought of as a standard principal-agent problem in a repeated game setting. Assuming state laws are given exogenously and policing effort is perfectly observed, then in each period the police must choose how much (costly) anti-drug policing effort to exert and the county has to choose how much of the seized funds to leave with the police, and how much to appropriate for county budgets through reduced allocations to police.⁹ We use a simplified approach that reduces both police and county preferences to a function of available resources (inputs), rather than outcomes from increased resources (lower crime or better schools). In other words, the county makes expenditure choices and the police make enforcement decisions that increase their own budgets. Legislators and police may be motivated to do this in part because, as individual agents, they can benefit from higher salaries or perks such as nicer offices or patrol cars (see Gordon and Wilson 1999).

The county is thus maximizing:

$$U_c(X_p, X_o) \quad \text{s. t. } Y + TS \geq X_p + X_o$$

⁸ They also control for drug use in a sub-sample of 24 cities. Oddly, this variable has no significant effect on arrests.

⁹ As noted below, county allocations to police are sufficiently large that they could offset the full amount of police seizures through reductions if they choose.

where X_p is spending on police and X_o is spending on other goods, Y is (exogenously given) revenue, T is the statutory tax rate on police seizures, and S is the amount the police seize. Similarly, the police are maximizing:

$$U_p(X_p + (1-T)S, S)$$

where the arguments are the total size of the police budget (more is better), but also seizure effort (which they dislike).¹⁰

In each period, the police first choose an effort level that produces a seizure amount (which might be determined entirely by effort, or might be the product of effort and noise), and the county then chooses how much money to allocate to policing. If this were a one-period game, the county would treat its share of the seizure proceeds (TS) as unconstrained income, and would allocate it accordingly (with presumably only a small share to policing).¹¹ In that case, however, police would have no incentive to make seizures. Because this is a repeated interaction and the county cares about future income from seizures, the county is motivated to leave incentives in place for police to seize. This implies that changes in county allocations to police will not completely offset the seizures made by police $\left((1-T) + \frac{\partial X_p}{\partial S} > 0 \right)$, while seizures will be

a positive function of the net return to police $\left(\frac{\partial S}{\partial \left((1-T) + \frac{\partial X_p}{\partial S} \right)} > 0 \right)$. Furthermore, if the county

¹⁰ The government's problem of choosing an implicit tax rate on seizures to maximize revenues is analogous to the problem of labor supply taxation, where labor supply (like seizures) declines with the tax rate.

¹¹ If the county is making utility-maximizing allocations to the police, when new funds are generated by seizures, the county would presumably choose to allocate some small portion of them to policing, just as it chooses to allocate some of its income to policing. Given that the fraction of the income of county residents allocated to policing is small, this unconstrained fraction would likely be very small as well.

has convex preferences for spending, shocks to other income (Y) may affect its offsetting behavior (particularly if the police can observe these shocks as well and have negotiated based on the expected distribution of these shocks). If counties value income more highly in times of fiscal distress, then they would offset more of police seizures in those times $\left(\frac{\partial^2 X_p}{\partial S \partial Y} < 0\right)$. We estimate empirically these relationships between statutory sharing, county offsets, police effort, and seizures.

We first examine the net effect of seizures made by local law enforcement agencies on their budgets $\left(\frac{\partial X_p}{\partial S}\right)$. Although many state forfeiture laws were written so as to provide a “windfall” to law enforcement (Stellwagen and Wylie 1985), this intent can be effectively undone through budget offsets. In other words, parent (county) government can reduce its own allocations, eliminating any increase in police resources through seizures. We thus estimate:

$$Police\ Budget_{ist} = \alpha_{is} + \alpha_t + \beta_1 Seizures_{is,t-1} + X_{ist}\Gamma + \varepsilon_{ist} \quad (1)$$

where i indexes counties, s indexes states, and t indexes time. We include county and year fixed effects and covariates such as crime rates, unemployment, and the size of county government. Police budgets and seizures are expressed in real per capita terms. We weight regressions by the population in each county, and cluster standard errors at the state level.¹² We used lagged seizures in this OLS specification as a first attempt to capture the causal effect of seizures on budgets.¹³

It is important to note that the seizures police make are not included in the budgets they receive from their parent (county) governments. β_1 thus captures the degree to which counties

¹² The survey results in Worrall (2001) indicate that large police agencies, which typically correspond to police agencies in large jurisdictions, report greater reliance on and use of asset forfeiture.

change police budgets in response to police seizures. We include analysis both of seizures made through state statutes and seizures made through the DOJ. We are also interested in the heterogeneity of offsetting behavior. To examine differential responses to local seizures, we include the interaction of seizures with local deficits $\left(\frac{\partial^2 X_p}{\partial S \partial Y}\right)$:

$$Police\ Budget_{ist} = \alpha_{is} + \alpha_t + \beta_1 Seizures_{is,t-1} + \beta_2 Seizures * Deficit_{is,t-1} + X_{ist} \Gamma + \varepsilon_{ist} \quad (2)$$

To the extent that counties reduce their allocations to police, they have extra funds to spend on other programs or to reduce tax revenues. To explore the use of these funds, we also include other categories as alternate dependent variables.

