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Policing and Prosecuting for Profit: Arizona's Civil Asset Forfeiture Laws Violate Basic Due Process Protections

by Tim Keller, Executive Director, Arizona Chapter, Institute for Justice; and Jennifer Wright, law student, Arizona State University, former law clerk and paralegal, Institute for Justice

EXECUTIVE SUMMARY

In 2002, New Jersey's Carol Thomas made headlines after her teenage son used her 1990 Ford Thunderbird to sell marijuana to an undercover police officer. He was arrested, pled guilty and faced his punishment. However, that did not end the case. The government also seized Thomas' car, despite the fact that no drugs were found in the car, she was the sole owner, and she had no knowledge of her son's use of the car to sell illegal drugs. The government's action was pursuant to a legal doctrine—civil asset forfeiture—that allows police and prosecutors to seize and forfeit property without ever filing criminal charges against the property owner.

The purported intent of asset forfeiture laws is to deprive criminals of their ill-gotten property and cash and then use those proceeds to enforce the very laws the wrongdoers violated. Yet civil forfeiture laws are one of the most serious assaults on private property rights in the nation today because many forfeiture schemes give police and prosecutors a direct financial stake in the outcome of forfeiture proceedings by allowing them to keep the money and property confiscated from individuals. Arizona's forfeiture law is just such a scheme. It threatens to divert law enforcement priorities away from the fair administration of justice and toward the pursuit of property and profit in violation of both state and federal constitutional due process provisions, which guarantee that those responsible for enforcing the law must administer justice in an impartial manner.

Over the past four years, civil forfeitures generated \$64.5 million in revenue for state and local law enforcement agencies and, in many cases, forfeitures constitute a sizable percentage of agency budgets. For example, in fiscal year 2003¹ forfeiture revenues constituted 39 percent of Pima County's Counter Narcotics Alliance's² budget—up from zero percent in 2000. Pinal County's forfeiture spending leapt from less than \$500,000 to close to \$1.5 million—a 200 percent increase in one fiscal year.

While law enforcement is a legitimate government expense, and properly funding police should be a legislative priority, law enforcement agencies should not rely on forfeiture funds to increase their budgets. It is precisely because law enforcement agencies want to purchase weapons or hire additional officers—and because more forfeiture means more money—that an improper incentive is created to forfeit more and to do so in a manner that is not necessarily fair.

Due process prohibits statutory schemes that create actual bias, the potential for bias, or even the appearance of bias in the administration of justice. Policymakers should repeal Arizona's civil asset forfeiture scheme to protect private property rights.

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Due Process Requires Fair and Impartial Administration of Justice³

“Arizona’s forfeiture statutes are broad and far-reaching and therefore subject to potential prosecutorial abuse.”—Arizona Court of Appeals⁴

Civil asset forfeiture is a legal doctrine that allows police and prosecutors to seize and forfeit property without ever filing criminal charges against the property owner.

What is Civil Asset Forfeiture?

Civil asset forfeiture is a serious assault on private property rights in Arizona today. It is a legal doctrine that allows police and prosecutors to seize and forfeit property without ever filing criminal charges against the property owner. Civil asset forfeiture actions are *in rem* proceedings, which means literally “against a thing.” Thus, forfeiture actions arise from a legal fiction that treats inanimate objects used by someone in furtherance of criminal activity as if the objects themselves acted to assist in the commission of a crime. As a result, civil forfeiture proceedings have bizarre titles, such as *In the matter of: United States currency in the amount \$315,900.00* or *In the matter of: 1996 Nissan Sentra*. Of course, objects such as cash, real property, cars or boats sued for participation in criminal activity do not act or think. Yet the law operates as if the seized property is guilty of committing an offense.

In Arizona, forfeited property and proceeds are deposited into anti-racketeering accounts, rather than into a general fund. Those special accounts are controlled exclusively by prosecutors’ offices and police departments. Therefore, seizing and prosecuting agencies have a direct and significant stake in the outcome of forfeiture efforts, which encourages these agencies to seize as much property as possible. Not only does this scheme inject improper incentives into law enforcement’s responsibility to enforce the law fairly, but it also sweeps up wholly innocent property owners in forfeiture proceedings. For example, spouses and business owners are exempted from the definition of “owner” and are therefore deprived under Arizona law of any opportunity to defend their property.⁵ Arizona’s scheme raises serious constitutional concerns: fundamental to the constitutional guarantee of due process is that the government must act in an impartial manner in the administration of justice.

Direct Financial Incentives Raise the Specter of Improper Bias

Although many individuals within the government undoubtedly share a principled commitment to carrying out the mission of the employing agency, some government officials, operating in what they perceive as their own self-interest, naturally attempt to maximize

the size and budget of their agency. Larger budgets benefit everyone within an agency through higher salaries, greater job security, better equipment, and increased power and prestige. The incentive to maximize a department's budget through improper action is particularly strong in the context of civil forfeiture.

When public officials have a direct financial stake in the outcome of their actions—as in the case of civil forfeiture—the U.S. Supreme Court subjects such actions to particularly close scrutiny under the due process guarantee of the Constitution.⁶ In *Marshall v. Jerrico, Inc.*,⁷ the leading U.S. Supreme Court decision in this area, the Court upheld civil penalty provisions under the Fair Labor Standards Act but declared that “a scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.”⁸ Such serious questions are raised when a government official's “judgment will be distorted by the prospect of institutional gains as a result of zealous enforcement efforts.”⁹

The due process clause can be violated even if public officials do not receive a direct personal benefit from a particular scheme, so long as an agency or department benefits directly. The relevant inquiry is whether a scheme creates a possible temptation to distort the justice system for monetary gain, rather than whether a scheme creates

proven biased results.

To determine whether a prosecutorial scheme, such as Arizona's civil forfeiture law, violates the due process clause, the U.S. Supreme Court has set forth three relevant factors:

- the financial dependence of law enforcement agencies on the collected revenues;
- the personal interest of the officials or agencies in the scheme; and
- the funding formula mandated and used by the government.¹⁰

Scrutinizing Arizona's civil forfeiture laws under these three factors reveals that the state's forfeiture scheme violates basic due process guarantees. First, under Arizona's civil forfeiture statute, law enforcement agencies at the state and local levels can and do fund their activities through forfeiture. Second, law enforcement agencies receive direct, tangible benefits from forfeiture, such as, *inter alia*, increased law enforcement budgets, medical services, overtime pay, conference attendance, use of seized vehicles, and the purchase of new vehicles. Finally, the agencies are reimbursed based not on the expenses incurred in undertaking the forfeiture, but rather on the basis of how much property was seized and forfeited. The more forfeiture actions the departments undertake, the higher the recompense.

Arizona's method of distributing forfeited property and proceeds creates, at a minimum, the potential for or the appearance of bias, if not actual bias, in

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the forfeiture of individuals' property. Injecting even the appearance of bias violates the right of property owners to impartial justice guaranteed by the due process clauses of the U.S. and Arizona Constitutions.

In 1862, the Supreme Court of Kentucky declared the Confiscation Acts unconstitutional and presciently observed that “these in rem proceedings may today be the engines of punishment to the rebels, but, in the future, they may be the instruments of oppression, injustice, and tyranny. . .”

A Brief History of Civil Forfeiture

“In the future, [civil forfeiture proceedings] may be the instruments of oppression, injustice, and tyranny. . .”—Kentucky Supreme Court¹¹

American forfeiture law arose from the British Navigation Acts of the mid-17th century.¹² Passed during England's vast expansion as a maritime power, the Acts required British ships to carry imports and exports. If the Acts were violated, the ships or the cargo could be seized and forfeited to the crown regardless of the guilt or innocence of the owner. Using the British statutes as a model, the first United States Congress passed forfeiture statutes to aid in the collection of customs duties, which provided 80-90 percent of the finances for the federal government during that time.¹³

The Supreme Court upheld early forfeiture statutes.¹⁴ Most important to understanding these early cases is the underlying rationale for permitting civil forfeiture against even innocent property owners. The Court reasoned that civil forfeiture was closely tied to the practical necessities of enforcing admiralty, piracy,

and customs laws. *In rem* forfeiture permitted courts to obtain jurisdiction over property when it was virtually impossible to obtain jurisdiction over the persons guilty of violating maritime law. Justice Joseph Story wrote that the “vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner.”¹⁵ However, Story justified such forfeitures “from the necessity of the case, as the *only* adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party.”¹⁶

The Supreme Court released civil forfeitures from their historical moorings during the Civil War. The Confiscation Acts allowed the Union to seize and forfeit the Confederates' Northern property and the property of those who aided the Confederacy.¹⁷ In 1862, the Supreme Court of Kentucky declared the Confiscation Acts unconstitutional and presciently observed that “these *in rem* proceedings may today be the engines of punishment to the rebels, but, in the future, they may be the instruments of oppression, injustice, and tyranny. . .”¹⁸ Numerous challenges to these Acts were mounted and eventually the U.S. Supreme Court agreed to address the issue. In 1871 the Acts were upheld.¹⁹ Validating the Acts worked “a revolution in forfeiture law that persists to this day—use of the *in rem* action without constitutional limitation.”²⁰

Throughout most of the 20th century, civil forfeiture remained a relative backwater in American law, with one exception—the government used it extensively during Prohibition against automobiles and other vehicles transporting illegal liquor. Modern civil forfeiture use exploded during the early 1980s as the government at all levels stepped up the war on drugs. No longer tied to the practical necessities of enforcing maritime law, the forfeiture power has become one of the most powerful weapons in the government’s crime-fighting arsenal. Additionally, as described below, the forfeiture power is not limited to fighting the drug war.

A Stacked Deck: How Arizona’s Forfeiture Laws Endanger Property Rights

“It is not the burden of the state to establish who the wrongdoers are, nor that any wrongdoer has an interest in the property.” —Arizona Court of Appeals²¹

Arizona’s civil forfeiture scheme stacks the deck against property owners by requiring only a tenuous connection between the forfeited property and any possible criminal activity. As the Arizona Court of Appeals recently stated, “the state is not required to show ‘who the wrongdoers are, nor that any wrongdoer has an interest in the property.’”²² There is no requirement that a person be charged with or convicted of a crime before forfeiture is permissible, because

the proceedings are civil and directed at the property itself instead of a person accused of wrongdoing.

A 1993 award-winning exposé of Arizona forfeiture law by *Tribune* reporter Mark Flatten revealed that only one-quarter of those who lost property in the forfeiture cases studied were ever charged with a crime.²³ Similarly, one national study found that approximately 80 percent of persons whose property the federal government seized for forfeiture were never charged with a crime.²⁴ Unfortunately, Arizona law does not require agencies authorized to forfeit property to compile these types of statistics—and the nature of this study did not lend itself to the Herculean task of updating the *Tribune* story.²⁵

The Mechanics of a Civil Forfeiture Action

Arizona’s criminal code lists 28 offenses that allow the government to seize property. These “racketeering” offenses include:

1. Homicide;
2. Robbery;
3. Kidnapping;
4. Forgery;
5. Theft;
6. Bribery;
7. Gambling;
8. Extortion;
9. Prohibited drugs, marijuana, or other prohibited chemicals or substances;
10. Obstructing or hindering criminal investigations or

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prosecutions;

11. A scheme or artifice to defraud;
12. Sexual exploitation of a minor;
13. Prostitution;
14. Terrorism; or
15. Money laundering.²⁶

Because many of the listed crimes include other, similar offenses, more than 80 crimes are implicated.²⁷ And the list of “similar” offenses keeps growing. The state legislature recently amended the money laundering statute to include the purely federal crime of smuggling illegal immigrants into the United States.²⁸ (See Appendix A for a complete list of these crimes.)

Prosecutors need only prove the property’s connection to allegedly criminal activity by a mere “preponderance of evidence” standard—not proof “beyond a reasonable doubt.”

Any person whose property the government seizes may try to secure release of the property pending the outcome of the forfeiture proceeding. To do so, the person must post bond with the court in the amount of the market value of the seized item.²⁹ Within 20 days of a seizure, the seizing agency must make “reasonable efforts” to provide notice of the seizure “to all persons known to have an interest in the property.”³⁰ Also within 20 days, the seizing agency must send a written request for forfeiture to a state attorney.³¹

Once an attorney has determined that “a forfeiture is authorized by law,” a notice of pending forfeiture is typically filed in the Superior Court and served on those known to have an interest in the property.³² However, a common practice is to mail the notice of pending forfeiture to the potential claimant rather than file it in the Superior Court.

This has the practical effect of requiring a claimant to file first in the Superior Court. And, of course, the first filing fee is more expensive in Superior Court. Any person claiming an interest in the property must file a verified claim within 30 days after receiving the notice.³³ The government must then file a complaint against the property within 60 days of filing a notice of pending forfeiture.³⁴ Any person making a claim to the seized property must answer the complaint within 20 days.³⁵ If no answer is filed, the state may then proceed with the forfeiture action.³⁶ It is then up to the Court to schedule a hearing on any claimant’s assertion of an interest in the property.

At the hearing, prosecutors need only prove the property’s connection to allegedly criminal activity by a mere “preponderance of evidence” standard—not proof “beyond a reasonable doubt,” as in criminal cases.³⁷ Once the state has met its burden of showing that the property is subject to forfeiture, the burden then shifts to the claimant to prove by a preponderance of the evidence that the property is exempt from forfeiture.³⁸ Property owners may defeat a forfeiture action only upon showing *all* of the following:

- 1) The owner acquired an interest in the property before or during the conduct giving rise to the forfeiture;
- 2) The owner did not empower any person whose act or omission gave rise to the forfeiture with legal or equitable power to sell or transfer the property, and that they were not married to any

such person, or if married to such person, that the property was held as separate property; and

3) The owner did not know and could not reasonably have known of the act or omission giving rise to the forfeiture *or* that it was likely to occur.³⁹

This “list of exemptions is exclusive and controls the property rights of all claimants.”⁴⁰ An inference also exists in the law that any money found in proximity to contraband or any instrumentalities of an offense are the proceeds of contraband or were used or intended to be used to facilitate the commission of the offense.⁴¹ There is also a one-way attorneys’ fees statute, which says that any claimant who fails to establish that his “entire interest is exempt” *shall* pay “the state’s costs and expenses . . . including reasonable attorney fees.”⁴² That means even a claimant who prevails on most of his claim will still be ordered to pay the state’s costs and fees. These procedural hurdles and evidentiary standards spell disaster for innocent property owners caught up in forfeiture proceedings.

