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The Oregon Constitution, Article XV, section 10, prohibits the state from using certain forfeited property and proceeds for law enforcement purposes. The Department of State Police (department) asks three questions about the applicability of that prohibition to federal forfeitures.

FIRST QUESTION PRESENTED

Does the constitutional prohibition on using forfeited property for law enforcement apply to the department's share of property or proceeds obtained in United States Department of Justice (USDOJ) criminal forfeitures?

ANSWER GIVEN

No. The text, context and history of Article XV, section 10 indicate that the prohibition applies only to property and proceeds obtained in USDOJ civil forfeitures.

SECOND QUESTION PRESENTED

Does the constitutional prohibition on using forfeited property for law enforcement apply to the department's share of property or proceeds obtained in United States Department of the Treasury (Treasury) civil or criminal forfeitures?

ANSWER GIVEN

No. Article XV, section 10 does not apply to property or proceeds derived from civil or criminal forfeitures obtained by Treasury.

THIRD QUESTION PRESENTED

Does the constitutional prohibition apply to property or proceeds from USDOJ civil forfeitures commenced by seizure of the property prior to

December 7, 2000, the effective date of Article XV, section 10, but concluded after that date?

ANSWER GIVEN

No. The constraints that Article XV, section 10 places on the department's use of property or proceeds received from USDOJ civil forfeitures do not apply to property or proceeds seized by authorities before section 10's effective date, even if the judgment of forfeiture is issued after that date.

DISCUSSION

I. Property or Proceeds from USDOJ Criminal Forfeitures

Section 10 of Article XV was added to the Oregon Constitution as a result of the people's approving Ballot Measure 3 on November 7, 2000. Section 10 generally imposes limitations on the forfeiture of private property and restrictions on the state's use of forfeiture proceeds. Most of its provisions relate to state forfeitures only, but two relate to federal forfeitures. Section 10(8) directs the state to take "all necessary steps" to share in the proceeds of a USDOJ "forfeiture" and to use any shared proceeds in the manner specified in section 10(7). Section 10(7) forbids the use of forfeited property and proceeds for law enforcement purposes, among other restrictions. After informally conferring with DOJ counsel, the department previously concluded that subsections (7) and (8) apply to USDOJ civil forfeitures. That conclusion is consistent with the analysis set out in this opinion. The question is whether they also apply to USDOJ criminal forfeitures. The answer will determine whether the state receives any share from USDOJ criminal forfeitures, since USDOJ's current guidelines apparently prohibit it from sharing forfeiture proceeds with a state unless the state uses a specified percentage for law enforcement.^{1/} See USDOJ GUIDE TO EQUITABLE SHARING OF FEDERALLY FORFEITED PROPERTY FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES (March 1994), Sec 10(A) at 10-14 and Addendum at 6 ("Permissible Use Policy") (USDOJ GUIDE).

In interpreting a constitutional measure approved by initiative, we first look to the text and context of the measure to determine the intent of the people. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n 4, 859 P2d 1143 (1993). If the people's intent is clear from the text and context of the measure, the inquiry ends there. If the people's intent is not clear from the text and context, we look to materials, such as information available to the people at the time the measure was adopted, that disclose the people's understanding of the measure. *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 560 n 8, 871 P2d 106 (1994). Those materials include ballot titles, explanatory statements and arguments in voters' pamphlets, news stories and editorials. *Id.*

A. Text of Article XV, Section 10(8)

Section 10(8) relates to the state's participation in USDOJ forfeitures:

The State of Oregon or any of its political subdivisions shall take all necessary steps to obtain shared property or proceeds from the United States Department of Justice resulting from a *forfeiture*. Any property or proceeds received from the

United States Department of Justice by the State of Oregon or any of its political subdivisions shall be applied as provided in subsection (7) of this section. (Emphasis added.)