There is clearly the possibility for causality to run the other direction: police may respond to changes in the budget allocated to them by the county. While the timing of these reactions helps give some insight into causal pathways, the persistence of both policing patterns and county budgets makes it difficult to rely on timing alone to determine causality in a simultaneous-equation framework. To better gauge the extent of reverse causality, we use an instrumental variables approach to estimate:

$$Seizures_{ist} = \alpha_{is} + \alpha_t + \beta_1 PoliceBudgets_{is,t-1} + X_{ist} \Gamma + \varepsilon_{ist} \quad (3)$$

Our approach builds on the fact established by Levitt (1997) and further validated by McCrary (2002) that municipal police hiring varies across election cycles, increasing relative to the average in election years. The obvious corollary is that, relative to the average, police spending systematically increases in election years in a way that is unrelated to crime. We first demonstrate this occurrence. We then use variation in the timing of mayoral election cycles as

¹³ Results controlling for lagged or contemporaneous arrests are virtually identical.

our instrument for municipal spending on police to estimate the effect of budgetary changes on drug-related asset forfeiture.¹⁴ We can thus evaluate the extent to which local police vary their seizure and drug arrest activity as a means to supplement their budgets in response to a shortfall or reduce their effort in response to a windfall. This allows us to put a bound on the extent to which our previous estimates of county “offsetting” behavior may instead be capturing the reaction of police to anticipated budgetary changes.¹⁵

The second question we ask is whether or not police respond to the (net) incentives for seizures. The *de jure* incentive to seize is written into federal and state laws, and we see whether police seize more and focus more on anti-drug policing when the statutory sharing rule is higher. We analyze both the quantity of seizures and the number of arrests police make to capture relative effort exerted by police. We thus estimate:¹⁶

$$Policing\ Behavior_{ist} = \alpha_i + \beta_1 Statutory\ Sharing_{st} + X_{ist}\Gamma + \varepsilon_{ist} \quad (4)$$

Because localities may act to offset police seizures through reductions in their allocations to police, however, the *de facto* incentives faced by police may be much smaller. We next characterize states into those where counties do a lot of offsetting versus those where little offsetting occurs by including state-specific interactions with DOJ program seizures in equation (1). We consider DOJ as opposed to state seizures because we have this data for all states, and because all localities face the same statutory sharing percentage from seizures made through the

¹⁴ Note we use the term shocks to mean changes that are uncorrelated with crime, rather than unanticipated by police.

¹⁵ Somewhat more formally, the potential for reverse causality suggests a system of two simultaneous equations:

$$Seizures_{ist} = \beta_0 + \beta_1 + \beta_1 PoliceBudgets_{is,t-1} + X_{ist}B + \varepsilon_{ist}$$

$$PoliceBudgets_{ist} = \gamma_0 + \gamma_1 + \gamma_1 Seizures_{is,t-1} + \gamma_2 Election_{it} + X_{ist}\Gamma + \varepsilon_{ist}$$

If, as previous literature suggests (and we show below), mayoral elections affect police budgets but not seizures directly, we can use the mayoral election cycle to separately identify β_1 and γ_1 .

federal program. We then use the state-specific estimates of DOJ offsetting behavior as a measure of how much *localities* in each state are likely to offset seizures through the DOJ program. We construct a state-level dummy variable based on the size of this coefficient – states with smaller than average coefficients (in absolute value) are classified as “low offsetters” and states with higher than average coefficients are classified as “high offsetters.”

The net financial incentive for police to increase seizures and anti-drug policing should be a function of the *de facto* increase in their budget – which is a function of both statutory rates and offsetting behavior. We thus estimate:

$$Policing\ Behavior_{ist} = \alpha_i + \beta_1 Statutory\ Share_{st} + \beta_2 Statutory\ Share_{st} * Low\ Offset_s + X_{ist}\Gamma + \varepsilon_{ist} \quad (5)$$

to see whether police respond to the *de facto* incentives they face.

DATA

We use data from several different sources to perform this analysis. One important and novel component is that we have collected information on the value of seizures made by police agencies through 5 individual state statutes. We also use publicly available data on forfeitures through the DOJ for all continental states, as well as local government spending, crime, and other covariates. These data, which are discussed below, are summarized in Table 1. Panel A gives summary statistics for the full sample and Panel B for the 5 states for which we have state-program seizure data.

¹⁶ As described below, state sharing rules do not vary within states over the time period for which we have state seizure data, so we cannot include county fixed effects.

Forfeitures through State Programs

Information on assets seized through state programs is not collected nationally, and different states have different reporting requirements and data availability. We have gathered data on assets seized by local law enforcement agencies in (parts of) the 1990s for California, Florida, Pennsylvania, Arizona, and New York. Details on the form and scope of these data are included in Appendix 1. We have aggregated these seizures to the county-year level. As shown in Table 1, in our sample of 5 states, police seize roughly one dollar per capita per year or about 1.4 percent of their annual police budget through state statutes. (The between-county standard deviation is about two-thirds as large as the within-county standard deviation.)