Few property owners can meet the burdens of civil forfeiture proceedings and they often do not challenge seizures of their property. This is especially true when government seizes property, the value of which would be greatly exceeded by the time, attorney fees and other expenses necessary to fight the forfeiture. Despite the claims of law enforcement that asset forfeiture laws are designed to break the backs of organized crime by removing the financial

incentives and gains of illegal activity, it appears that, in reality, the majority of forfeitures are aimed at small-time offenders.⁴³ There are many reasons. One is that city police departments do not have the time or resources to conduct the type of large-scale investigations required to net big-time drug dealers.⁴⁴ Another is that drug kingpins know all too well how to hide their assets from law enforcement.⁴⁵

The purported intent of forfeiture laws is to deprive criminals of their ill-gotten property and cash and then use those proceeds to enforce the very laws the wrongdoers violated. The unintended consequence of this effort, however, may be that many officials now view raising revenue—not enforcing the law fairly and justly—as the primary goal of their activities.

Where are the Proceeds of Civil Forfeitures Deposited?

All proceeds obtained from forfeitures, either cash receipts or the money collected from selling seized property, are deposited into anti-racketeering revolving funds controlled by prosecutors.⁴⁶ Forfeiture proceeds may be used, almost exclusively, only for law enforcement purposes.⁴⁷ Specifically, the money may be used for “the investigation and prosecution of any offense included in the definition of racketeering.”⁴⁸ The authorizing statutes also permit forfeiture funds to be spent for gang and substance abuse prevention programs, but as is discussed later, only a small amount of money is actually

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dedicated to such programs. Law enforcement agencies retain full discretion over the disbursement of forfeited money and assets. Therefore, seizing and prosecuting agencies in Arizona have a direct financial stake in the outcome of forfeiture efforts.

The Attorney General (AG) and each of the County Attorneys' offices administer anti-racketeering revolving funds.⁴⁹ These funds are commonly referred to as RICO⁵⁰ accounts. Monies or property forfeited as a result of seizures instigated by political subdivisions are "held for the benefit of the agency or agencies responsible for the seizure or forfeiture to the extent of their contribution."⁵¹ For example, Maricopa County's RICO account holds funds in trust for the more than 20 law enforcement agencies in the county.

There is virtually no oversight of the money flowing in and out of the RICO accounts annually. Although the law requires prosecutors to submit quarterly reports to the Arizona Criminal Justice Commission (ACJC), which are ultimately distributed to elected officials, the reports do not provide detailed information concerning the number of forfeiture cases filed, the average amount forfeited, the number of criminal charges filed against owners who have had property forfeited, or the details about exactly how the money is spent.

Originally, there was only one RICO account, managed by the AG, and the legislature provided for oversight of the

account by requiring the Auditor General to audit it each fiscal year. This "audit" provision was repealed in 1983.⁵² One year later, the legislature authorized each county to establish and manage separate RICO accounts. The legislature also used to require that any monies in the RICO accounts exceeding \$25,000 be deposited into the state general fund. That provision was later increased to \$50,000, and then removed entirely in 1987.⁵³ Restoring these two provisions, or adopting other similar measures, would reduce the potential for RICO account mismanagement and lessen the direct profit incentives found in Arizona's forfeiture laws.

Are Innocent People Really Harmed?

The purpose and scope of this paper was limited to researching forfeiture revenues, forfeiture spending, and agency budgets to demonstrate that Arizona's civil forfeiture laws violate constitutional due process protections by injecting a profit incentive into prosecutorial decision making. It was tempting to spend time researching individual cases, as Mark Flatten did 10 years ago, in order to put a human face on the raw numbers. To satisfy that desire, Appendix B contains an admittedly subjective top-10 abuses of civil forfeiture (as reported by Mark Flatten).

One of those abuse cases involves James Hernandez, who lost his 1983 Buick sedan after his son was pulled over by Phoenix police for going approximately 20 miles per hour over

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the posted speed limit. Officers claimed they noticed a strong odor of marijuana and said Mr. Hernandez's son was attempting to push something under the front seat. After searching the car, they found \$30 worth of marijuana. The Buick was seized by Phoenix police for forfeiture. Mr. Hernandez tried to get the vehicle back by supplying receipts for payment, the car's registration, receipts for insurance payments, and even a credit application. However, the police and prosecutors concluded that the son was the true owner and the Buick was forfeited.⁵⁴

Lupe Aguilar, on the other hand, was able to obtain release of her seized vehicle following an incident with her son, but it was costly. Ms. Aguilar was required to pay \$4000 to have her 1989 Ford Aerostar van returned from the Glendale police. Her son was seen loading a television set from a motel into the back of the van. Police seized the van for forfeiture, alleging it had been used to facilitate a burglary. Sadly, such settlement offers, in which property owners are permitted to "buy back" their property, is not an uncommon practice.⁵⁵

A valuable resource that demonstrates the terrible abuses sometimes wrought by civil forfeiture is FEAR.org (FEAR stands for "Forfeitures Endanger American Rights).

Do They Have Something to Hide? Putting Together the Pieces of the Puzzle

"We were unable to obtain an accurate estimate of annual forfeitures receipts . . . because duplication of reporting commonly occurs . . . and not all jurisdictions file reports . . ."—Arizona Auditor General⁵⁶

Millions of dollars flow in and out of RICO accounts each year in Arizona. Yet looking solely at generated revenues could not establish a violation of due process using the U.S. Supreme Court's *Marshall* factors. A thorough analysis requires a determination of how the money was spent and how that spending compared to the agencies' total budget spending.

The first step in the data compilation project was to review quarterly RICO reports submitted to ACJC. Each quarter, counties and agencies using or planning to use RICO funds submit to ACJC uniform reports detailing RICO monies received and RICO monies spent employing one of the following methods:

1. The individual agency submits the report directly to ACJC;
2. The individual agency submits the report to the corresponding county attorney, who then forwards the report to ACJC; or
3. The individual agency submits the report to the county attorney and the county attorney compiles a report

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and forwards the compiled report to ACJC. These compiled reports do not differentiate individual agency data, but provide the data for the county as a whole.

Once ACJC receives all of the information, it compiles the data into a short report that is distributed to the governor, with copies sent to the director of the Department of Administration, the President of the Senate, the Speaker of the House of Representatives, and the director of the Joint Legislative Budget Committee.⁵⁷ We relied on the actual reports as they were submitted to ACJC, instead of ACJC's compiled reports. The authors checked the compiled reports against the actual reports to ensure accuracy, giving preference to submitted data over compiled information.⁵⁸

We reviewed a total of four years of quarterly RICO reports from over 40 agencies. Although the ACJC office does compile the data, their headings were very vague and did not allow the data to be analyzed to the desired depth. As an example, ACJC lumps all salaries, overtime, and employee-related expenses into one heading on the compiled report. However, it was important for purposes of this report to be able to separate overtime spending from regular salary spending.

After compiling the data, we began gathering the corresponding budgets for agencies using RICO funds.⁵⁹ Most agencies were able to comply with our public records request within two weeks. Unfortunately, some data took months to obtain, most notably the Pinal

County Attorney's Office, which took over 18 weeks. As a result, it was necessary to continually follow up with the agencies until the budgets were obtained.⁶⁰ Ultimately, we obtained annual budgets for fiscal years 1999-2000, 2000-2001, 2001-2002, and 2002-2003 from the following agencies:⁶¹

Apache County Attorney's Office
 Apache Junction Police Department
 Arizona Attorney General's Office
 Arizona Department of Public Safety
 Avondale Police Department
 Casa Grande Police Department
 Chandler Police Department
 Cochise County Attorney's Office
 Coconino County Attorney's Office
 Gila County Attorney's Office
 Glendale Police Department
 Graham County Attorney's Office
 La Paz County Attorney's Office
 Counter Narcotics Alliance
 Maricopa County Attorney's Office
 Maricopa County Sheriff's Office
 Mesa Police Department
 Mohave County Attorney's Office
 Navajo County Attorney's Office
 Northern Arizona Univ. Police Dep't
 Oro Valley Police Department
 Peoria Police Department
 Phoenix Police Department
 Pima County Attorney's Office
 Pima County Sheriff's Office
 Pinal County Attorney's Office
 Pinal County Sheriff's Office
 Santa Cruz County Attorney's Office
 Scottsdale Police Department
 South Tucson Police Department
 Tempe Police Department
 Tucson Airport Police Department

Private entities may be crowded out of the marketplace by virtue of their efficiency—the very quality that makes them more productive than state entities.

Tucson Police Department
 Yavapai County Attorney's Office
 Yuma County Attorney's Office

Amassing all of the budgets into one workbook was a particularly difficult task because no two budgets were alike. Some budgets were composed of only a page or two, while others were over 50 pages long. To standardize the information, we used the major categories from the ACJC-RICO reports, including salaries, professional and outside services, travel expenses, operating expenses, and equipment. One by one, line by line, every expense was categorized and put into an Excel spreadsheet. We then verified all data input against the original budgets.

The Numbers Don't Lie: The Specter of Bias is Raised When Forfeiture Proceeds Flow Directly to Police and Prosecutors

"If you talk to law enforcement people on an informal basis . . . they are more interested in money than they are in getting drugs off the street." —Former Phoenix police officer⁶²

"Considering the magnitude of the forfeitures now being made, the broad application of the laws, and what appears to be an inherent potential for possible misuse/abuse, we believe a comprehensive evaluation [of Arizona's forfeiture laws] is overdue." —Arizona Auditor General⁶³

Although the purpose of this paper—particularly this section—is to demonstrate that Arizona's civil asset forfeiture laws create an improper incentive for police and prosecutors to maximize property seizures as a means of increasing the agencies' budgets in violation of constitutional due process protections, the *Tribune's* Mark Flatten ably established this precise point over a decade ago. In his award-winning series examining Arizona's forfeiture laws, Mr. Flatten quoted a Department of Public Safety officer as bluntly stating, "Do you go after the extra bucks? You're damned right you do, especially to keep in operation."⁶⁴

In the landmark *Marshall*⁶⁵ decision described above, the U.S. Supreme Court probed the limits of when a pecuniary interest unduly biases the government's decision to prosecute a case. In upholding the challenged scheme, the court noted that there was no realistic probability that institutional gain was a motivation for prosecuting cases because (1) the civil penalties in that case represented substantially less than one percent of the agency's overall budget, and (2) the salary of the individual charged with making the decision to prosecute cases was fixed by statute. Thus, "the enforcing agent [was] in no sense financially dependent on the maintenance of a high level of penalties."⁶⁶ Neither of these protective factors is present in Arizona.

Arizona's forfeiture scheme has the potential to motivate prosecutors to enhance their budgets. As Table 1 and Table 2 demonstrate, many law

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Table 1: Statewide RICO Administrative Expenditures FY 2000-2003 (Regular Salaries, Employee-Related Expenses, and Overtime)

	State (\$)	County (\$)	Statewide total (\$)
FY 2000	463,504	1,818,600	2,282,103
FY 2001	835,510	1,720,391	2,555,901
FY 2002	1,152,851	1,750,658	2,903,509
FY 2003	729,690	2,414,380	3,144,070
Grand Total	3,181,555	7,704,028	10,885,583

Table 2: County RICO Forfeitures as Percentage of County Budgets, FY 2000-2003 (U.S. Currency, Other Property, and Interest v. Total Law Enforcement Budget)

County	FY 2000	FY 2001	FY 2002	FY 2003	4-year average
Apache	3.31	2.75	0.11	-0.17	1.50
Cochise	12.67	31.27	16.93	13.16	18.51
Coconino	2.64	10.53	5.20	13.33	7.93
Gila	2.64	2.93	0.93	2.46	2.24
Graham	2.12	2.51	2.24	2.52	2.35
Greenlee*	0.00	0.00	0.00	0.00	0.00
La Paz**	0.00	1.58	50.00	35.01	21.65
Maricopa	1.05	0.80	0.68	0.63	0.79
Mohave	11.99	13.59	14.38	6.95	11.73
Navajo	1.89	2.11	5.86	8.67	4.63
Pima	1.57	1.33	1.68	2.16	1.68
Pinal	2.43	2.72	2.14	3.52	2.70
Santa Cruz	46.58	31.17	34.67	27.89	35.08
Yavapai	7.73	10.84	7.50	8.08	8.54
Yuma	3.81	1.68	3.10	2.40	2.75

* Budget was not provided by Greenlee County

** FY 2000 budget was not provided by La Paz County

enforcement agencies rely on forfeiture revenues not only to pay the expenses of regular employees, but also for a significant percentage of their overall budget.⁶⁷

Exactly How Much Money Are We Talking About?⁶⁸

Statewide, proceeds from forfeitures during the past four years have brought in an average of \$16 million per year, with the annual forfeiture revenue increasing 34 percent between 2000-2003. The total amount of money generated by forfeitures from 2000-2003 was \$64,518,020 (see Table 3). These numbers don't include forfeited property used by the agency (rather than auctioned) such as houses, boats, and cars, which are employed in sting operations and undercover work, or automobiles driven as D.A.R.E. vehicles.

We examined the agencies' spending habits using the extremely broad categories employed by the reporting agencies themselves, including administrative expenses,⁶⁹ civil remedies,⁷⁰ construction, equipment,

gang/drug prevention and education,⁷¹ match to grants,⁷² operating expenses, professional/outside services, travel, and witness protection.⁷³ By far the most constitutionally dubious use of forfeiture funds is paying the salaries of agency employees, which is found under administrative expenses. During the four-year period examined, nearly \$11 million was spent on law enforcement employee compensation.