Section 10(7) restricts the uses to which the state may apply property or proceeds received from a forfeiture covered by section 10(8) as follows:

Disposition of property and proceeds to drug treatment. Any sale of forfeited property shall be conducted in a commercially reasonable manner. Property or proceeds forfeited under subsections (3), (5), or (8) of this section shall not be used for law enforcement purposes but shall be distributed or applied in the following order:

(a) To the satisfaction of any foreclosed liens, security interests and contracts in the order of their priority;

(b) To the State or any of its political subdivisions for actual and reasonable expenses related to the costs of the forfeiture proceeding, including attorney fees, storage, maintenance, management, and disposition of the property incurred in connection with the sale of any forfeited property in an amount not to exceed twenty-five percent of the total proceeds in any single forfeiture;

(c) To the State or any of its political subdivisions to be used exclusively for drug treatment, unless another disposition is specially provided by law.

Neither section 10(7) nor section 10(8) uses the term “criminal” or “civil” to modify or describe “forfeiture.” In interpreting the people’s intent, “words of common usage typically should be given their plain, natural, and ordinary meaning.” *PGE*, 317 Or at 611. Courts may refer to dictionary definitions to determine that meaning. *Ecumenical Ministries*, 318 Or at 560 61 (court looks to dictionary for ordinary meaning of “casino”). WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 1993) defines “forfeiture” as:

the divesting of the ownership of particular property of a person on account of the breach of a legal duty and without any compensation to him * * * loss of some right, privilege, estate, honor, office, or effects in consequence of a crime, offense, breach of condition, or other act.

WEBSTER’S at 891. This definition makes no distinction between forfeitures accomplished through civil and criminal proceedings; it encompasses both. Therefore, standing alone, the text of section 10(8) suggests that it covers property and proceeds the state receives from USDOJ civil and criminal forfeitures. Under *PGE*, however, it is necessary to determine the meaning of section 10(8) within the context of the remainder of section 10.

B. Context of Article XV, Section 10(8)

In interpreting Article XV, section 10, we may consider statutory and judicially developed rules of construction that “bear directly on how to read the text.” *PGE*, 317 Or at 611. One such rule is that a term repeated within a statute should be interpreted consistently throughout. *PGE*, 317 Or at 611 citing *Oregon Racing Comm. v. Multnomah Kennel Club*, 242 Or 572, 586 [sic], 411 P2d 63 (1966).^{2/} The term “forfeiture” is used in over a dozen places

in section 10, in addition to subsection 8. The term “civil forfeiture” is used in several places, but “criminal forfeiture” is never used. This raises the question whether the unmodified “forfeiture” was intended to convey the term’s broader, dictionary meaning or was, instead, used merely as shorthand for “civil forfeiture.” To answer that question, we examine every provision which contains the unmodified term to see if any was either clearly intended to cover criminal forfeitures or clearly intended not to cover them even though it could sensibly have done so.^{3/} We find no instances of the former, but one of the latter.

Section 10(4)^{4/} provides certain safeguards for the protection of innocent property owners, such as secured creditors, which is an issue that could arise in civil or criminal forfeiture proceedings. While section 10(4) uses the unmodified term “forfeiture,” the section begins with a phrase limiting its effect to “civil forfeiture” proceedings. The fact that section 10(4) is expressly limited to civil proceedings is an indication of the people’s intent to preclude application of section 10 to criminal forfeiture proceedings.

In a similar vein, section 10(9)^{5/} limits the circumstances in which the state and its political subdivisions may “transfer forfeiture proceedings” to the federal government. A review of state statutes in effect when Ballot Measure 3 was adopted reveals that only one statute authorized such transfers. ORS 475A.045(4)(a) authorizes the state or a political subdivision to transfer seized property to a federal agency with forfeiture authority. This statute applies to civil forfeitures only.^{6/} Thus, even though section 10(9) uses the broader, unmodified term, its practical meaning at the time of its approval by the people was confined to civil forfeitures.

That sections 10(4) and 10(9) apply either explicitly or practically only to civil forfeitures, combined with the absence of any provision in section 10 clearly intended to apply to criminal forfeitures, suggests that the unmodified term “forfeiture” was understood to encompass civil forfeiture only throughout section 10. In short, “forfeiture” appears to be shorthand for “civil forfeiture.”