We follow the work of Mast, Benson and Rasmussen (2000) and Worrall (2001) in codifying the sharing rules in each state, supplemented by our discussions with state officials. Each state's statute defines the fraction of seizures that are to be returned to the seizing (police) agency. For example, in New York the statute dictates that 40 percent of net proceeds be returned to the police agency, while in California 65 percent is returned. The Pennsylvania statute suggests that all of the funds are to be allocated at the discretion of the District Attorneys and Attorneys General, but in practice many of these funds are returned to the police.

Federal Department of Justice Forfeitures

We also analyze the seizures that local agencies make through the DOJ. Pursuant to the Comprehensive Crime Control Act of 1984, state and local agencies can request federal adoption of asset seizures if (1) a federal agency was involved in the seizure or (2) the seizure was made pursuant to the commission of a federal crime that provides for seizure, as is the case with any drug offenses. After the seizure is "adopted" by the Department of Justice, the government can

return up to 80 percent of the proceeds back to the seizing agency (before 1990, 90 percent could be returned). DOJ does, however, set minimums on the value of seizures in adoptive cases.

Data on seizures through the federal program are available annually from 1990 to 1998 at the judicial district level. Unfortunately, these judicial reporting districts are often much bigger than counties (or the agencies responsible for the seizure and in receipt of the revenues). We allocate these seizures to counties based on population. We explore the validity of this allocation using supplemental data on DOJ disbursements to individual local agencies, which are available from 1998 to 2001.¹⁷ A regression of the log of DOJ disbursements to counties on the log of population, year fixed effects, and the covariates discussed below yields a coefficient on the log of population of 1.06 (with a standard error of .04), suggesting that disbursements flow to counties roughly in proportion to their population.

In the full sample, police seize almost two dollars per capita through the federal statute. Thus, DOJ-processed seizures amount to about 4.3 percent of county allocations to police. In our 5-state sample, police seize over three and a half dollars per capita through this program or about 4.8 percent of their county allocation. As suggested by the similarity in the percent of allocations they represent across the two samples, per capita DOJ-processed seizures are likely higher in our 5-state sample because it is composed primarily of large industrialized states, with major metropolitan areas, established drug markets, and correspondingly large per capita police budgets. Moreover, although federally adopted seizures represent about 77 percent of the value of a county's total annual seizures in the 5-state sample, they are not necessarily the police's

¹⁷ When agencies make seizures, the funds are deposited in a central account before being disbursed back to the local agencies based on the sharing rules. Disbursements (unlike deposits, which get reported in the year of seizure) occur with lags, depending on the timing of the disposition of the case. For this reason, and because of the limited data we have on disbursements through federal and state programs, we focus on seizures.

preferred method of forfeiture.¹⁸ Rather, the DOJ will not adopt a seizure unless it is at least \$5,000 in cash, vehicles or monetary instruments or \$20,000 in real property. These DOJ minimums on the value of seizures in adoptive cases imply that seizures falling below federal thresholds must be processed through a state program. Moreover, typically major drug stings, the very cases that are likely to net significant assets, involve federal agencies, even when carried out by or with local police, and DOJ tries to exert its authority in the processing of such forfeitures.

County Budget Data

County and state revenues and expenditures are collected by the Census Bureau and are publicly available. Data on local budgets is available for all localities every 5 years from the *Census of Government Finances*, and for a sample (roughly half to two-thirds) annually from the *Survey of Government Finances*, through 2001. All analysis uses real per capita revenues or expenditures. Annual police budgets are roughly \$45 per capita for the full sample and \$77 per capita for the 5-state sample. As mentioned above, however, in both cases, DOJ-processed seizures are about 4 to 5 percent of police budgets. Together seizures processed through the federal and state statutes represent almost 7 percent of police budgets.

Mayoral Elections

Data on the year in which city-level mayoral elections are held come from McCrary (2002), following Levitt (1997). We match each of the 52 cities in the McCrary data set with the county in which they are located. We update the McCrary data for 2000 and 2001 using the

¹⁸ Indeed, although some maintain that DOJ-sharing rules offer law enforcement a generous alternative to strict state sharing provisions (Blumenson and Nielsen 1998), conversations with several officials in such states (e.g. NJ) reveal that police typically prefer to process their seizures through the state.

United States Conference of Mayors' *Election Results Database: 1999-2003* (and verify using information posted on individual cities' web sites).

Covariates

Data on criminal activity and arrests is available annually at the county level through the federal *Uniform Crime Reports*. Total arrests per 100,000 residents and "index I" crime (murder, rape, robbery, aggravated assault, burglary, larceny, and motor vehicle theft) arrests per 100,000 are almost identical across the two samples. Drug arrests, however, represent about 9 percent of arrests reported in the overall sample and over 12 percent in the 5-state sub-sample. It is unclear how much of this represents greater drug enforcement versus greater drug activity in these states but either case should correspond to more forfeiture opportunities. We also use county-level data on unemployment from the Bureau of Labor Statistics.

RESULTS

Using this data we answer two questions. First, how much and under what circumstances do counties offset police seizures by reducing their allocations to police? Second, how do these incentives affect police behavior?