Scott Bullock, a senior attorney with the Institute for Justice and a constitutional expert on direct profit incentives, said, "It is astounding that Arizona law permits forfeiture revenue to be used to pay the salaries of law enforcement. Officials in Arizona thereby personally and institutionally benefit to a large degree from forfeited property."⁷⁴ Former Arizona Attorney General Bob Corbin has also criticized the use of RICO funds to pay salaries, saying it opens the door to accusations "of a conflict . . . going after people so you get more people in your office."⁷⁵ Corbin correctly noted that paying salaries with RICO funds "has the

"It is astounding that Arizona law permits forfeiture revenue to be used to pay the salaries of law enforcement. Officials in Arizona thereby personally and institutionally benefit to a large degree from forfeited property."

Table 3: Statewide Forfeiture Revenues, FY 2000-2003 (U.S. Currency, Property, and Interest Earned)

	State (\$)	County (\$)	Statewide Total (\$)
FY 2000	1,583,751	12,388,602	13,972,353
FY 2001	3,154,593	12,083,186	15,237,779
FY 2002	4,183,462	12,445,228	16,628,690
FY 2003	4,359,795	14,319,403	18,679,198
Grand Total	13,281,601	51,236,419	64,518,020

appearance [of illegality], and sometimes appearance is worse than the actual violation.”⁷⁶

Using RICO money to pay salaries is not new in Arizona.⁷⁷ In 1992, the attorney heading the Department of Public Safety’s (DPS) forfeiture unit stated in a memo that in allowing DPS attorneys to prosecute cases, rather than sending them to the state, county, and city prosecutors, would bring in enough additional revenue to “fund the bottom salary of legal advisor.”⁷⁸

In states such as New Jersey, paying salaries using forfeited funds is prohibited.⁷⁹ However, such measures do not remove the direct profit incentive because law enforcement agencies are still permitted to keep the proceeds of forfeiture actions. Prohibiting the use of forfeiture funds to pay salaries may distance law enforcement officers from the money, but as long as the seizing department benefits financially from the forfeiture, a taint remains. It would be tempting simply to “fix” Arizona’s laws by prohibiting forfeiture revenues from being used to pay salaries. However, when we narrow budgets down to non-administrative expenses alone, the percentage of the law enforcement budgets funded by forfeiture revenue is, in many cases, astounding. Table 4 illustrates that forfeiture revenues provide funding for as much as 399 percent of law enforcement agency non-administrative budgets.⁸⁰ There is no reason for substantial percentages of law enforcement operations to be funded by forfeitures. The only way to remove or reduce this profit incentive is to ensure

that agencies do not have a direct financial stake in forfeiture revenues.

As previously noted, the RICO statutes permit forfeiture revenues to be spent on drug abuse and gang prevention programs.⁸¹ In 1991, the forfeiture statutes were amended so as to allow—but not require—spending on prevention programs, despite law enforcement’s aggressive lobbying against the proposal.⁸² During the past four years, law enforcement has spent a total of \$3,250,928 on such deterrence programs (see Table 5). This constitutes a mere five percent of the total forfeiture revenues collected, and just seven percent of total RICO expenditures in the same time period (see Figure 1). Additionally, there has been a marked decrease in the amount of forfeiture revenues spent on prevention programs. According to ACJC, agencies statewide spent \$942,545 on gang/drug prevention and education programs in 2000. After a spike in 2001, the number dwindled to \$532,200 in 2002 and improved only marginally in 2003 (see Table 5).

To complicate the issue, these figures are considerably different from those reported by the Arizona Drug and Gang Prevention Resource Center (ADGPRC). According to ADGPRC calculations, \$1,136,959 and \$405,787 were expended statewide in 2000 and 2002, respectively, on gang and drug prevention programs using RICO funds.⁸³ What is particularly interesting is how the RICO contributions compare to all gang and drug prevention program

In 1992, the attorney heading the Department of Public Safety’s (DPS) forfeiture unit stated in a memo that in allowing DPS attorneys to prosecute cases, rather than sending them to the state, county, and city prosecutors, would bring in enough additional revenue to “fund the bottom salary of legal advisor.”

Table 4: Forfeiture Revenues as Percentage of Non-Administrative Budgets, FY 2000-2003 (U.S. Currency, Other Property, and Interest v. Non-Administrative Budgets)

	FY 2000	FY 2001	FY 2002	FY 2003	Grand totals 2000-2003
Attorney General	15.66	21.36	30.46	33.15	25.22
Dept. of Public Safety	0.00	0.00	0.77	1.91	0.71
State Total	3.63	6.46	7.89	8.91	6.84
Apache	41.01	27.49	1.06	-1.71	15.44
Cochise	31.60	86.77	40.25	24.14	41.92
Coconino	8.82	34.80	21.70	64.40	30.74
Gila	15.18	18.23	4.86	16.26	12.42
Graham	23.97	23.48	6.38	8.14	9.86
Greenlee*	0.00	0.00	0.00	0.00	0.00
La Paz**	0.00	7.15	232.54	150.24	194.43
Maricopa	5.18	4.10	3.56	3.58	4.09
Mohave	54.55	51.60	40.81	16.26	34.44
Navajo	10.97	9.87	27.92	46.77	24.20
Pima	6.96	5.84	6.41	8.39	7.00
Pinal	15.39	18.63	16.11	28.74	19.72
Santa Cruz	398.69	116.62	176.32	105.70	157.32
Yavapai	39.45	60.43	46.70	52.48	49.77
Yuma	10.82	4.34	9.57	6.33	7.42
County Totals	3.31	3.09	2.83	3.26	3.12

* Budget was not provided by Greenlee County

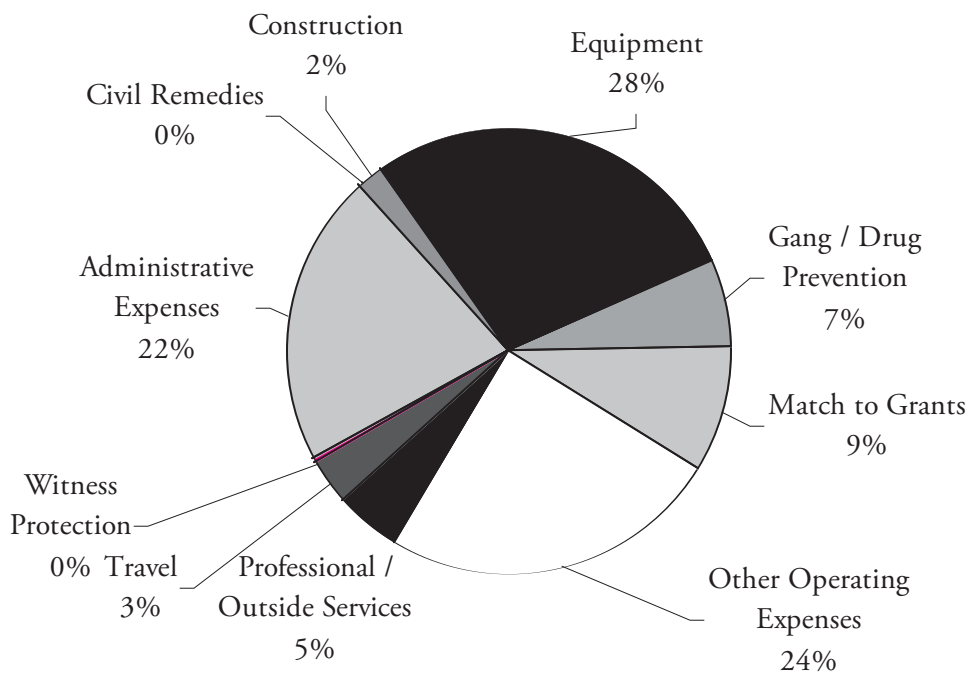
** FY 2000 budget was not provided by La Paz County

Table 5: Total Statewide Gang/Drug Prevention Expenditures, FY 2000-2003

	State* (\$)	County (\$)	Statewide Total (\$)
FY 2000	145,549.82	796,995.56	942,545.38
FY 2001	142,885.07	972,164.10	1,115,049.17
FY 2002	21,500.00	510,700.00	532,200.00
FY 2003	-	661,133.41	661,133.41
Grand Total	309,934.89	2,940,993.07	3,250,927.96

*Includes Department of Public Safety

Figure 1: Total Statewide RICO Expenditures by Category, FY 2000-2003



spending. Civil asset forfeiture contributed on average an insignificant 0.7 percent of statewide spending on prevention and treatment programs, and it averaged just 1.5 percent of prevention only programs⁸⁴ (see Figure 3). The amount of money expended using RICO funds in 2002 represents a 10-year low in RICO prevention spending. According to the 2002 ADGPRC Program Inventory,⁸⁵ RICO funded over \$1.6 million in prevention programs in

1993—four times the amount funded in 2002. Although forfeiture revenues have been increasing, prevention program spending is going down (see Table 6 and Figure 2).

Because the AG and the individual counties manage separate RICO accounts, the various RICO revenues and spending habits must be examined individually.

Table 6: Statewide Substance Abuse Funding from All Sources, FY 2000-2003*

	Total funding	Total prevention funding	RICO funding	RICO % of total funding	RICO % prevention funding	# Programs funded by RICO
FY 2000	153,897,099	73,552,350	1,136,959	0.7	1.5	100
FY 2001	129,591,910	64,438,465	1,314,517	1.0	2.0	173
FY 2002	131,760,088	58,994,044	405,787	0.3	0.7	91
FY 2003**	0	0	0	0.0	0.0	0.0

*As reported by the Arizona Drug and Gang Prevention Resource Center annual Program Inventory

**As of May 27, 2004, the 2003 Program Inventory had not yet been released by ADGPRC

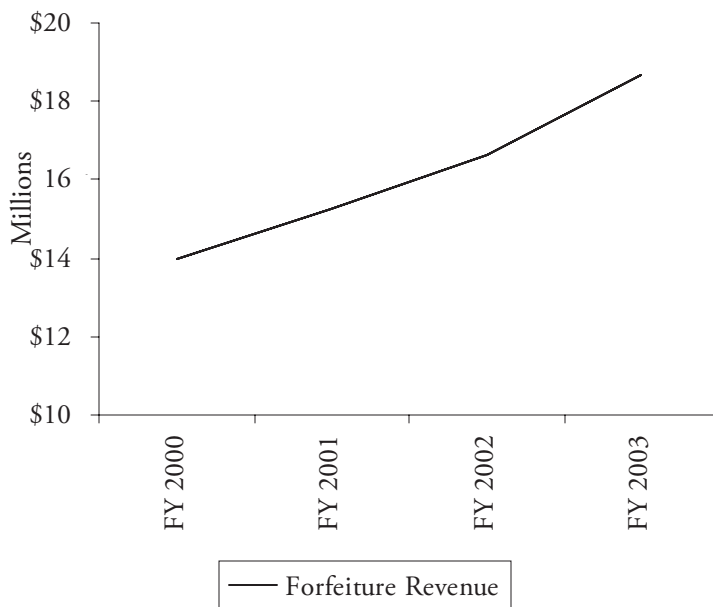
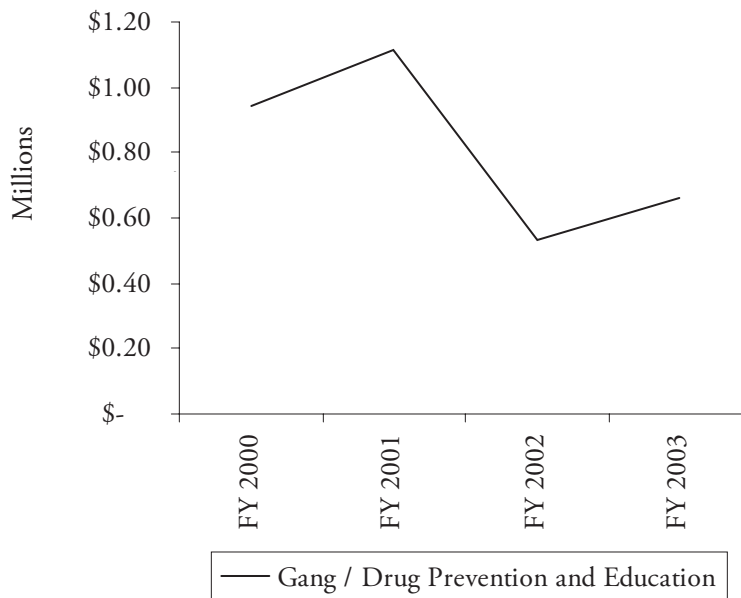
Figure 2: Statewide Forfeiture Revenue FY, 2000-2003

Figure 3: Statewide Gang/Drug Prevention and Education Spending, FY 2000-2003

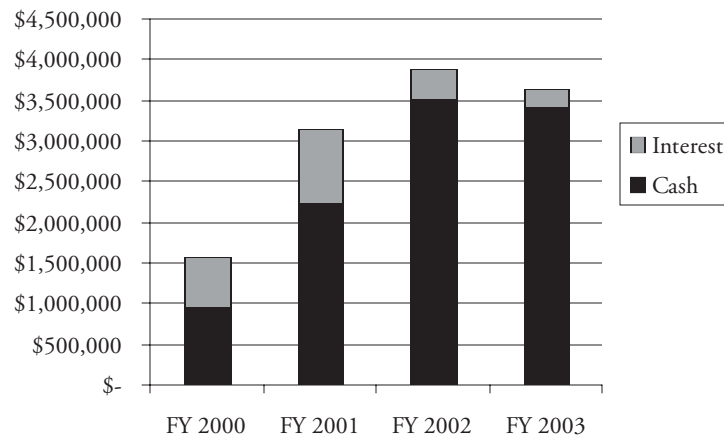


This means that nearly one-third of the collected forfeitures in 2002 directly benefited employees of the AG’s office. This is actually a conservative figure because it does not include money spent on professional/outside services, which is used, in part, to pay the salaries of temporary employees and contract workers.