The meaning of “forfeiture” as used in sections 10(7) and 10(8) is illuminated by the law existing prior to approval of Ballot Measure 3. Until 1989, Oregon had no comprehensive state law by which property could be forfeited through civil litigation brought by governments. Cities and counties had begun enacting ordinances providing for civil forfeiture of property used in a growing list of unlawful conduct. Oregon Laws 1989, chapter 791 preempted the local forfeiture process by imposing uniform civil procedures for forfeiture proceedings. Nothing in the 1989 law predicated forfeiture of property on a criminal charge or conviction. No “criminal” forfeiture procedure of general applicability existed.

C. History of Article XV, section 10

Nothing in the ballot title, explanatory statement, arguments in favor or against, or newspaper reports about Ballot Measure 3 speaks to the issue of sharing proceeds with USDOJ and how that would be affected by approval of the measure. The explanatory statement accompanying Ballot Measure 3, however, helps to understand its intended scope.^{7/}

The explanatory statement contrasts forfeitures under then-current law with forfeitures under Ballot Measure 3 if approved. 2000 GENERAL ELECTION VOTERS’ PAMPHLET at 237 (Voters’ Pamphlet). Section 10(11) contains reporting requirements as to “all property and

proceeds seized for forfeiture or forfeited.” Like other provisions, section 10(11) makes no explicit distinction between civil and criminal forfeitures. The explanatory statement, however, says that “[m]easure 3 expands current reporting requirements to include all civil forfeitures.” Voters’ Pamphlet at 237. Hence, the explanatory statement identifies another provision of section 10 that applies only to civil forfeitures despite using the broader, unmodified term “forfeiture.”

D. Maxims of Statutory Construction

Finally, if the people’s intent remains unclear after considering text, context and history, we may resort to general maxims of construction to resolve any remaining uncertainty as to the meaning of the measure. *PGE*, 317 at 612. Because there is uncertainty here, we also consider the maxim that legislation should be construed so as to avoid internal inconsistencies and to achieve harmony. *Todd v. Bigham*, 238 Or 374, 398, 395 P2d 163 (1964); *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 49, 911 P2d 350, *rev den* 323 Or 136, 916 P2d 311 (1966); 20 Op Atty Gen 124 (1940). One disharmony that would result if “forfeiture” were interpreted to include both civil and criminal forfeiture is as follows. If section 10(8) applied to property and proceeds received from USDOJ civil and criminal forfeitures, the state would be required to dispose of all such property and proceeds in the manner required by section 10(7), *e.g.*, using the net proceeds exclusively for drug treatment. The state would be required to dispose of property and proceeds received from state civil forfeiture actions in the same manner. However, without any apparent reason for the distinction, the provisions of section 10(7) would not apply to property or proceeds forfeited through state criminal proceedings.^{8/} On the other hand, interpreting section 10(8) to apply only to property and proceeds from civil forfeitures provides for a consistent disposition of property and proceeds, as between those forfeited through civil and criminal proceedings, throughout section 10.

E. Conclusion

In section 10(8), the term “forfeiture” is sometimes used alone and is sometimes modified by the term “civil.” On the other hand, the context provided by the remaining provisions of section 10, related statutes, the section’s history, and maxims of construction support interpreting “forfeiture” within section 10(8) to refer only to civil forfeiture. Therefore, we interpret the references to “property or proceeds from the United States Department of Justice resulting from a forfeiture” and “any property or proceeds received from the United States Department of Justice” in Article XV, section 10(8) to apply to property and proceeds resulting from only civil, as opposed to criminal, forfeitures.

II. Property or Proceeds from Treasury Civil or Criminal Forfeitures

The second question is whether section 10 applies to the department’s share of property or proceeds resulting from civil or criminal forfeitures obtained by Treasury.

USDOJ and Treasury are, and were when the people were considering Ballot Measure 3, distinct agencies within the federal government. *Compare* 28 USC § 501 *et seq.*, establishing USDOJ, with 31 USC § 301 *et seq.*, establishing Treasury. The two agencies operate different civil and criminal forfeiture programs. *Compare, e.g.*, 21 USC § 881(e), providing for the

Attorney General's disposition of forfeited property, and 31 USC § 9703, providing for establishment and use of a "Department of the Treasury Forfeiture Fund."