County Offsets of Police Seizures

The first issue we explore is the net effect of seizures on the rest of police budgets. If parent governments fully offset the financial "gains" from seizures, then seizures will have no effect on police resources. We estimate the effect of seizures through state programs (for our sample of 5 states) and through the DOJ program (for all states and the 5 state sub-sample) on county allocations to police budgets. All regressions control for index I crime arrests per capita,

total county expenditures per capita, county unemployment rates, and county and year fixed effects. Table 2 reports these results with results for DOJ program seizures in Panel A and state program seizures in Panel B. Results in even columns also include state-specific time trends.¹⁹

Both Panels A and B suggest that increases in seizures within a county are associated with reductions in budgetary allocations to police the following year, although, as will be discussed below, the extent of offsetting depends on the type of seizure made. The consistency of this result is striking since conventional wisdom might have suggested a positive relationship between changes in police spending and seizures (if both are related to unmeasured increases in crime, changes in preferences, or increased resources for anti-drug policing).

Our results suggest that each dollar police seize through the DOJ program is offset dollar-for-dollar by reductions in county allocations to police, with coefficients of -1.55 for the full sample and -1.31 for the 5-state sub-sample (columns (1) and (3), respectively). Estimates including state-specific time trends, although significant at only the 11 and 13 percent levels, are also consistent with full budgetary offsetting in response to DOJ-processed seizures. According to statute, as much as 80 percent of these “federally adopted” seizures are returned to law enforcement, with the DOJ keeping the balance and state and county governments typically receiving nothing – but county governments use the budgetary authority at their disposal to capture much of the gains from seizures.

Seizures made through state programs, however, do not appear to be offset at the same rate. As shown in columns (3) and (4) of Panel B, each dollar of seizures made by police through the state program results in a reduction of an (insignificant) 25 to 40 cents in county allocations to police. (As discussed above, even in these 5 states the DOJ seizures are fully

¹⁹ Results with county-specific time trends are quite consistent, but are computationally intensive and lack power because of the limited number of observations we have per county.

offset.) This finding clears up some confusion about police usage of DOJ versus state program seizures. Many who have studied asset forfeiture maintain that DOJ-sharing rules offer law enforcement a generous alternative to strict state sharing provisions (Blumenson and Nielsen 1998). However, local police often prefer to process their seizures through the state, even when their state offers a less generous sharing rule than the federal government. These results provide some insight into why this is so: far from providing a bigger windfall, seizures processed through the DOJ are typically completely captured by the county government through reductions in allocations to police, while seizures through the state program are only partially offset.

Why would counties be less likely to offset the seizures made through the state program? First, state and county governments typically share in some fraction of state-processed seizures already (explored more below). Second, counties may in fact offset DOJ-seizures more than state-processed seizures as a way to “punish” local police for bypassing state and local authority and strengthen their incentive to seize through the state program. Finally, state laws may be enacted endogenously: that is, state seizure laws may be passed by states at a time when local governments intend to spend more on policing.

Unfortunately, we do not have an instrument for the enactment of state laws, but we can explore the circumstances under which these laws seem to bind most. One possibility is that when a locality faces fiscal distress, it co-opts more of the funds the police seize. To test this hypothesis, we include the size of a county’s deficit (or surplus) as a regressor and the interaction between the deficit and seizures made by police in the county (either through state programs or the DOJ program), both lagged one year.²⁰ As columns (5) to (8) of Panel A. show, the greater the fiscal stress on a county (as measured by the size of its deficit – real per capita expenditures minus real per capita revenues), the more it captures police seizures with offsetting reductions in

its allocations to police. A \$100 per capita increase in the county deficit results in a 70 cent offset in DOJ program seizures and a 60 cent offset in state program seizures. These results are consistent across samples and are robust to the inclusion of state-specific time trends.

If counties usurp DOJ-processed seizures from police budgets, where do they spend the money? Table 3 explores the possible reallocation of police budgetary offsets by county governments. Counties appear to reallocate police budget offsets primarily to other criminal justice programs.²¹ In particular, a one dollar increase in seizures is associated with a roughly 80 to 95 cent increase in allocations to correctional and judicial budgets. In times of fiscal distress, however, offsets are redirected to increases in public welfare spending: a \$100 per capita increase in the county deficit results in a 90 cent offset in state program seizures but a corresponding increase in public welfare budgets.²² Spending on other budget categories, such as fire protection and health and hospitals (not shown here), does not respond to seizures, overall or in times of distress.

The results from Tables 2 and 3 suggest that the *de jure* share of seizures that police are supposed to receive by state and federal statute may not correspond to the *de facto* share that they actually receive when associated changes in their budget are taken into account. Seizures through the DOJ program seem to be entirely offset by localities, but seizures through state programs seem to be offset more in times of fiscal distress.

One potential problem with this specification is the dynamic reaction that police might

²⁰ A county deficit is its total spending less expenditures; thus the variable is positive in times of fiscal distress.

²¹ This is consistent with Baicker's (2001) finding that the shock of financing a capital crime trial may be absorbed in part by decreases in police spending.