The Attorney General Revenue and Spending

Between 2000 and 2003, the AG’s office annual forfeiture revenues jumped from \$1,583,751 to \$3,634,041 (see Figure 4). In 2002 and 2003, forfeiture proceeds constituted over seven percent of the AG’s total operating budget for those same years⁸⁶ (see Table 7). In 2002, forfeiture monies were used to pay \$916,257 in regular salaries. Spending on employment-related expenses such as medical benefits totaled \$198,345 (see Table 8). In that same year, the AG’s office forfeited \$3,526,650 (see Figure 4). This means that nearly one-third of

the collected forfeitures in 2002 directly benefited employees of the AG’s office. This is actually a conservative figure because it does not include money spent on professional/outside services, which is used, in part, to pay the salaries of temporary employees and contract workers.⁸⁷ In 2002, \$625,077 was used to pay for expenses designated as professional/outside services. Combining these costs with administrative expenses, roughly \$1,739,679 was used directly and indirectly to compensate personnel, (including regular, temporary and contract employees), which is equivalent to a staggering 50 percent of the AG’s

Figure 4: Total Attorney General Forfeiture Revenue FY 2000-2003**Table 7: Attorney General Forfeiture Revenue in Relation to Budget, FY 2000-2003 (U.S. Currency, Other Property and Interest Earned)**

Fiscal Year	Percentage
FY 2000	3.45
FY 2001	6.13
FY 2002	7.49
FY 2003	7.26

Table 8: Attorney General RICO Expenditures by Category FY 2000-2003

	FY 2000(\$)	FY 2001(\$)	FY 2002(\$)	FY 2003(\$)	Grand total (\$) (2000-2003)
Administrative Expenses	338,135	774,491	1,114,602	677,016	2,904,244
Regular Salaries	278,193	645,886	916,257	552,025	2,392,361
Overtime Salaries	0	0	0	0	0
Employee-Related Expenses*	59,943	128,605	198,345	124,991	511,883
Civil Remedies	40,505	1,101	66	0	41,672
Construction	0	0	0	0	0
Equipment	88,604	113,809	424,139	143,942	770,494
Gang/Drug Prevention	25,000	51,500	21,500	0	98,000
Match to Grants	214,248	197,693	226,597	236,844	875,382
Operating	69,104	114,147	164,987	170,730	518,968
Evidence Acquisition	32,624	38,327	16,001	22,660	111,613
Professional/Outside Services	12,453	109,647	625,077	155,163	902,340
Travel	4,644	33,194	85,036	65,063	187,938
Witness Protection	0	0	0	0	0
Total	792,694	1,395,582	2,662,003	1,448,759	6,299,038

*Refers to expenses such as health benefits, taxes, and pension contributions paid by the employer.

The AG's office spent only \$21,500 of RICO funds on gang/drug prevention programs in 2002, a meager 0.6 percent of the forfeiture revenue. During the entire four-year period studied, the AG's office spent just \$98,000 on prevention programs. During that same period, \$111,613 was paid out for "evidence acquisition" (i.e., purchasing drugs).

forfeiture revenue.

In stark contrast, the AG's office spent only \$21,500 of RICO funds on gang/drug prevention programs in 2002, a meager 0.6 percent of the forfeiture revenue. During the entire four-year period studied, the AG's office spent just \$98,000 on prevention programs. During that same period, \$111,613 was paid out for "evidence acquisition" (i.e., purchasing drugs).⁸⁸ That means more money was injected into the drug underground than was spent on programs for drug prevention.

In addition to managing their own

forfeitures, the AG's office acts as a middleman for funds transferred into their account from federal authorities or neighboring states as a result of federal RICO cases or joint investigations. The AG distributes the fund transfers to local law enforcement agencies throughout the state. From 2000 to 2003, \$20,389,120 was transferred into the RICO account administered by the AG's office, while \$26,001,952 was transferred out (see Table 9). This figure does not take into account the \$12,247,064 in forfeiture revenue generated by the AG's office (see Figure 4). When combined, the four-year total for AG forfeitures and transfers into the

AG account equals \$32,636,184, and the total AG expenditures and transfers out of the AG account equals \$32,300,990. This \$32 million equals roughly 65 percent of the annual AG budget. At the current rate of growth, it would take just over six years for RICO inflows to pay for the AG's entire office budget.

County RICO Revenue and Spending

Collectively, Arizona's 15 counties generated \$51,236,419 in forfeiture revenue from 2000-2003 (see Table 10). During that four-year period, county law enforcement agencies spent \$7,704,028 on administrative expenses (regular wages, overtime, and employee-related expenses), which is 19 percent of the \$40,297,171 in RICO expenditures (see Figure 5 and Table 11). Nearly one out of every five dollars spent went directly into the pockets of the prosecutors and law enforcement officers conducting the forfeitures. At the same time, county law enforcement agencies allocated, on average, only seven percent of the expenditures to gang and drug prevention programs—one prevention dollar for every three dollars going toward wages and benefits (see Table 12).

With such a relatively small amount of money going to prevention programs, the vast majority of forfeiture money is used to benefit law enforcement personnel, equipment, and operating budgets—creating a direct and unmistakable profit incentive.

Between 2000 and 2003, 31 percent of expenditures (\$12,279,575) was used to buy equipment such as computers, weapons, cameras, vehicles, uniforms, exercise equipment, combat gear, and even an airplane engine⁸⁹ (see Table 11). What is more astonishing is that the RICO equipment expenditures averaged 8.7 percent of total equipment budgets between 2000 and 2003 (see Table 13). Consequently, county law enforcement agencies are relying on forfeiture money to cover more than eight percent of their equipment budgets—a risky proposition.

Travel, although only four percent of total county RICO spending, equated to an average 13.84 percent of travel budgets. Often considered a perk for employees, travel includes outlays for airfare and per diem expenses to training conferences and seminars.⁹⁰ Predictably, these events are in destination locations such as Colorado Springs, Las Vegas, Orlando, San Diego,⁹¹ Los Angeles, Boston, and New Orleans.⁹² With RICO money funding well over 10 percent of travel budgets, counties rely heavily on forfeiture money to pay for these trips. Although this is not direct compensation, these trips are tangible benefits that create added incentives to officers and prosecutors to make forfeitures.

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Table 9: Attorney General's Office RICO Fund Transfers, FY 2000-2003

	Transfers In (\$)	Transfers Out (\$)
FY 2000	3,108,201	2,275,912
FY 2001	3,415,749	11,562,306
FY 2002	8,043,076	5,199,526
FY 2003	5,822,094	6,964,207
GrandTotal	20,389,120	26,001,952

Table 10: Total County Forfeiture Revenue, FY 2000-2003 (U.S. Currency, Other Property and Interest Earned)

County	FY 2000 (\$)	FY 2001 (\$)	FY 2002 (\$)	FY 2003 (\$)	Grand totals 2000 - 2003
Apache	26,638	23,631	882	(1,500)	49,651
Cochise	374,235	1,188,017	725,870	627,051	2,915,174
Coconino	111,555	476,442	243,037	618,540	1,449,574
Gila	29,257	32,637	16,746	43,805	122,445
Graham	9,994	12,247	15,617	21,036	58,894
Greenlee	730	683	16,914	163	18,490
La Paz	186,589	6,834	215,912	146,110	555,444
Maricopa	7,287,312	5,929,274	5,393,609	5,296,609	23,906,804
Mohave	378,426	463,052	559,565	340,998	1,742,041
Navajo	45,544	54,180	157,356	233,529	490,608
Pima	2,662,438	2,462,489	3,742,669	5,094,171	13,961,766
Pinal	713,317	863,313	746,825	1,332,234	3,655,689
Santa Cruz	235,300	218,293	258,829	192,797	905,219
Yavapai	179,760	275,391	212,827	239,168	907,145
Yuma	147,510	76,704	138,569	134,692	497,474
County Totals	12,388,602	12,083,186	12,445,228	14,319,403	51,236,419

Figure 5: Total County RICO Expenditures by Category, FY 2000-2003

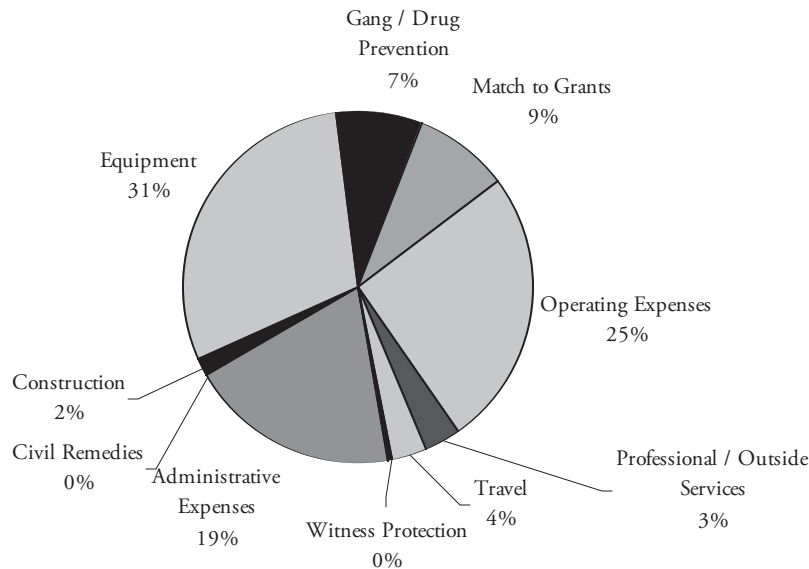


Table 11: Total County RICO Expenditures, FY 2000-2003

	FY 2000 (\$)	FY 2001 (\$)	FY 2002 (\$)	FY 2003 (\$)	Grand total (\$) 2000-2003
Administrative Expenses	1,818,599	1,720,391	1,750,658	2,414,380	7,704,028
Regular Salaries	612,696	592,806	615,196	742,993	2,563,690
Overtime Salaries	1,083,241	888,902	797,467	1,414,883	4,184,493
Employee-related Expenses	122,662	238,683	243,038	239,982	844,364
Civil Remedies	29,464	2,725	0	1,395	33,584
Construction	25,199	281,565	150,605	177,265	634,634
Equipment	4,180,720	2,772,230	2,825,152	2,501,474	12,279,575
Gang/Drug Prevention	796,996	972,164	510,700	639,633	2,919,493
Match to Grants	722,966	965,523	883,282	1,118,921	3,690,692
Operating Expenses	1,925,683	2,204,204	2,296,345	3,799,951	10,226,183
Professional/Outside Services	325,738	280,238	353,971	340,019	1,299,967
Travel	344,860	302,042	310,771	480,085	1,437,757
Witness Protection	17,796	17,643	24,832	10,987	71,258
County Total	10,188,020	9,518,725	9,106,317	11,484,109	40,297,171

Table 12: County Expenditures on Gang/Drug Prevention Programs, FY 2000-2003

County	FY 2000(\$)	FY 2001(\$)	FY 2002(\$)	FY 2003(\$)	Grand totals(\$) 2000-2003
Apache	0	0	0	0	0
Cochise	1,000	12,031	22,393	7,317	42,741
Coconino	34,108	32,000	35,000	40,000	141,108
Gila	1,500	0	0	0	1,500
Graham	0	0	0	0	0
Greenlee	0	0	0	0	0
La Paz	0	0	0	0	0
Maricopa	403,918	285,138	224,794	377,918	1,291,768
Mohave	0	2,052	295	58	2,405
Navajo	0	0	0	0	0
Pima	330,844	561,487	113,677	147,587	1,153,595
Pinal	25,625	77,456	108,541	85,253	296,876
Santa Cruz	0	0	0	0	0
Yavapai	0	2,000	6,000	3,000	11,000
Yuma	0	0	0	0	0
County Totals	796,996	972,164	510,700	661,133	2,940,993

Table 13: County RICO Expenditures as Percent of Law Enforcement Budgets, FY 2000-2003

	FY 2000 (%)	FY 2001 (%)	FY 2002 (%)	FY 2003 (%)	4-year average (%)
Administrative Expenses	0.25	0.22	0.21	0.29	0.24
Civil Remedies*	0.00	0.00	0.00	0.00	0.00
Construction	0.81	15.39	5.92	6.27	7.10
Equipment	9.17	7.20	8.70	8.13	8.30
Gang/Drug Prevention*	0.00	0.00	0.00	0.00	0.00
Match to Grants	272.12	425.46	258.78	17.10	243.36
Other Operating Expenses	1.88	1.93	1.70	1.91	1.86
Pro/Outside Services	0.76	0.69	0.72	1.31	0.87
Travel	17.36	13.62	11.94	12.42	13.84
Witness Protection*	0.00	0.00	0.00	0.00	0.00

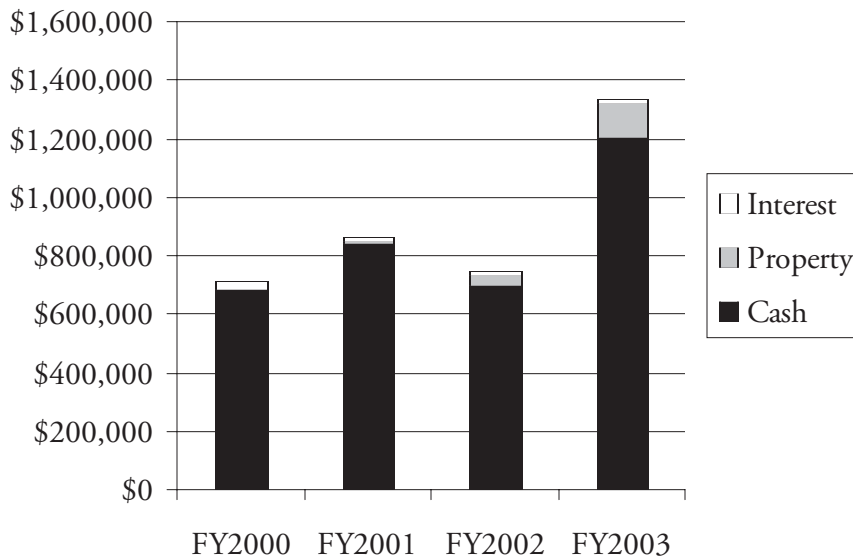
*These items did not appear in county budgets, resulting in a value of 0 percent of budget.