Using the *PGE* method of analysis described above, we begin by examining the text and context of section 10. Nothing in section 10 refers to Treasury. Section 10(8), which establishes the universe of federally shared property and proceeds subject to the limitations imposed by section 10(7), makes reference only to property or proceeds received from USDOJ. This is in contrast to section 10(9), which restricts when the state may transfer forfeiture proceedings "to the federal government." We interpret the specificity of section 10(8), in contrast to the more general language of section 10(9), to apply only to property or proceeds the state receives from USDOJ. Therefore, neither section 10(8) nor the use limitations in section 10(7) applies to the department's sharing in property or proceeds resulting from a civil or criminal forfeiture obtained by Treasury, as long as the state receives the funds from Treasury instead of from USDOJ.⁹ In other words, section 10 does not limit the department's authority to share in civilly or criminally forfeited property or proceeds received from Treasury.

III. USDOJ Civil Forfeiture Proceedings Spanning December 7, 2000

The department's final question is whether section 10 applies to the department's share of property or proceeds resulting from a USDOJ civil forfeiture which commenced by seizure before December 7, 2000, the date section 10 took effect, but concluded after that date.

"Whether a particular enactment is to be applied retroactively is a matter of legislative intent." *State v. Lanig*, 154 Or App 665, 670, 963 P2d 58 (1998) citing *Whipple v. Howser*, 291 Or 475, 479-81, 632 P2d 782 (1981). To determine whether section 10 applies retroactively requires an assessment of the people's intent, using the analytical framework established by *PGE*. *Lanig*, 154 Or App at 673-74. Neither the text nor context of section 10 expresses the people's intent on the issue of retroactivity. The fact that section 10 does not contain a retroactivity clause "suggest[s] either that the voters did not intend retroactive application or that they simply did not think about the matter." *Id.* at 673. The historical material, *e.g.*, the ballot title and explanatory statement, also are silent as to retroactivity. Turning to the third level of *PGE* analysis, which calls for consideration of relevant canons of construction, we consider the presumption that "constitutional amendments apply prospectively." *Id.* at 675.

[A] constitution always operates prospectively, unless it is clearly shown from the language used or the objects to be accomplished that the provision was intended to operate retrospectively, and such intent must be clearly established.

Id. at 675 quoting *Darling v. Miles*, 57 Or 593, 598, 111 P 702 (1910), rehearing denied 112 P 1084 (1911). Adhering to the maxim stated in *Darling* and applying section 10 prospectively, the question becomes whether applying section 10 to property or proceeds the department receives from USDOJ civil forfeiture proceedings begun by seizure prior to December 7 but concluding thereafter constitutes prospective application.

The Oregon Supreme Court has summarized the difference between prospective and retroactive application of a newly enacted law:

Retroactive legislation affects prior transactions or existing legal rights and obligations, not necessarily pending actions. See generally 2 Singer, Sutherland

Statutory Construction 337, § 41.01 (4th ed 1986). Therefore, when a prospective application is called for, the court applies the legislation in a manner which does not affect legal rights and obligations arising out of past actions or occurrences.

Fromme v. Fred Meyer, Inc., 306 Or 558, 561-62, 761 P2d 515 (1988) (citations omitted). Thus, we must apply section 10 to the sharing of property and proceeds with USDOJ in a way that “does not affect legal rights and obligations arising out of past actions or occurrences.”

For USDOJ to consider a state’s request to share in forfeited property or proceeds, the state must submit its request within sixty calendar days after the property or proceeds were seized, or within sixty calendar days of federal adoption of the seizure. USDOJ GUIDE 6. If the state did not want to share in the property or proceeds prior to approval of section 10, it did not need to take any action. Section 10(8) takes away the state’s discretion by requiring it to “take all necessary steps” to share in federally forfeited property and proceeds with USDOJ. Under section 10(8), the department or another affected agency must submit a request within the timeline set by USDOJ whenever the state has a right to do so. In this way, section 10(8) affects the state’s legal obligations in relation to forfeitures controlled by USDOJ.