²² Interestingly county allocations to highways, like police, are reduced when seizures increase: a one dollar increase in seizures, either DOJ or state-processed, is associated with a roughly 50 cent reduction in county allocations to highways. In contrast to police offsets, seizure-related highway offsets do not increase in times of distress. Why would highway spending be reduced in response to seizures? One possibility is that highway budgets capture allocations to local highway patrol units, many of which make seizures of vehicles and the like when they find illicit substances in the course of routine traffic stops.

have to county offsets. If police increase their seizures when counties cut their budgets, then our estimates may be capturing this reaction as well. To try to distinguish between budget offsetting and police “fund-raising” in anticipation of shortfalls, we exploit the timing of mayoral election cycles to see how the systematic increase in police spending experienced in election years affects the value of asset seizure activity. Counties are assigned the mayoral election year of the largest city in the jurisdiction and the analysis for this section is limited to 52 large U.S. cities.²³

Table 4 looks at the relationship between the timing of mayoral elections and police budgets and arrests for our full sample and the sample of 5 states. Mayoral elections are associated with an increase in per capita county-level police spending of roughly two dollars in the full sample and four dollars in the state sample. One reason for the higher average spending response to mayoral elections in the smaller sample is that it is restricted to a higher share of counties that correspond uniquely to a city (e.g. Miami, New York, Philadelphia, San Francisco). In other words, the full sample may introduce more measurement error into the election-year indicators. To the extent that county spending includes spending from towns and cities that do not have directly elected mayors and/or are not on the same election cycle as the main city in that county, we are understating the increase in spending associated with mayoral elections. Nonetheless, these results strongly suggest that real per capita spending on police increases in election years.²⁴ The results in columns (2) and (3) suggest that mayoral elections are only weakly related to a reduction in drug arrests relative to index crimes arrests (or total arrests).

Table 5 uses this variation to instrument for police budgets and to then examine whether police adjust their seizure behavior in response to exogenous changes in their budget. Column

²³ Levitt (1997) and McCrary (2002) consider 59 large cities. We cut the sample down slightly because some of the associated counties are not in our main analysis. These cities are: Arlington, TX; Austin, TX; Honolulu, HI; Mesa, AZ; New Orleans, LA; Saint Paul, MN; and Washington, D.C.

²⁴ We found no effect on spending in other budget categories – consistent with previous literature.

(1) presents the OLS regression results from our two samples. The point estimates are negative, suggesting that increases in spending are associated with reductions in the value of seizures, but in neither case are they statistically distinguishable from zero. The main 2SLS regression results in columns (2) and (3), with the latter including state-specific time trends, are fairly precisely estimated and are significantly larger than the OLS coefficients. They suggest that a one dollar per capita exogenous increase in police spending leads to a roughly 6 cent decrease in per capita seizures. This reaction is interesting, but small in light of the offset estimates in Table 2 (which suggest an almost dollar for dollar reduction in police budgets). Indeed, if we assume that the estimated dollar reduction in police spending following a dollar increase in DOJ seizures captures county offsets and police behavior alone, then police fundraising can account for at most 6 percent of the relationship. In contrast, police fundraising may account for as much as 23 percent (6/26) of the estimated relationship between states seizures and police budgets. In both cases, however, these estimates suggest that, while the offset estimates may also capture a behavioral response on the part of police, this bias is rather small.

Police Responses to Incentives

We next explore the responses of police to the *de jure* and *de facto* incentives that they face. We include the statutory sharing rule to capture *de jure* incentives, but interact them with an indicator variable for states in which counties do the most offsetting of police seizures, as described in equation (5) above. Taken together with state statutory sharing rates, this offsetting measure allows us to estimate the response of police seizure activity to net or *de facto* financial incentives.

These results are shown in Table 6. As shown in columns (1) and (2), while police respond to the share of seizures they are entitled to keep by statute, they respond more when they

are in states where localities actually allow them to keep the funds without an offsetting reduction in other allocations. In particular, a 10 percentage point increase in state sharing is associated with an increased value of state seizures of roughly 19 cents per capita plus an additional 9 cents per capita in states where there is relatively little offsetting of DOJ seizures. Police are also much more likely to use the state program relative to the DOJ program when they are allowed to keep more of the proceeds without offset, as shown in columns (3) and (4). (Note that this specification speaks to the mix of seizures, and thus abstracts from other factors that might be influencing the magnitude of seizures.)

If the de facto sharing of seizures influences the amount of seizing that police do, it must be influencing the number of arrests, composition of arrests (between drugs and other crimes), or character of drug arrests (bigger busts, more arrests for sales versus possession). Columns (5) through (12) explore these mechanisms. Comparing columns (5) and (6) suggests that while localities in states with higher statutory sharing make more drug arrests per capita, this effect holds only where budgetary reductions are not used to offset seizures. In other words, it is de facto rather than de jure sharing rules that are associated with higher drug arrest rates. This relationship between de facto as opposed to de jure sharing and drug arrest rates is true not only in an absolute sense but also as a proportion of index crime arrests (columns (9) and (10)). Finally, conditional on making a drug arrest, police in states that allow them to keep more of their seizures are also less likely to make the arrest for sales as opposed to possession. This finding is consistent with policies aimed at targeting money rather than drugs. For example, in the 1980s police in New York City were directed to impose roadblocks on the southbound lanes of I-95, where drug buyers could be found carrying cash, rather than northbound lanes, where sellers could be found carry drugs (Blumenson and Nielsen 1998). In short, these results are

consistent with the idea that police respond to increased net incentives (statutory sharing minus budgetary offsets) by seizing more and that they do so by making more drug arrests per capita and focusing more on drug possession offenses.