Pinal County

Of all the counties examined, Pinal County had the most alarming rates of increase, both in terms of forfeiture revenues and forfeiture spending. Between 2000 and 2003, Pinal County nearly doubled its forfeiture revenue from \$713,317 in 2000 to \$1,336,175 in 2003 (see Figure 6). In that same time period, expenditures on regular salaries, not including overtime pay or temporary employees, grew from zero

dollars to \$102,571 (see Table 14). Amazingly, spending on “office supplies” jumped from \$1,349 in 2000 to \$318,939 in 2003 (see Table 14). In comparison, the two largest counties in Arizona—Maricopa and Pima⁹³ -spent just \$6,882 and \$23,302, respectively, on office supplies in 2003. Office supplies are not to be confused with office equipment: in 2003, Pinal County spent \$126,214 on office equipment⁹⁴ and \$31,029 on data processing equipment.⁹⁵

Figure 6: Pinal County Forfeitures, FY 2000-2003



Of all the counties examined, Pinal County had the most alarming rates of increase, both in terms of forfeiture revenues and forfeiture spending.

Table 14: Pinal County RICO Expenditures by Category, FY 2000-2003

	FY 2000(\$)	FY 2001(\$)	FY 2002(\$)	FY 2003(\$)	Grand total 2000-2003
Administrative Expenses	0	0	0	102,571	102,571
Regular Salaries	0	0	0	102,571	102,571
Overtime Salaries	0	0	0	0	0
Employee-Related Expenses	0	0	0	0	0
Civil Remedies	0	0	0	384	384
Construction	13,500	276,565	48,730	6,206	345,001
Equipment	341,513	281,443	207,309	272,961	1,103,226
Gang/Drug Prevention	25,625	77,456	108,541	85,253	296,876
Match to Grants	32,789	37,176	37,612	48,484	156,061
Operating	99,260	94,136	57,039	936,662	1,187,096
Office Supplies	1,349	19,053	19,604	318,939	358,945
Professional/Outside Services	2,054	477	4,181	525	7,237
Travel	6,847	22,406	8,592	27,132	64,976
Witness Protection	336	0	9,713	3,254	13,303
Total	521,925	789,659	481,717	1,483,431	3,276,731

Pima County

Pima County, like Pinal, appears to be collecting a disproportionate amount of money in forfeitures. Approximately \$12.5 million in property and cash has been forfeited over four years with an additional \$1.5 million in interest earned (see Figure 7).

Another startling trend is the dramatic increase in administrative spending and the decrease in prevention program spending in Pima County. In 2000, just \$128,498 was used for employee compensation (see Table 15). By 2003, that number nearly quadrupled to \$485,518 (see Table 15). Administrative spending for overtime wages increased the most. In 2000, only

\$12,157 of RICO funds were used to pay overtime wages. Two years later, that number had skyrocketed nearly 20 times to an astonishing \$222,129. In 2003, it increased yet again to \$374,341—30 times the amount of money spent just three years earlier (see Table 15). In the same period, prevention spending fell from a four-year high of \$561,487 in 2001 to just \$147,587 in 2003.

Within Pima County, the Counter Narcotics Alliance (formerly M.A.N.T.I.S.—Metropolitan Area Narcotics Trafficking and Addiction Squad) spent the majority of the administrative monies. According to its submitted reports and provided budgets, nearly 75 percent of the Counter Narcotics Alliance's budget has been

Figure 7: Pima County Forfeitures FY, 2000-2003

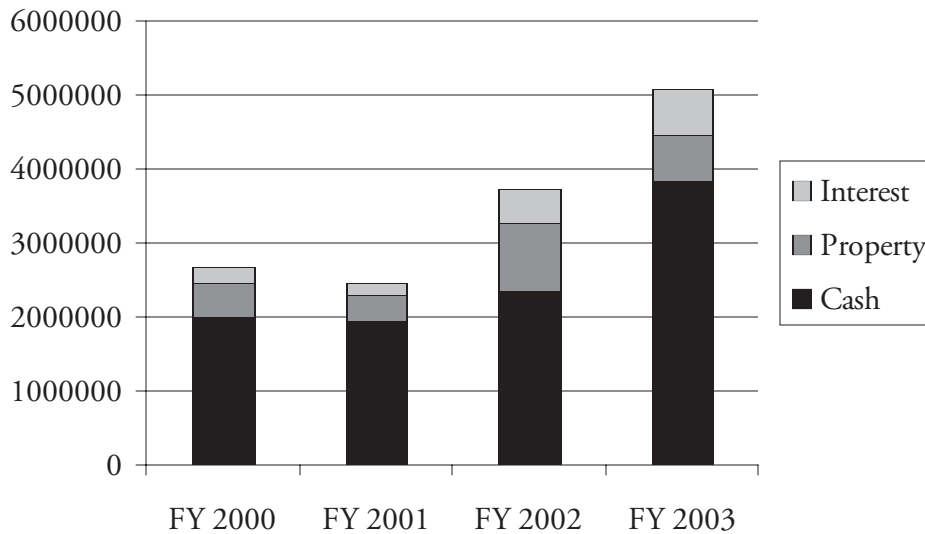


Table 15: Pima County RICO Expenditures by Category FY 2000-2003

	FY 2000(\$)	FY 2001(\$)	FY 2002(\$)	FY 2003(\$)	Grand total(\$) 2000-2003
Administrative Expenses	128,498	257,736	368,935	485,518	1,240,687
Regular Salaries	103,585	96,078	114,469	77,848	391,980
Overtime Salaries	12,157	41,423	222,129	374,341	650,050
Employee-Related Expenses	12,755	120,236	32,338	33,329	198,658
Civil Remedies	0	0	0	0	0
Construction	0	0	0	0	0
Equipment	823,227	427,274	412,609	371,930	2,035,040
Gang/Drug Prevention	330,844	561,487	113,677	147,587	1,153,595
Match to Grants	56,830	112,632	96,133	215,962	481,557
Operating	695,477	863,007	933,814	805,390	3,297,689
Professional/Outside Services	80,764	96,687	96,852	46,521	320,824
Travel	181,246	131,466	149,972	140,854	603,538
Witness Protection	0	0	0	0	0
Total	2,296,886	2,450,289	2,171,992	2,213,763	9,132,931

Table 16: County Narcotics Alliance RICO Expenditures and Budget by Category, FY 2000-2003

	FY 2000 (\$)		FY 2001 (\$)		FY 2002 (\$)		FY 2003 (\$)		Grand total 2000-2003 (\$)	
	Expenditures	Budget	Expenditures	Budget	Expenditures	Budget	Expenditures	Budget	Expenditures	Budget
Admin. Expenses	0	116,177	126,882	136,981	226,428	1,749,544	405,680	1,975,830	758,990	3,978,531
Regular	0	0	94,063	0	0	1,039,298	2,006	1,320,328	96,068	2,359,626
Overtime	0	113,833	0	132,174	222,129	426,026	373,648	379,774	595,777	1,051,807
ERE	0	2,344	36,791	4,806	4,299	284,220	30,026	275,728	71,116	567,098
CivilRemedies	0	0	0	0	0	0	0	0	0	0
Construction	0	0	0	0	0	0	0	0	0	0
Equipment	0	527,116	29,633	5,304	26,241	21,449	168,938	154,883	224,812	708,753
Gang/Drug Prevention	0	0	0	0	0	0	0	0	0	0
MarchtoGrants	0	201,115	100,632	184,504	96,133	238,597	215,962	242,619	412,727	866,835
Operating	0	302,841	225,639	224,387	245,937	201,455	227,892	187,396	699,468	916,079
Pro/Outside Services	0	136,720	1,377	114,338	447	90,386	1,575	53,536	3,399	394,980
Travel	0	18,542	5,067	9,710	3,506	8,047	7,126	7,126	15,698	43,424
Witness Protection	0	0	0	0	0	0	0	0	0	0
Total	0	1,302,510	489,231	675,224	598,691	2,309,479	1,027,172	2,621,389	2,115,094	6,908,602

funded directly and indirectly by RICO forfeitures.⁹⁶ It is clear that, during the past four years, the Counter Narcotics Alliance has become more and more dependant on RICO funds as its primary source of funding. In 2000, the Counter Narcotics Alliance (then M.A.N.T.I.S.) did not report using *any* RICO funds but, by 2003, it was using over \$1 million to cover nearly 100 percent of budgeted expenditures for overtime wages, match-to-grant contributions, and travel expenses. In some categories, RICO expenditures exceeded the agency budget, as seen in operating expenses and equipment (see Table 16). With such a heavy reliance on RICO funds to pay for the agency's operation, there is a clear and unmistakable profit incentive for law enforcement agents working on that task

force to make forfeitures.⁹⁷

Neither the Counter Narcotics Alliance nor Pima County report to ACJC's office exactly how much money the Alliance forfeited, because the county is reported as a single entity. We do know, however, that between 2000 and 2003, Pima County's forfeiture revenue rose from around \$2.5 million to just over \$5 million. In that same time, the Counter Narcotics Alliance went from using zero RICO dollars to over \$1 million (see Figure 8). It is hard to avoid the conclusion that the increased pressure on the Counter Narcotics Alliance to make forfeitures to fund operations likely contributed to the dramatic increase in forfeitures made over the four years examined.

It is clear that, during the past four years, the Counter Narcotics Alliance has become more and more dependant on RICO funds as its primary source of funding.

Figure 8: Counter Narcotics Alliance Expenditures v. Pima County Forfeiture Revenue, FY 2000-2003

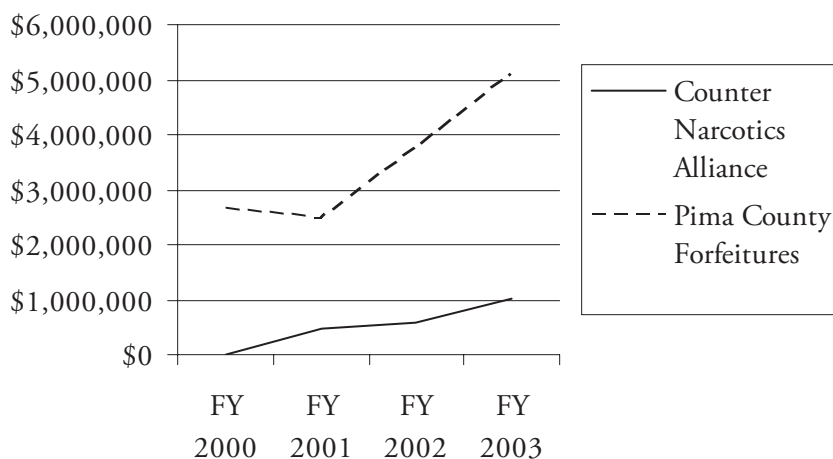


Table 17: Maricopa County Total Forfeiture Revenue, FY 2000-2003 (U.S. Currency, Other Property and Interest Earned)

	FY 2000(\$)	FY 2001(\$)	FY 2002(\$)	FY 2003(\$)	Grand total 2000-2003(\$)	Four-year average(\$)
Cash	6,828,980	5,076,580	4,817,707	4,934,737	21,658,004	5,414,501
Property	41,376	506,919	217,319	159,899	925,513	231,378
Interest	416,955	345,775	358,583	201,973	1,323,286	330,822
Total	7,287,312	5,929,274	5,393,609	5,296,609	23,906,804	5,976,701

The Maricopa County RICO account has seen revenues of nearly \$6 million per year in the past four fiscal years, for a total of \$23,906,804

Maricopa County: Forfeiting Mostly on Behalf of Local Police Agencies

The Maricopa County RICO account has seen revenues of nearly \$6 million per year in the past four fiscal years, for a total of \$23,906,804 (see Table 17). On average, the RICO fund account balance exceeds \$8 million.⁹⁸ Despite these high numbers, Maricopa County’s revenue is less than its proportional share of the population.

Like Pima County, Maricopa County reports forfeitures for the county as a whole—not by city or agency. Although we do not know who brought in what forfeitures, we do know the amounts spent (see Table 18).

City of Phoenix Police Department

Over the time period studied, the City of Phoenix spent \$2 million on average, and expended a total of \$8,187,759 in RICO funds over four years (see Table 18). As one would expect from Arizona’s largest city, Phoenix spent more than any other city in the state. What is unusual is how

Phoenix spends the RICO money. On average, over 55 percent of expenditures were for administrative expenses—primarily overtime wages. In 2003, Phoenix spent over \$1 million on overtime wages alone, which was 4.62 percent of Phoenix’s overtime budget (See Tables 18 and 19).

Another big expenditure for the City of Phoenix was operating expenses, accounting for 20 percent of RICO spending. Over four years, there has been a marked increase in spending on operating expenses: \$283,094 was spent in 2000, and \$777,162 was spent in 2003 (see Table 20). A large chunk of the 2003 operating expenses—\$546,319 to be exact—was reported as “other operating expenses” by the City of Phoenix on quarterly RICO reports. Another \$150,000 was designated as “special projects.” Despite the mysterious headings for the large expenditures, Phoenix did itemize procurements such as “police dog maintenance,” \$7,343; “postage,” \$2,979; and “office supplies,” \$1,875.