As required by *Fromme*, section 10(8) may not affect the state’s legal obligations arising out of past actions or occurrences. The state’s obligation to submit the required sharing request to USDOJ within a certain amount of time is triggered by the seizure of property or proceeds, or federal adoption of the seizure. Therefore, we conclude that for section 10(8) to apply prospectively it may apply only to property or proceeds seized after December 7, 2000, when section 10(8) took effect. Thus, section 10 does not limit the department’s authority to share in property or proceeds with USDOJ resulting from a federal civil forfeiture action that commenced by seizure before December 7, 2000.^{10/}

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^{1/} The United States Attorney General has the authority to decide from several statutory options in disposing of property forfeited through USDOJ criminal or civil forfeiture. 21 USC § 881(e).

^{2/} A case prior to *Oregon Racing Comm.* states the rule of interpretation more completely:

[I]n the absence of anything in the statute clearly indicating a contrary intent, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout; and, where its meaning in one instance is clear, this meaning will be attached to it elsewhere.

School Dist. No. 17 v. Powell, 203 Or 168, 185, 279 P2d 492 (1955), citing, *Holman Transfer Co. v. Portland*, 196 Or 551, 563, 249 P2d 175, 250 P2d 929 (1952). This rule appears to apply equally to the interpretation of constitutional amendments adopted by initiative. *PGE*, 317 Or at 614, n 4.

^{3/} Sections 10(3) and 10(5) both impose a precondition to forfeiture – criminal conviction – that is, of course, redundant as to criminal forfeitures. Subsections 10(2) and 10(6) – 10(11) use the unmodified term “forfeiture,” or some form thereof, but their substance does not compel either meaning. The same is true of the reference to federal forfeitures, since federal law allows for both.

^{4/} Section 10(4) provides:

Protection of innocent property owners. In a civil forfeiture proceeding if a financial institution claiming an interest in the property demonstrates that it holds an interest, its interest shall not be subject to forfeiture.

In a civil forfeiture proceeding if a person claiming an interest in the property, other than a financial institution or a defendant who has been charged with or convicted of a crime involving that property, demonstrates that the person has an interest in the property, that person’s interest shall not be subject to forfeiture unless:

- (a) The forfeiting agency proves by clear and convincing evidence that the person took the property or the interest with the intent to defeat the forfeiture; or
- (b) A conviction under subsection (3) is later obtained against the person.

^{5/} Section 10(9) provides:

Restrictions on State transfers. Neither the State of Oregon, its political subdivisions, nor any forfeiting agency shall transfer forfeiture proceedings to the federal government unless a state court has affirmatively found that:

- (a) The activity giving rise to the forfeiture is interstate in nature and sufficiently complex to justify the transfer;
- (b) The seized property may only be forfeited under federal law; or
- (c) Pursuing forfeiture under state law would unduly burden the state forfeiting agencies.

Although the phrase “forfeiture proceedings” suggests that subsection (9) only applies to pending state court litigation, we conclude that a pending state suit is not a precondition to its application because such a precondition would render (9)(b) nugatory.

^{6/} Amendments to ORS 475A.045(4), deleting specific reference to “civil forfeiture,” become operative on July 31, 2005. Or Laws 2001, ch 780, § 66.

^{7/} By statute, an explanatory statement is an impartial explanation of a ballot measure prepared by a committee composed of five persons, two appointed by the measure’s proponents, two appointed by the Secretary of State from among the opponents, if any, and one appointed by the first four appointees. ORS 251.205; 251.215.

^{8/} Section 10(7)’s disposition requirements apply to property or proceeds forfeited under section 10(3), 10(5) or 10(8). Sections 10(3) and 10(5) apply only to civil forfeiture proceedings while section 10(8) applies to USDOJ forfeitures. Therefore, it is not possible for section 10(7)’s disposition requirements to apply to property or proceeds forfeited in state criminal forfeiture proceedings.

^{9/} The Secretary of the Treasury has authority, independent of USDOJ, to share forfeited property or proceeds with state and local law enforcement agencies. 19 U.S.C. § 1616a(c)(1)(B)(ii); 18 U.S.C. § 981(e)(2).

^{10/} Other portions of section 10 relate to state civil forfeiture proceedings. For example, under section 10(3), a civil forfeiture judgment may not be entered in state proceedings unless the owner of the property is convicted of a crime and the property is found to be related to that crime in one of several ways specified in the subsection. Because your question concerns only sharing property and proceeds with USDOJ, we have not looked exhaustively at what prospective application of other portions of section 10, such as section 10(3), entails.