CONCLUSION

Counties and police respond to incentives driven by seizures laws in a sophisticated way that depends both on the reaction of the other party and on the fiscal circumstances that affect their marginal utility of the funds. We find that local governments do indeed capture a significant fraction of the seizures that police make by reducing their other allocations to policing, undermining the statutory incentive created by state seizure laws. They are more likely to do so in times of fiscal distress. Police, in turn, respond to the real net incentives for seizures, once local offsets are taken into account, not simply the incentives set out in statute. When de facto policies allow police to keep the assets they seize, they seize more. Thus, a simple analysis of the effects of asset forfeiture laws, as they appear on the books, will provide a limited or even distorted view of the effects of these policies.

More generally, these findings have strong implications for the effectiveness of using financial incentives to solve agency problems in the provision of public goods in a federal system. The effectiveness of federal and state laws in influencing agents' behavior is limited by the ability of local governments to divert funds to other uses. Ignoring this yields a misleading picture of the responsiveness of local agents to incentives and the effectiveness of federal and state policies. Understanding the financial incentives faced by each agency and each level of government involved in the budget process is a crucial component of designing policies to affect the provision of public goods.

APPENDIX I: DATA ON FORFEITURES THROUGH STATE PROGRAMS

Arizona

- Since at least 1994, the Arizona Attorney General could transfer all money and proceeds from forfeitures to the seizing agency. The forfeiture laws specify that money from drug seizures be used for law enforcement purposes or for highly targeted, anti-gang-related or anti-drug-related youth activities.
- We have obtained Arizona state-processed seizures and proceeds as well as disbursements for the DOJ to local agencies (reported by county) are available for fiscal years 1995-2001.

California

- Since 1994, California has divided the proceeds from seizures between the education (24 percent), the prosecuting agency (10 percent), a nonprofit for educating law enforcement and prosecutors on asset forfeiture (1 percent), and law enforcement (65 percent, although with restrictions that vary by county). There is some anecdotal evidence that these funds have been anticipated in state budgets, and that allocations to counties have been reduced accordingly.
- We have obtained California data on seizures by and disbursements to individual agencies for 1996 to 2001 and by county for 1995-2001 calendar years.

Florida

- Distribution method varies by seizing agency, but may not be spent on normal, law enforcement operating expenses. (For example, buying police cars would not be permissible, but helping a particular neighborhood impacted by illegal substances would be considered appropriate.) Agencies that received at least \$15,000 must expend at least 15 percent of the proceeds for drug treatment/education/prevention, crime prevention, safe neighborhoods, or school resource officer programs.
- We have obtained provided semi-annual reports on seizures and disbursements from Florida. The data is available electronically for 1996 to 2002, and in hard copy from 1992 to 1996.

New York

- Since 1990, roughly 30 percent of seizures in New York are returned to the claiming authority (DA), 40 percent to the claiming agent (usually the local police agency, but some DAs have their own police agents), and 30 percent to substance abuse fund (OASAS).
- We obtained New York data on seizures and disbursements from annual reports in hard copy with information at the agency and county level for 1992 to 2001 calendar years.

Pennsylvania

- District Attorneys and Attorneys General receive 100 percent of proceeds from forfeitures in Pennsylvania, but usually give it back to the seizing agency, with the provision that the money must be used for drug enforcement.
- We have obtained Pennsylvania data on state-processed seizures and proceeds for fiscal years 1994-2001. We have coded the data on cash seizures and proceeds from property sold.

REFERENCES

- Abt Associates (for National Assessment Program), *Use of Forfeiture Sanction in Drug Cases*.
- Baicker, Katherine, *The Budgetary Repercussions of Capital Convictions*, NBER Working Paper 8382, 2001.
- Baicker, Katherine, and Nora Gordon, *The State Giveth and the State Taketh Away?: School Finance Equalizations and Net Redistribution*, mimeo, 2004.
- Benson, Bruce, David Rasmussen, and David Sollars, *Police Bureaucracies, Their Incentives, and the War on Drugs*, **Public Choice**, Vol. 83, 1995.
- Benson, Bruce and David Rasmussen, *Predatory Public Finance and the Origins of the War on Drugs* **The Independent Review**, Vol. I, no. 2, Fall 1996.
- Benson, Bruce and David Rasmussen, *The Context of Drug Policy: An Economic Interpretation*, **Journal of Drug Issues**, Vol 28, no. 3, 1998.
- Blumenson, Eric, and Eva Nilsen, *The Drug War's Hidden Economic Agenda*, **The Nation**, March 9, 1998.
- Blumenson, Eric, and Eva Nilsen, *Policing for Profit*, **University of Chicago Law Review**, Vol. 65, no. 35, 1998.
- Blumenson, Eric, and Eva Nilsen, *The Next Stage of Forfeiture Reform*, **Federal Sentencing Reporter**, Vol. 14, no. 2, 2001.
- Cassella, Stefan D. *Forfeiture is Reasonable and it Works*, **Criminal Law and Procedure News**, Vol. 1, no. 2, Spring 1997.
- Di Eduardo, Chris. *Bill Seeks to Modify Asset Forfeiture Laws*, **Las Vegas Review-Journal**, April 22, 2001.
- Dillon, Karen. *Cash in Custody: A Special Report on Police and Drug Money Seizures*, **Kansas City Star**, May 19, 2000.
- Ehlers, Scott, *Policy Briefing: Asset Forfeiture*, Drug Policy Foundation, 1999.
- Gordon, Roger H. and John D. Wilson. *Tax Structure and Government Behavior*, NBER Working Paper 7244, 1999.
- Guerra, *Reconciling Federal Asset Forfeiture and Drug Offence Sentencing*
- Levitt, Steven, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime*, **American Economic Review**, Vol. 87, no. 3, June 1997.
- Levy, Leonard, *A License to Steal*, University of North Carolina Press, Chapel Hill, 1996.
- Mast, Brent, Bruce Benson, and David Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy*, **Public Choice**, Vol. 104, 2000.
- McCrary, Justin, *Using Electoral Cycles in police Hiring to Estimate the Effect of Police on Crime: Comment*, **American Economic Review**, Vol. 92, no. 4, 2002.
- Miller, Mitchell and Lance Selva, *Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs*, **Justice Quarterly**, Vol. 11, no. 2, June 1994.
- Rasmussen, David and Bruce Benson, *The Economic Anatomy of a Drug War*, Rowman and Littlefield Publishers, London, 1994.