Although the RICO funds spent for

Table 18: Maricopa County RICO Expenditures by Agency, FY 2000-2003

	FY 2000(\$)	FY 2001(\$)	FY 2002(\$)	FY 2003(\$)	Grand total 2000-2003(\$)	4-year average(\$)
County Attorney	1,167,911	762,926	380,508	600,910	2,912,255	728,064
Avondale	64,564	32,049	9,801	69,117	175,531	43,883
Chandler	75,420	170,334	289,468	796,033	1,331,255	332,814
Glendale	187,681	91,872	128,459	117,788	525,800	131,450
Sheriff's Office	601,386	218,790	212,774	315,009	1,347,959	336,990
Mesa	335,311	585,084	237,206	353,796	1,511,397	377,849
Peoria	21,239	5,718	29,661	69,997	126,615	31,654
Phoenix	1,766,490	1,756,774	1,693,552	2,970,943	8,187,759	2,046,940
Scottsdale	1,083,049	171,452	393,505	261,447	1,909,453	477,363
Tempe	329,678	241,869	618,913	100,385	1,290,845	322,711
Total	5,632,730	4,036,869	3,993,846	5,655,424	19,318,869	4,829,717

Table 19: City of Phoenix Administrative Expenditures and Percent of Corresponding Budget

	Total Admin		Regular Wages		Overtime Wages		ERE	
	Dollars	% of Budget	Dollars	% of Budget	Dollars	% of Budget	Dollars	% of Budget
FY 2000	1,142,617	0.51	231,989	0.15	854,082	4.32	56,546	0.12
FY 2001	1,088,314	0.46	214,886	0.13	816,167	4.61	57,261	0.12
FY 2002	929,851	0.36	274,628	0.15	502,351	2.52	152,872	0.27
FY 2003	1,419,622	0.49	270,129	0.13	1,007,378	4.62	142,115	0.22

Table 20: City of Phoenix RICO Expenditures by Category FY 2000-2003

	FY 2000(\$)	FY 2001(\$)	FY 2002(\$)	FY 2003(\$)	Grand total 2000-2003	% of spending
Administrative Expenses	1,142,617	1,088,314	929,851	1,419,622	4,580,404	55.94
Regular Salaries	231,989	214,886	274,628	270,129	991,632	12.11
Overtime Salaries	854,082	816,167	502,351	1,007,378	3,179,978	38.84
Employee-Related Expenses	56,546	57,261	152,872	142,115	408,794	4.99
Civil Remedies	0	0	0	0	0	0.00
Construction	0	0	0	0	0	0.00
Equipment	278,960	233,918	316,522	587,175	1,416,575	17.30
Gang/Drug Prevention	0	0	0	4,527	4,527	0.06
Match to Grants	0	0	0	0	0	0.00
Operating	283,094	343,297	358,432	777,162	1,761,985	21.52
Pro/Outside Services	7,020	10,718	11,783	6,646	36,167	0.44
Travel	54,799	80,527	76,964	175,811	388,101	4.74
Witness Protection	0	0	0	0	0	0.00
Total	1,766,490	1,756,774	1,693,552	2,970,943	8,187,759	

operating expenses is less than three percent of the operating budget, the \$175,811 spent on travel expenses corresponded to over 200 percent of Phoenix’s 2003 travel budget (see Table 21). Of the \$175,811, \$130,000 was attributed to “out-of-state” travel. Over the past four years, there has been an increase in the use of RICO funds to pay for travel expenses. In 2000, just \$54,799 was expended on travel (although that still accounted for 85 percent of the city travel budget). By 2003, that amount had more than tripled (see Tables 20 and 21).

More alarming than the mushrooming travel expenditures are the equipment expenses. In 2003, 21 percent of budgeted equipment expenditures were paid for with RICO

funds, the majority of which was used to buy “office equipment” (see Table 21). While “office equipment” is not necessarily a critical expense for law enforcement agencies, it is disturbing to think that our police force is depending on RICO funds to cover 20 percent of equipment costs. Law enforcement agencies appear increasingly dependent on civil asset forfeitures.

The County Attorney

The next big spender in Maricopa County is the County Attorney’s Office. During the past four years, it has spent close to \$3 million in RICO funds. Unlike many of the other agencies we have highlighted, the County Attorney’s Office seems to have exhibited some positive trends. First, there has been a

Table 21: City of Phoenix RICO Expenditures as Percent of Budget, FY 2000-2003

	FY 2000(%)	FY 2001(%)	FY 2002(%)	FY 2003(%)
Equipment	2.85	1.83	4.98	21.14
Operating Expenses	0.77	0.91	0.96	2.59
Travel	85.92	157.74	139.33	200.35

Table 22: Maricopa County Attorney Total Expenditures v. Prevention Program Spending, FY 2000-2003

	Total Expenditures(\$)	Gang/Drug Prevention(\$)	Percent
FY 2000	1,167,911	335,596	29
FY 2001	762,926	250,889	33
FY 2002	380,508	203,281	53
FY 2003	600,910	347,306	58

Table 23: City of Scottsdale Equipment Expenditures by Subcategory, FY 2000-2003

	FY 2000(\$)	FY 2001(\$)	FY 2002(\$)	FY 2003(\$)	Grand total 2000-2003(\$)
Data Processing	95,057	120,320	104,178	3,151	322,705
Communications	350,000	0	48,235	(158)	398,077
Surveillance	637,993	28,880	6,823	23,862	697,558
Office	0	12,322	0	12,384	24,707
Transportation	0	0	119,236	2,865	122,101
Other	0	0	40,717	104,785	145,502
Total	1,083,049	161,523	319,189	146,889	1,710,650

Table 24: City of Scottsdale Equipment Expenditures v. Budget, FY 2000-2003

	Budget(\$)	Expenditures(\$)	% of Budget
FY 2000	2,061,336	1,083,049	53
FY 2001	1,969,026	161,523	8
FY 2002	1,755,386	319,189	18
FY 2003	19,700	146,889	746
Total 2000-2003	5,805,448	1,710,650	29

general decline in RICO spending over the past four years. Second, there has been a marked increase in the concentration of contributions to gang/drug prevention and education programs. As a matter of fact, in 2000, 29 percent of RICO expenditures were dedicated to prevention programs. By 2003, that amount had swelled to 58 percent⁹⁹ (see Table 22).

City of Scottsdale Police Department

Rounding out the top three spenders in Maricopa County is Scottsdale. The majority of Scottsdale's expenditures took place in 2000, and 100 percent of these expenditures purchased equipment. According to the reports

Scottsdale submitted to the ACJC for 2000, it spent \$95,057 on data processing, \$350,000 on communications, and \$637,993 on surveillance equipment, for a total of \$1,083,049 (see Table 23). It is striking that over four years, 29 percent of the equipment budget appears to be coming from RICO funds. In 2003, the City of Scottsdale used RICO funds to cover 746 percent of the equipment budget (see Table 24).

Combat gear, exercise equipment, and walk-in freezers

Although no other cities in Maricopa County necessarily stand out, some of their expenditures do. In 2000,

In 2003, Chandler spent \$115,000 on “technical assistance” and \$360,000 on a “command van and supplies.” Mesa spent \$340,000 on “leased undercover vehicles,” and Avondale spent about \$35,000 on a walk-in freezer.

Glendale spent approximately \$30,000 in forfeiture funds on a digital camera, Mesa spent over \$20,000 on a bomb van, and Tempe spent close to \$60,000 on weapons. In 2001, Mesa spent \$13,000 on helicopter pilot training and over \$65,000 on a jail van, the county attorney’s office spent \$24,000 on advertising, and Chandler spent \$7,500 on exercise equipment. In 2002, Chandler spent \$120,000 on combat helmets and face shields, Mesa spent \$236,052 on weapons, transcriber, and undercover vehicles, Tempe spent \$220,000 on new wiretap equipment, and \$136,000 was spent countywide on software. Additionally, in 2003, Chandler spent \$115,000 on “technical assistance” and \$360,000 on a command van and supplies. Mesa spent \$340,000 on “leased undercover vehicles,” and Avondale spent about \$35,000 on a walk-in freezer.¹⁰⁰ It is precisely because law enforcement officers naturally want these things—and because more forfeitures mean a higher budget for them to purchase these things—that an improper incentive is created to simply forfeit *more* and not necessarily forfeit *fairly*.

Certainly, law enforcement is a legitimate government expense. Properly funding and equipping police and prosecutors must be a legislative priority. Law enforcement agencies should not rely on RICO funds to pay for equipment, such as weapons, as they currently do. We do not know whether the agencies are inadequately anticipating their equipment needs or whether they exclude equipment

expenditures from general budgets in anticipation of using RICO funds to cover the expenses. Either way, it is apparent that local governments possess insufficient oversight of, and insight into, law enforcement budgets. Funding equipment purchases with RICO creates a risk that not enough money will be forfeited to pay for necessary expenses. In addition, using forfeiture money to pay for requisite supplies creates an urgency to forfeit. Although being underpaid is frustrating, being undersupplied could be life threatening.

Under the current system, it appears that officers *must* forfeit to afford guns, bulletproof jackets, and undercover vehicles. On the other side of the coin, there is a legitimate question of whether law enforcement needs to purchase equipment such as combat helmets and face shields. The decision of what type of equipment to purchase, especially when the equipment could be seen as militarizing the local police, should be left to elected officials (with the input of law enforcement personnel) to maintain consistent control over controversial equipment.

What about “Match to Grants”?

“Match to Grants” is a term that on first glance sounds like a noble endeavor by law enforcement agencies. One might assume that law enforcement agencies are matching community grants for new parks, drug prevention programs, or after school activities, but nothing could be further from the truth. “Match to grants” is the money that law

enforcement agencies are mandated to contribute when they seek federal grant money in the Edward Byrne Memorial State and Local Law Enforcement Assistance Program. Established to provide additional funding to law enforcement agencies, the Byrne Program requires that recipients match 25 percent of the award. According to the Department of Justice, number five on a list of 29 authorized uses of grant funds is to “disrupt illicit commerce in stolen goods and property”—another way of saying “to promote civil asset forfeiture.” The end result is for each dollar an agency forfeits, it can apply to

the federal government for an additional three dollars to fund agency activities (see Figure 9). In 2003, \$1,360,765 of RICO money was applied to this purpose, turning \$1.3 million of forfeited funds into \$5,443,061 net revenue for Arizona law enforcement agencies. With law enforcement agencies contributing a total of \$2,492,555 to matching funds in 2003, an astounding 55 percent of those funds came directly from forfeited revenue (see Table 25). Essentially, agencies have found a way to quadruple RICO forfeitures—thus increasing the dependence of the agency on forfeiture money.

Essentially, agencies have found a way to quadruple RICO forfeitures—thus increasing the dependence of the agency on forfeiture money.

Figure 9: How the Edward Byrne Memorial State and Local Law Enforcement Assistance Program works



\$100 is seized and forfeited by a law enforcement agency. The agency then uses the funds as the 25 percent match required to receive disbursements from the Edward Byrne Memorial State and Local Law Enforcement Assistance Program.

The federal government then pitches in another \$300 as part of the Byrne Grant, resulting in \$400 net revenue for the law enforcement agency that seized the original \$100.

Table 25: Total Money Contributed to the Edward Byrne Memorial State and Local Law Enforcement Assistant Formula Grant Program in relation to RICO Contributions

	Total Byrne funds*	Amount matched by agencies*	RICO money used as match**	% of RICO money used
FY 2000	6,957,451	2,319,151	937,214	40
FY 2001	6,482,884	2,160,960	1,163,216	54
FY 2002	7,112,298	2,370,778	1,159,879	49
FY 2003	7,493,650	2,492,555	1,360,765	55

“This court concludes that the augmentation of the county prosecutors’ budgets . . . provides to those in prosecutorial functions financial interests which are not remote as to escape the taint of impermissible bias in enforcement of the laws, prohibited by the due process clauses of the New Jersey and U.S. Constitutions.”

*As reported by the Arizona Criminal Justice Commission annual Enhanced Drug and Gang Enforcement report

**As reported in “Match to Grants” heading of quarterly RICO reports submitted to ACJC’s office.

Can Arizona Learn a Lesson from New Jersey?

In 2002, the Institute for Justice filed in New Jersey Superior Court the first-ever due process challenge to a civil forfeiture scheme allowing police and prosecutors to keep all of the forfeited proceeds and property. The New Jersey case arose when Carol Thomas’ 17-year old son used her 1990 Ford Thunderbird to sell marijuana to an undercover police officer. The son was arrested, pled guilty, and faced his punishment. Yet that did not end the case. The government also went after Thomas’ car, despite the fact that no drugs were found in the car, she was the sole owner, and she had no knowledge of her son’s use of the car to sell illegal drugs.

After examining the New Jersey system, the trial court judge struck down the program as unconstitutional, writing that, “in theory and in practice, there is

no limitation upon the motivation for enlargement to which a county prosecutor is subject in deciding upon seizure of property . . . This court concludes that the augmentation of the county prosecutors’ budgets . . . provides to those in prosecutorial functions financial interests which are not remote as to escape the taint of impermissible bias in enforcement of the laws, prohibited by the due process clauses of the New Jersey and U.S. Constitutions.”¹⁰¹

The trial court’s ruling certainly had the potential to put a stop to the most pernicious and dangerous aspect of New Jersey’s civil forfeiture laws—encouraging law enforcement agencies to enhance their budgets rather than impartially pursue justice. Unfortunately, the New Jersey appellate division, in an unpublished decision, reversed the trial court. An appeal to the New Jersey Supreme Court is now underway.

Arizona's forfeiture scheme is sure to come under a similar legal attack. Policymakers should pursue remedial action to remove the perverse profit incentives from Arizona's forfeiture statutes. Unlike New Jersey's scheme, Arizona's scheme arguably would have been found to violate due process by the New Jersey appellate court. The appellate court hinged much of its decision upon the fact that New Jersey's "prohibitions against using forfeiture proceeds to fund regular salaries or normal operating needs . . . provide adequate generalized safeguards against use of the forfeiture process as a budget-increasing mechanism."¹⁰² Arizona's forfeiture scheme provides no such "generalized safeguards," and indeed forfeiture funds are used to pay regular salaries and to fund normal operational needs.

Conclusion

Policymakers should repeal, in their entirety, Arizona's civil asset forfeiture laws. Of course, criminal forfeiture laws, which require the government to demonstrate that the property sought to be forfeited was actually the product of illegal activity, could remain intact. Barring repeal of civil forfeiture laws, policymakers should remove the direct profit incentives from the civil forfeiture law to restore the confidence of all Arizonans that prosecutorial decisions are made free from even the appearance of bias. Due process, at a minimum, requires the following protections:

- Require forfeited funds to be deposited in state and county general funds while permitting law enforcement agencies to be reimbursed for investigative costs and legal fees out of forfeiture revenues;
- Prohibit the use of forfeiture funds to pay the salaries of law enforcement officials;
- Require prosecutors to establish the property's connection to illegal activity beyond a reasonable doubt—or at least by clear and convincing evidence—rather than the minimal "preponderance of the evidence" standard;
- Eliminate entirely any burden on property owners to establish their property as exempt from forfeiture;
- Eliminate the statutory inference that money found in proximity to contraband or instrumentalities of an offense is the proceeds of contraband or was used or intended to be used to facilitate the commission of the offense;
- Eliminate the grossly unfair one-way attorneys' fees statute and permit property owners who successfully defend a forfeiture action to recover their costs and attorneys' fees; and
- Allow spouses and business owners to defend their property by no longer excepting them from the definition of "owner."

The due process clauses of the U.S. and Arizona Constitutions demand nothing less than the fair and impartial administration of justice.

APPENDIX A

ARIZONA REVISED STATUTES § 13-2301

Pursuant to Arizona Revised Statutes § 13-2301(D)(4) “Racketeering” means any act, including any preparatory or completed offense, that is chargeable or indictable under the laws of the state or country in which the act occurred and, if the act occurred in a state or country other than this state, that would be chargeable or indictable under the laws of this state if the act had occurred in this state, and that would be punishable by imprisonment for more than one year under the laws of this state and, if the act occurred in a state or country other than this state, under the laws of the state or country in which the act occurred, regardless of whether the act is charged or indicted, and the act involves either:

- (a) Terrorism that results or is intended to result in a risk of serious physical injury or death; or
- (b) Any of the following acts if committed for financial gain:

- (i) Homicide;
- (ii) Robbery;
- (iii) Kidnapping;
- (iv) Forgery;
- (v) Theft;
- (vi) Bribery;
- (vii) Gambling;
- (viii) Usury;
- (ix) Extortion;
- (x) Extortionate extensions of credit;
- (xi) Prohibited drugs, marijuana, or other prohibited chemicals or substances;
- (xii) Trafficking in explosives, weapons, or stolen property;
- (xiii) Participating in a criminal syndicate;
- (xiv) Obstructing or hindering criminal investigations or prosecutions;
- (xv) Asserting false claims including, but not limited to, false claims asserted through fraud or arson;
- (xvi) Intentional or reckless false statements or publications concerning land for sale or lease or sale of subdivided lands or sale and mortgaging of unsubdivided lands;
- (xvii) Resale of realty with intent to defraud;
- (xviii) Intentional or reckless fraud in the purchase or sale of securities;
- (xix) Intentional or reckless sale of unregistered securities or real property securities;
- (xx) A scheme or artifice to defraud;

- (xxi) Obscenity;
- (xxii) Sexual exploitation of a minor;
- (xxiii) Prostitution;
- (xxiv) Restraint of trade or commerce in violation of § 34-252;
- (xxv) Terrorism;
- (xxvi) Money laundering;
- (xxvii) Obscene or indecent telephone communications to minors for commercial purposes; or
- (xxviii) Counterfeiting marks as proscribed in § 44-1453.

APPENDIX B

COUNTDOWN TO THE TOP TEN CIVIL ASSET FORFEITURE ABUSES...¹⁰³

10. In 1991, Phoenix police seized a 1981 Buick Regal when a woman's brother loaned the vehicle to a friend. The friend was stopped while driving the car and police found 1.9 grams of cocaine in his possession. The vehicle was forfeited and the woman was never charged with a crime.¹⁰⁴

9. A woman's car was seized and forfeited when a friend borrowed her car without permission and used it to deliver marijuana to an undercover police officer. To add insult to injury, the court ordered the woman to pay \$200 in court fees as compensation to Chandler police.¹⁰⁵

8. The police seized \$651 from a man who was picking up his little brother at the airport. The man's friend "appeared nervous" to officers when he walked into the terminal, checked the monitors, and then returned to the vehicle where the man waited. Both men then returned to the terminal together where officers stopped the men, asked them to empty their pockets, and found \$651 in cash. Although no drugs were found, no criminal charges were filed, and no arrests were made, the officers seized the money because police dogs reacted to it. The money was forfeited.¹⁰⁶

7. During a layover at Phoenix Sky Harbor International Airport, police seized \$3,494 in cash from two men. The pair had aroused suspicions in Minneapolis and, when they arrived at Sky Harbor, Phoenix police questioned them and asked to search their belongings. Although no drugs were found, a police dog reacted¹⁰⁷ to the cash, giving probable cause for seizure and ultimately forfeiture. No criminal charges were ever filed.¹⁰⁸

6. Police seized \$36,876 from a dog broker when he arrived at Phoenix Sky Harbor International Airport. Cincinnati police called Phoenix officers after an airline ticket agent¹⁰⁹ reported the broker had been "acting suspiciously." Upon arrival in Phoenix, police questioned the broker and asked to search his belongings, where they found the money. A police dog reacted to the large sum of cash, and it was seized and ultimately forfeited. No drugs were found and no arrest was made.¹¹⁰

5. Phoenix police intercepted a woman's package containing \$6,500 in cash. The woman received the money from someone who had wrecked her boyfriend's car. Although no drugs were found with the package, a police dog reacted when the money was sniffed, giving the police probable cause to seize and forfeit the money. No

one was ever charged with a crime.¹¹¹

4. Police seized a man's 1989 Chevrolet pickup when his son was arrested for acting as middleman in a cocaine buy from an undercover officer. The man was out of the country when it happened, and his son was never even given permission to use the vehicle.¹¹²

3. Law enforcement seized a doctor's car after his daughter allegedly attempted to pass a forged prescription at a pharmacy. Police contend that she had used the vehicle to facilitate a crime. The doctor challenged the seizure and the vehicle was returned.¹¹³

2. A hay farmer and auto repairman's 1985 Mercedes, 1980 GMC pickup truck, 1988 Chevrolet pickup, 30-foot boat, 20-foot ski boat, jewelry, guns, photographs, videotapes, VCR, refrigerator, microwave, oven, sofa, and "miscellaneous school paper work" were seized when a drug dealer-turned-paid informant provided an unsubstantiated tip to police that he *suspected* the man of dealing drugs (Even the informant admits that he never saw the man selling or supplying drugs).¹¹⁴

1. The Department of Public Safety seized the crankcase of a woman's vintage 1958 Harley-Davidson motorcycle because Department of Motor Vehicle inspectors found that the original serial numbers on the crankcase had been tampered with. The Ohio dealership from which the woman bought the motorcycle explained to DPS that, prior to 1970, it was common practice to grind off old serial numbers and punch in new ones when restoring a damaged Harley. The woman was never charged with a crime, and there were never any accusations that the crankcase was stolen, yet it was still forfeited.¹¹⁵

NOTES

The authors thank Institute for Justice law clerks Elizabeth Bullington and David Hammond and intern Alexis Graham for their work editing and cite checking this paper.

1. Each year referenced refers to fiscal years. Fiscal years for Arizona governments and agencies run from July 1st to June 30th.
2. The Counter Narcotics Alliance was formerly known as M.A.N.T.I.S.—the Metropolitan Area Narcotics Trafficking and Addiction Squad.
3. Much of the background in this section and sections titled “A Brief History of Civil Forfeiture” and “A Stacked Deck: How Arizona’s Forfeiture Laws Endanger Property Rights” is drawn from Scott G. Bullock, *Policing and Prosecuting For Profit: New Jersey Ex-Sheriff Fights Civil Forfeiture Abuse*, Institute for Justice, Litigation Backgrounder, at www.ij.org/media/private_property/new_jersey/backgroud.shtml (October 28, 2004).
4. *In re: United States Currency in the amount of \$315,900.00*, 183 Ariz. 208, 216 (App. 1995).
5. Arizona Revised Statutes § 13-4301(5) (“An owner with power to convey property binds other owners, and a spouse binds his spouse, by his act or omission”).
6. See *Tumey v. Ohio*, 273 U.S. 510 (1927) (overturning fine where mayor, sitting as a judge, personally received a share of the fines); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (finding a due process violation where a substantial portion of a town’s income came from fines imposed by town mayor sitting as judge).
7. 446 U.S. 238, 249-50 (1980)
8. *Ibid.*
9. *Ibid.*, 250.
10. *Ibid.*, 250-52.
11. *Norris v. Doniphan*, 61 Ky. (4 Met.) 385, 426 (1863).
12. *Ibid.*; Schechter, *Fear and Loathing and the Forfeiture Laws*, 75 Corn. L. Rev. 1151, 1154 (1990); Maxeiner, *Bane of American Forfeiture Law—Banished at Last?*, 62 Corn. L. Rev. 768, 772 (1977).
13. Maxeiner, *supra* note 13, at 782 n.86.
14. See, e.g., *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827).
15. See *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844).
16. *Ibid.* (emphasis added).
17. Maxeiner, *supra* note 13, at 786-787.

18. *Norris*, 61 Ky. (4 Met.) at 426.
19. *Miller v. United States*, 78 U.S. (11 Wall.) 268, 305 (1871).
20. Maxeiner, *supra* note 13, at 787.
21. *In re One Residence Located at 4030 W. Avocado, Cortaro Ridge, Lot 32, in Docket 8592, Page 1222*, 184 Ariz. 219, 222 (App. 1995).
22. *In re One Residence at 319 E. Fairgrounds Dr.*, 205 Ariz. 403, 408 17 (App. 2003) (quoting *In re 4030 W. Avocado*, 184 Ariz. 219, 222 (App. 1995)).
23. Mark Flatten, “Policing for Profits,” *Tribune*, November 21-26, 1993. Flatten’s series received several awards, including a 1994 Livingston Award, National Headliner Club Award, and Best of Cox Newspaper Award.
24. Representative Henry J. Hyde, “Forfeiting Our Property Rights, (1995), 6.
25. “The *Tribune* reviewed more than 4,000 civil and criminal case files and entered the information into a computer database; pursued more than 40 public-records requests; read tens of thousands of pages of documents; and interviewed more than 100 people on both sides of the issue.” Mark Flatten, “Thousands of Cases Reviewed; Analyzed for RICO Answers,” *Tribune*, November 21, 1993.
26. Arizona Revised Statutes § 13-2301(D)(4)(a), (b)(i)-(xxviii).
27. Office of the Auditor General, “Arizona Forfeiture Statutes Should Be Reviewed,” Auditor General Letter Report, No. 93-L1 (January 21, 1993), p. 2.
28. 2004 Ariz. Sess. Laws 291, amending Arizona Revised Statutes. § 13-2317(F)(3)(c).
29. Arizona Revised Statutes § 13-4306(G).
30. Arizona Revised Statutes § 13-4306(C).
31. Arizona Revised Statutes § 13-4306(F) (Providing that the writing is to include “a statement of facts and circumstances of the seizure including the names of witnesses then known, the appraised or estimated value of the property and a summary of the facts relied on for forfeiture”).
32. Arizona Revised Statutes § 13-4311(A).
33. Arizona Revised Statutes § 13-4311(D). Subsections (E)(1)-(8) require that the claim set forth the proper caption of the proceeding, the address at which the claimant will accept future mailings, the nature and extent of the claimant’s interest in the property, the date, the identity of the transferor and the circumstances of the claimant’s acquisition of the interest, the specific provisions of law relied upon in asserting the property is not subject to forfeiture, all facts supporting such an assertion, any additional facts supporting the

claimant's claim, and the precise relief sought.

34. Arizona Revised Statutes § 13-4308(B)

35. Arizona Revised Statutes § 13-4311(G). The owner or interest holder is required to sign the answer under penalty of perjury.

36. *Ibid.*

37. Arizona Revised Statutes § 13-4311(M). Although the preponderance of the evidence standard is much lower than the reasonable doubt standard, for many years the Arizona Legislature actually required an even lower standard: the state need only prove that probable cause existed to believe that the property had been used in a crime. Probable cause is also the standard for issuing a search warrant. The Legislature greatly improved the protections of Arizonans by increasing the standard of proof to a preponderance of the evidence in 1994, very likely in response to the *Tribune* exposé by Mark Flatten, *supra* and *infra*.

38. *Ibid.*

39. Arizona Revised Statutes § 13-4304(4)(a)-(c). This exemption statute contains a few atypical exemptions. For example, vehicles used as a common carrier in the transaction of business are exempt. See section (1). Nor may a vehicle be forfeited if it was unlawfully in the possession of another. See section (2).

40. *In the matter of Property, Business, and Building located at 2120 S. 4th Avenue, Lot 16, Block 8 of Resubdivision of Home Addition No. 2*, 177 Ariz. 599, 603 (App. 1994).

41. Arizona Revised Statutes § 13-4305(F).

42. Arizona Revised Statutes § 13-4314(F) (“The court *shall* order any claimant who fails to establish that his entire interest is exempt from forfeiture . . . to pay . . . the state’s costs and expenses of the investigation and prosecution of the matter, including reasonable attorney fees) (emphasis added).

43. See, for example, Office of the Auditor General, “Maricopa County Attorney’s Office: Theft of Public Monies,” Auditor General Investigative Report, September 11, 2002, p. 6 (Table recording total dollar amount of 27 forfeitures, all relatively low dollar collections); and Office of the Auditor General, “Arizona Forfeiture Statutes Should Be Reviewed,” p. 1, (“Forfeiture statutes do not necessarily target the serious offenders”).