Short, Ernest H., *Civil Forfeiture of Real Property and the Civil Asset Forfeiture Reform Act of 2000*, **Oklahoma Bar Journal**, Vol. 73, no. 18, 2002.

Stellwagen, Lindsey D. and Karen A. Wylie, **Strategies for Supplementing the Police Budget**, *Issues and Practices in Criminal Justice*, National Institute of Justice, May 1985.

Stellwagen, Lindsey D., **Use of Forfeiture Sanctions in Drug Cases**, *Research in Brief*, National Institute of Justice, July 1985.

Worhol, Greg and Brian Johnson, *Guilty Property: A Quantitative Analysis of Civil Asset Forfeiture*, **American Journal of Criminal Justice**, Vol. 21, No. 1, 1996.

Worrall, *Addicted To The Drug War: The Role Of Civil Asset Forfeiture As A Budgetary Necessity In Contemporary Law Enforcement*, **Journal of Criminal Justice**, Vol. 29 (2001).

Table 1: Summary Statistics

	Mean	Std Dev	N
Panel A: Full Sample			
Seizures through DOJ (\$real per capita)	\$1.97	\$2.94	27576
Share of City-Years in a Mayoral Election	0.31	0.46	1040
County Budgets (\$real per capita)			
Total Spending	\$867.43	\$1,000.59	45536
Allocations to Police	\$45.41	\$61.41	45307
Arrests (per capita)			
Total Arrests	4873.6	2626.7	50081
"Index" Crime Arrests	916.1	529.1	50076
Drug Arrests	446.0	368.7	50285
Panel B: 5-State Sample			
Seizures through States (\$real per capita)	\$1.14	\$2.01	1536
Seizures through DOJ (\$real per capita)	\$3.51	\$4.65	2385
Share of City-Years in a Mayoral Election	0.27	0.45	395
County Budgets (\$real per capita)			
Total Spending	\$1,336.46	\$1,447.68	4629
Allocations to Police	\$76.83	\$91.43	4542
Arrests (per capita)			
Total Arrests	4899.9	2616.3	4371
"Index" Crime Arrests	948.9	528.8	4366
Drug Arrests	597.1	419.6	4371

Notes: County-year observations, weighted by population.
 State program seizures are from PA, NY, CA, FL, and NY, various years (spanning 1994-2001).
 DOJ program seizures are reported by DOJ by judicial districts (allocated to counties based on population), 1990-1998.
 County budget data from Bureau of the Census, 1990-2001.
 Arrest data from Uniform Crime Reports, 1990-2001.

Table 2: The Effect of Seizures on Police Budgets

Dependent Variable: Per Capita Police Budgets										
Panel A: DOJ Seizures 1991-1999										
Lagged DOJ Seizures	-1.55 (.59)	-0.95 (.60)	-1.31 (.63)	-1.06 (.699)	-0.39 (.37)	-0.01 (.40)	-0.10 (.57)	-0.01 (.578)		
County Deficit					0.005 (.003)	0.005 (.002)	0.002 (.004)	0.002 (.003)		
Lagged DOJ Seizures*					-0.008 (.001)	-0.007 (.002)	-0.008 (.001)	-0.008 (.001)		
County Deficit										
N	17408	17408	1774	1774	15121	15121	1640	1640		
State-Specific Time Trends	No	Yes	No	Yes	No	Yes	No	No		
Sample	48-state	48-state	5-state	5-state	48-state	48-state	5-state	5-state		
Panel B: State Seizures 1996-2001										
Lagged State Seizures			-0.26 (.87)	-0.42 (.84)			-0.27 (.87)	-0.50 (.89)		
County Deficit							-0.001 (.007)	0.001 (.007)		
Lagged State Seizures*							-0.006 (.002)	-0.007 (.003)		
County Deficit										
N			951	951			846	846		
State-Specific Time Trends			No	Yes			No	No		
Sample			5-state	5-state			5-state	5-state		

Standard errors are clustered by state and given in parentheses. All regressions include county and year fixed effects and are weighted by population. County deficit is equal to spending minus revenue and is thus positive in times of fiscal stress. Controls include total county spending, per capita index crime arrests, and county unemployment rates. DOJ seizures are reported at the judicial district level, and have been allocated to counties within judicial districts based on population. 48 states are all but HI and AK; 5-state sample includes AZ, CA, FL, NY, and PA.