44. Mark Flatten, “The Choice: Crooks or Cash?: Push for Money Competes with Push for Arrests,” *Tribune*, November 22, 1993.

45. Office of the County Attorney, Yuma County, “Divisions: Criminal: Asset Forfeiture,” at www.co.yuma.az.us/atty/divisions-criminal.htm (October 28, 2004).

46. Arizona Revised Statutes §§ 13-2314.01(A), (D); 13-2314.03(A), (D).
47. Arizona Revised Statutes § 13-4315.
48. Arizona Revised Statutes §§ 13-2314.01(E); 13-2314.03(E).
49. Arizona Revised Statutes §§ 13-2314.01(D); 13-2314.03(D).
50. RICO is an acronym derived from the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968.
51. Arizona Revised Statutes §§ 13-2314.01(D); 13-2314.03(D).
52. Ariz. Sess. Laws 1983, Ch. 224, § 4.
53. Ariz. Sess. Laws 1987, Ch. 307, § 9.
54. Mark Flatten, "Stories of RICO," *Tribune*, November 23-25, 1993. The abuse suffered by Mr. Hernandez could technically no longer occur under Arizona law because the exemption statute has since been amended to require that, with respect to drug transactions, no property may be forfeited unless the amount of drugs exceeded the statutory threshold (as defined in Arizona Revised Statutes § 13-3401) or unless the crime was committed for financial gain (i.e., that the drugs were possessed for sale).
55. Flatten, "Stories of RICO."
56. Office of the Auditor General, "Arizona Forfeiture Statutes Should Be Reviewed," p. 1, note 1.
57. Arizona Revised Statutes § 13-2314.01(G), (H) and A.R.S. § 13-2314.03(G), (H).
58. We relied more heavily on the actual reports because the data compiled by ACJC was problematic on two accounts. First, the information is manually compiled. Second, reports that were submitted late to the ACJC's office are excluded from the compilation report. By relying on the actual reports, we were able to include the late reports into our compilation.
59. We gathered budgets for agencies that were spending or receiving a significant percentage of the RICO funds for that county. If the agencies were using the funds only minimally, we did not obtain their budgets. For instance, the Buckeye Police Department spent less than \$20,000 over the four-year period: This amount comprises 0.1 percent of Maricopa County's \$19,000,000 in spending for the same four-year period.
60. We developed a spreadsheet to track public records requests with such information as: who the contact person was; his or her phone and fax number; notes of all communications between us and the agency, and status.
61. Budgets were also obtained from Coolidge, Eloy, Florence, and Kearny police departments. However, we

ultimately eliminated the data from the data set because these departments' use of RICO funds was negligible. After speaking with officials from Gila River, Mammoth, and Superior police departments and determining that they also did not significantly use RICO funds, we withdrew our public records request and never obtained their budgets. After several attempts to obtain the budget from Greenlee County, we abandoned the efforts since their total RICO spending over all four years was a meager \$17,859.96—insignificant in the overall study.

62. Flatten, "Policing for Profits."

63. Office of the Auditor General, "Arizona Forfeiture Statutes Should Be Reviewed," p. 1.

64. Flatten, "The Choice: Crooks or Cash?" (emphasis added).

65. 446 U.S. 238, 250-51 (1980); see also *Connally v. Georgia*, 429 U.S. 245 (1977) (invalidating system in which justices of the peace were paid for issuance but not for non-issuance of search warrants).

66. 446 U.S. at 251.

67. Pinal County provided estimated employee-related expenses (ERE) budget data for Pinal County Sheriff and Attorney's office as they lump all ERE budgets into one account for all agencies. Estimated data were provided by Jim Throop, Budget Director for the Pinal County Finance Department.

68. Unless otherwise noted, all expenditure data were obtained from the law enforcement agency's quarterly RICO reports as submitted to the Arizona Criminal Justice Commission and budget data was obtained directly from the corresponding law enforcement agency. Quoted figures may represent data we compiled from the original sources.

69. According to quarterly RICO reports from the Arizona Criminal Justice Commission, administrative expenses comprise employee-related expenses (such as insurance, contributions to pension plans, and income taxes) and regular and overtime wages.

70. Author interview with Karen Ziegler, Arizona Criminal Justice Commission, May 27, 2004. Civil remedies are defined as monies paid out pursuant to Arizona Revised Statutes § 13-2314(A), "recovery of treble damages and the costs of the suit, including reasonable attorney fees, or to prevent, restrain, or remedy racketeering as defined by section 13-2301, subsection D, paragraph 4 or a violation of section 13-2312."

71. *Ibid.* Zeigler defined Gang/Drug Prevention and Education as "money spent for preventing gang and drug-related activities."

72. According to an author interview with Karen Ziegler, *supra* note 71, match to grants are contributions to law enforcement grants the agency is

required to contribute to in order to obtain funding from that grant program. These are most often used for the Edward Byrne Memorial State and Local Law Enforcement Assistance Program. The Byrne grant requires the agency match 25 percent of the funds.

73. According to an author interview with Karen Ziegler, *supra* note 71, witness protection is defined as the funds used when a law enforcement agency needs to put a witness into protection.

74. Tim Keller interview with Scott Bullock, Senior Attorney, Institute for Justice, May 14, 2004.

75. Mark Flatten, "Forfeiture Funds Pay Workers' Salaries," *Tribune* (Arizona), November 21, 1993.

76. *Ibid.*

77. *Ibid.* (finding that the nine agencies that do most of the forfeiture work in Maricopa County spent about \$2.6 million per year on personnel).

78. *Ibid.*

79. NJ/L&PS Forfeiture Program Administration S.O.P. 12:9A-B (March 1, 1998) as directed by the New Jersey Attorney General.

80. Table 4 represents the percentage of total RICO forfeitures compared to the entire non-administrative budget (total agency budget less any salary, employee-related benefits, and overtime

pay). Santa Cruz County, which had the highest percent of forfeitures in 2000, brought in \$235,317 in RICO revenue. In that same year, the Santa Cruz County Attorney's Office's total non-administrative budget was \$59,018. Here, and throughout the entire report, the Arizona Criminal Justice Commission provided RICO revenue data while the law enforcement agency provided the budgetary data (in this instance, the Santa Cruz County Attorney's Office).

81. Arizona Revised Statutes §§ 13-2314.01(E); 13-2314.03(E).

82. Mark Flatten, "Anti-gang Funding Not a Priority," *Tribune*, November 22, 1993.

83. Fiscal year 2003 figures had not yet been released by the Arizona Drug and Gang Prevention Resource Center as of this paper's publication date and were therefore excluded from our statistics.

84. According to data from the Arizona Drug and Gang Prevention Resource Center Program Inventories FY 2000-FY 2002.

85. Figure 15-1.1 on page 15-1.3 of the Arizona Drug and Gang Prevention Resource Center 2002 Program Inventory section on the Anti-Racketeering Influenced Corrupt Organizations (RICO).

86. It could be charged that it is not fair to include funds that flow through

the Attorney General's Office's revolving RICO account in relation to the total office budgets because the AG's office is simply a clearing house for some of those funds. Indeed, this criticism may have some merit. Unfortunately, due to the revolving nature of the RICO account and the lack of detail reported to ACJC about the account, it is nearly impossible to tell how much of the fund "belongs" to the AG's office and how much is kept for the benefit of other law enforcement agencies. Details about the transfers in and out of the AG's RICO account can be found in Table 9.

87. According to the City of Phoenix's *General Ledger Accounts—Expenditure Classification*, expenditure categories under professional services include: legal services, "outside legal services paid to attorneys and legal firms"; consultants and other professional services, "expenses for outside consultants' advice or other professional services not classified elsewhere"; and temporary employment services "expenses for services of temporary employees obtained through temporary employee agencies" (F-21—F-24).

88. Author interview with Karen Ziegler, *supra* note 71. Ziegler defined "evidence acquisition" as money spent by law enforcement agencies to buy information and evidence, and to pay informants. On clarification, Ziegler concurred that "buy evidence" referred to buying drugs and other contraband.

89. These examples were pulled directly from the quarterly RICO

reports submitted by law enforcement agencies to the Arizona Criminal Justice Commission and represent only a small subsection of the many different types of items purchased as equipment expenditures between FY 2000 and FY 2003.

90. Of the \$1,625,695 spent on travel over the four-year period examined, \$1,134,953 (70 percent) was used for out-of-state travel. The remaining 30 percent was spent for in-state or witness travel expenses.

91. These cities represent past annual conference locations for the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA). Seventeen police forces in Arizona are accredited with CALEA.

92. These cities represent future conference locations for the International Association of Chiefs of Police, the world's oldest and largest nonprofit membership organization of police executives.

93. U.S. Census Bureau, "Table 10: Arizona Incorporated Place Population Estimates, Sorted Within County: April 1, 2000 to July 1, 2002," at www.census.gov/popest/archives/2000s/vintage_2002/SUB-EST2002/SUB-EST2002-10-04.xls (October 28, 2004).

94. According to the City of Phoenix, *General Ledger Accounts—Expenditure Classification* (F-41—F-48) office supplies are defined as "all supplies

necessary for operation of an office, such as pencils, stationery, staples, columnar pads, rubber stamps and tabulating supplies. It does not include printed forms.” Office equipment is defined as “all office furniture and equipment with a cost of \$5,000 or more.” Although each agency may use different definitions, it is a Generally Accepted Accounting Principle (GAAP) that supplies are not considered a depreciable expense whereas equipment is. Therefore, it would be unusual to classify equipment purchases as supplies.

95. Through detailed reviews of county and state expenditure and budget reports, we found that data processing equipment generally refers to computers, printers, and other peripherals. The City of Phoenix does not have a specific definition for data processing equipment. “Data processing” is the term provided by the Arizona Criminal Justice Commission on the blank quarterly report form used by agencies to report RICO spending.

96. In 2003, M.A.N.T.I.S. reported spending \$1,027,172 in RICO forfeitures funds. Of that, \$215,962 was used for match to grants. The match to grant money is then matched by the federal government in the Edward Byrne Memorial State and Local Law Enforcement Assistance Program. The \$215,962—matched with federal funds—becomes \$863,848. Added to the over \$1 million spent with RICO funds means that \$1,891,020 of M.A.N.T.I.S. funds are tied to RICO forfeitures. According to M.A.N.T.I.S.

records, the 2003 budget for M.A.N.T.I.S. was \$2,621,389.

97. The *Arizona Daily Star* recently reported that a Tucson police detective has been charged with embezzling more than \$600,000 of seized drug money while he was assigned to M.A.N.T.I.S. Eric Swedlund, “Ex-drug Cop Pleads Guilty to Money Theft,” *Arizona Daily Star*, September 23, 2004.

98. Office of the Auditor General, “Maricopa County Attorney’s Office: Theft of Public Monies,” Auditor General Investigative Report, September 11, 2002, p. 1. (This investigation was conducted upon request by the Maricopa County Attorney’s Office because over \$30,000.00 was embezzled from the County’s RICO fund. The report found that the RICO accounts’ Assistant Controller, between July 1997 and May 2001, had removed the cash from 27 RICO forfeitures remitted to the County by six law enforcement agencies).

99. Although this is an example of positive spending, it is important to note that even though the Attorney’s Office is responsible for administering the RICO fund, it appears that virtually all of the prevention spending for Maricopa County is attributed to the Attorney’s Office—which somewhat skews the data.

100. Information obtained from quarterly RICO reports submitted to ACJC by local agencies.

101. *State of New Jersey v. One 1990 Ford Thunderbird*, Docket #CUM-L-000720-99, Superior Court of New Jersey, December 11, 2002.

102. *State of New Jersey v. One 1990 Ford Thunderbird*, Docket No. A-3879-02T1, Superior Court of New Jersey, Appellate Division, July 21, 2004.

103. The following stories of civil asset forfeitures were originally published in a 7-day series of articles by Mark Flatten, "Policing for Profits," *supra* note 24. Names of property owners have been withheld.

104. Mark Flatten, "Want It Back?: It's Going to Cost You," *Tribune*, November 24, 1993.

105. Flatten, "Stories of RICO," *supra* note 55.

106. Flatten, "Stories of RICO," *supra* note 55.

107. According to the Flatten series, drug-sniffing dogs are trained to scratch, bark, or bite when they smell illegal drugs, alerting the handler to the presence of drugs. In a November 24, 1993 *Tribune* article "Chances are you carry drug money," Dr. Jay Paupco of Toxicology Consultants Inc. in Florida reported that in his study of bills collected directly from banks along the east coast, 95 percent of them tested positive for traces of cocaine. Dr. Paupco stated, "In my opinion a dog alerting to a large quantity of United States currency does not indicate the currency was directly

involved in a drug transaction involving cocaine. The dog is being used as an analytical instrument for the detection of cocaine. However, unlike an instrument which gives you a readout, the dog is interpreted as an alert or not an alert. It's all very subjective." According to statements published by the *Tribune* in the same article, researchers in Germany and China have tested the sensitivity of dogs and found their sense of smell is about a million times greater than that of people.

108. Flatten, "Stories of RICO," *supra* note 55.

109. It is worth noting that according to November 24, 1993 *Tribune* article, "Drug dogs sniff way to big bucks," tips from airline ticket agents which result in forfeiture can qualify the agent for payment as informants.

110. Flatten, "Stories of RICO," *supra* note 55.

111. Flatten, "Stories of RICO," *supra* note 55.

112. Flatten, "Stories of RICO," *supra* note 55.

113. Flatten, "Stories of RICO," *supra* note 55.

114. Mark Flatten, "Farmer Had Too Many 'Toys,'" *Tribune*, November 21, 1993.

115. Mark Flatten, "Harley Owner Loses Crankcase to DPS," *Tribune*, November 23, 1993.

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