Table 3: The Effect of Seizures on Other Budget Items

		Panel A: 48 State Sample, 1991-1999						
Dependent Variable is	Police	Corrections and Judicial	Highways	Public Welfare	Police	Corrections and Judicial	Highways	Public Welfare
Real Per Capita								
Lagged DOJ Seizures	-1.547 (0.567)	0.973 (0.139)	-0.471 (0.191)	0.411 (0.457)	-0.394 (0.361)	0.726 (0.148)	-0.194 (0.227)	-0.839 (0.527)
County Deficit					0.005 (0.003)	0.004 (0.003)	0.006 (0.006)	0.021 (0.019)
Lagged DOJ Seizures*					-0.008 (0.001)	0.001 (0.001)	0.001 (0.001)	0.011 (0.003)
County Deficit								
N	17204	17291	15812	15084	14919	14975	13599	13305
		Panel B: 5 State Sample, 1991-1999						
Dependent Variable is	Police	Corrections and Judicial	Highways	Public Welfare	Police	Corrections and Judicial	Highways	Public Welfare
Real Per Capita								
Lagged DOJ Seizures	-1.297 (0.556)	0.840 (0.272)	-0.533 (0.204)	0.245 (0.695)	-0.106 (0.498)	0.582 (0.199)	-0.076 (0.150)	-0.928 (0.768)
County Deficit					0.002 (0.003)	0.003 (0.005)	0.009 (0.003)	0.033 (0.023)
Lagged DOJ Seizures*					-0.008 (0.001)	0.001 (0.000)	0.000 (0.000)	0.008 (0.005)
County Deficit								
N	1774	1776	1770	1761	1640	1642	1638	1633

Standard errors are clustered by state and given in parentheses.

All regressions include county and year fixed effects and are weighted by population.

County deficit is equal to spending minus revenue and is thus positive in times of fiscal stress.

Controls include total county spending, per capita index crime arrests, and county unemployment rates.

DOJ seizures are reported at the judicial district level, and have been allocated to counties within judicial districts based on population. 48 states are all but HI and AK; 5-state sample includes AZ, CA, FL, NY, and PA.

Table 4: Mayoral Election Cycles

"All" Cities			
Dependent Variable:	Police Budgets	Arrests	
		Index Crimes	Drug / Index
Mayoral election year indicator	2.02 (0.93)	-8.5 (10.9)	-0.003 (.002)
State-Specific Time Trends	yes	yes	yes
Observations	699	699	682

Cities in 5 States			
Dependent Variable:	Police Budgets	Arrests	
		Index Crimes	Drug / Index
Mayoral election year indicator	4.28 (0.96)	-9.2 (11.2)	-0.001 (.002)
State-Specific Time Trends	yes	yes	yes
Observations	245	244	230

Standard errors are clustered by state and given in parentheses.

All regressions include county and year fixed effects.

Controls include per capita spending on public welfare, reported index crimes per capita (for budgets and seizures) and county employment to population ratio.

The "All" Cities sample includes 52 large US cities; the sub-sample 16 such cities.

Table 5: Effect of Police Budgets on Seizures

Dependent Variable:	Per Capita DOJ Program Seizures		
	OLS	2SLS	2SLS
	"All" Cities		
Police Budgets	-0.009 (0.010)	-0.053 (0.029)	-0.06 (0.026)
State-Specific Time Trends	No	No	Yes
Observations	399	399	399
	Cities in 5 States		
Police Budgets	-0.006 (0.010)	-0.059 (0.022)	-0.057 (0.020)
State-Specific Time Trends	No	No	Yes
Observations	147	147	147

Standard errors are clustered by state and given in parentheses.

All regressions include city and year fixed effects and are weighted by population.

Controls include per capita spending on public welfare, index crimes per capita and county employment to population ratio.

The timing of mayoral elections is the instrument for police budgets.

The "All" Cities sample includes 52 large US cities; the sub-sample 16 such cities.

Table 6: Effect of Sharing on Policing

	State Seizures		Arrest Rates			
	State Program	State Program / DOJ Program	Drugs	Index Crimes	Drugs / Index	Drug Sales / Total Drug
Statutory share state proceeds agencies can keep	2.30 (.96)	2.51 (1.13)	109.5 (12.1)	53.5 (21.0)	0.018 (.002)	0.062 (.009)
Statutory state share kept*Dummy for states that do not offset much	0.89 (.23)	0.50 (.28)	170.0 (13.4)	271.0 (21.3)	0.034 (.002)	-0.144 (.009)
N	1106	668	26637	26637	23991	22886

Standard errors are clustered by state and given in parentheses.

All regressions include county fixed effects and are weighted by population.

Controls include grand total arrest rates (for seizures), total county spending and (un)employment rate.

States that do not offset much are defined as those in which county allocations to police are reduced less than the average in response to DOJ-processed seizures.