

# ARIZONA'S PROFIT INCENTIVE IN CIVIL FORFEITURE

Dangerous for Law Enforcement; Dangerous for Arizonans



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## Executive Summary

Arizona's civil forfeiture laws need to be reformed. In the upside-down world of civil forfeiture, police and prosecutors can seize and keep cash and property that was allegedly involved in criminal activity—without ever proving a crime was actually committed. Unlike *criminal* forfeiture, with *civil* forfeiture a property owner need not be found guilty of a crime—or even charged with a crime—to permanently lose his or her cash, car, home or other property. Even property owners who are acquitted of crimes can still lose their property. As the *Arizona Daily Star* reported, a Picture Rocks woman was acquitted of criminal charges but was still forced to forfeit her house, where the alleged crime occurred. According to one deputy county attorney, pursuing forfeiture even when a defendant has been acquitted of criminal charges is not unusual.<sup>1</sup>

There are three primary problems with Arizona's civil forfeiture laws that need to be addressed by the legislature.

### **Problem 1: Policing for Profit**

The first problem is the profit incentive that Arizona's civil forfeiture laws inject into policing and prosecutorial decisions. In Arizona, law enforcement personnel have a strong incentive to seize as much property as they can because they keep up to 90 percent of the funds raised through civil forfeitures. Allowing police and prosecutor to wield both the purse and the sword threatens the fair and impartial administration of justice, endangers private property rights, and can place police officers in unnecessary jeopardy. Forfeiture proceeds are used for a variety of expenditures, ranging from equipment to travel to salaries, benefits and overtime. Over the time period examined in this paper, law enforcement increased its forfeiture revenue almost 400 percent—from \$11.8 million in 2000 to \$50.1 million in 2011. These large and increasing sums give reason to worry that forfeiture has become, or is becoming, a way for law enforcement agencies to self-fund outside the normal budgetary process. This concern is magnified by the fact that the largest category of forfeiture expenditures is on personnel. Only two states—Arizona and Texas—permit forfeiture funds to be used for direct salaries.

The profit incentive also endangers law enforcement personnel. In 2010, Chandler police officer Carlos Ledesma was killed (and two others shot) in Phoenix during a reverse sting. In a reverse sting operation, undercover police actually bring the drugs, and the criminals bring the cash. The sting operation in which Officer Ledesma was killed targeted a quarter of a million dollars. If the operation had succeeded, the Chandler police would have kept almost the entire sum of money. As Goldwater Institute investigative reporter Mark Flatten uncovered, there is evidence that the Chandler Police Department is engaging in many high-risk operations designed to score large sums of money.

## **Problem 2: The Government Does Not Have to Prove Guilt**

The second problem is that Arizona's civil forfeiture laws turn the notion of innocent until proven guilty on its head by shifting the burden of proof to the property owner. In a criminal proceeding, the state must prove "beyond a reasonable doubt" that an individual has committed a crime. But in the civil forfeiture context, even after a criminal acquittal, the state can still forfeit the property if the *property owner* fails to prove that either the property in question was not used to facilitate criminal activity or that he or she is an innocent owner.

## **Problem 3: Lack of Transparency and Accountability**

Investigative reporters have uncovered a series of questionable expenditures from civil forfeiture funds. In 2009, the Maricopa County Sheriff's Office ("MCSO") spent \$500,000 in forfeiture funds to lease expensive cars, trucks, and sport utility vehicles that MCSO personnel drove to and from work. In 2007, Maricopa County Attorney Andrew Thomas spent forfeiture funds to put up billboards and ads in movie theaters to shame convicted drunken drivers. The ads included the convict's mug shot—and Thomas' name in bold letters. In 2011, the Pinal County Sheriff's office spent \$53,000 to send a contingent of people to St. Louis to receive an award at the National Sheriffs' Association annual conference. Such expenditures are possible because law enforcement agencies do not have to report details of their forfeiture spending.

It is the responsibility of the state legislature and elected municipal officials to adequately fund law enforcement agencies. Police and prosecutors should not be forced to fund themselves through forfeitures to purchase equipment that is necessary to do their jobs adequately. Sadly, however, agencies routinely circumvent the legislative process by spending forfeiture funds to purchase items such as tasers, vehicles, laptops, K-9s, and protective vests. They also spend a significant portion of the money on salaries. Government agencies relying on forfeiture funds to meet basic needs, especially when those needs relate to personnel and salaries, may fall prey to the temptation to shift priorities away from the pursuit of justice and toward the pursuit of profit.

## **What is the Solution?**

### **Criminalize all Forfeiture Proceedings**

Arizona should eliminate civil forfeiture and replace it with criminal forfeiture. No one has a property right to ill-gotten property—but in order to gain ultimate title to such property, the government should first be required to convict the property owner of a crime.

### **Eliminate the Profit Incentive**

The profit incentive should be eliminated by requiring that all proceeds from forfeitures go to the state's general fund or some other neutral fund.

### **Improve Transparency**

It is the responsibility of the legislative branch, not the executive branch, to appropriate funds to law enforcement. Police and prosecutors should report to the Arizona Criminal Justice Commission each seizure of property, the associated crime, the disposition of the property, the distribution of proceeds, and how law enforcement spent forfeiture proceeds.

## ARIZONA'S CIVIL FORFEITURE LAWS NEED TO BE REFORMED

### Arizona's Civil Forfeiture Scheme Stacks the Deck Against Property Owners

Arizona's civil forfeiture laws are a substantial threat to every Arizonans' private property rights.<sup>2</sup> Under Arizona's civil forfeiture scheme, police and prosecutors are entitled to take property without ever charging the owner, or anybody else, with a crime—and then profit from the proceeds.

Civil forfeiture relies on a legal fiction: that inanimate objects like cars, houses, and currency can be guilty of criminal activity. Police can seize cash and property they suspect *may* have been involved in a crime and prosecutors can engage in civil litigation to forfeit it for the benefit of the seizing agency. The seizing agency is then permitted to keep and use the property, or the proceeds thereof, for a wide variety of activities and items, including salaries, overtime, and equipment. Due to the civil nature of the proceedings, the property owner is not afforded the same rights that belong to defendants in a criminal proceeding. The government need only show by a preponderance of the evidence (a much lower standard of proof than beyond a reasonable doubt) that the seized property may have been—not that it actually was—involved in illicit activity.

Civil forfeiture's tangled and fast-paced chain of events starts when police seize property. Police and prosecutors can seize a person's property if they allege it was used to facilitate any one of thirty different crimes, ranging from offenses such as drug crimes, gambling and extortion to homicide and terrorism.<sup>3</sup> There is no requirement that any person actually be charged with a crime—ever—before prosecutors can seek to forfeit the property. Within 20 days of seizing the property, the government must make all “reasonable efforts” to notify every person known to have an interest in the property.<sup>4</sup> Prosecutors may then either offer the property owner an uncontested forfeiture, which effectively means no judicial review, or the prosecutor can begin court proceedings to forfeit the property.<sup>5</sup>

Any owner or interest holder whose property is seized without a prior judicial determination of probable cause may request a hearing on the sole issue of whether probable cause for forfeiture exists, but he or she must do so within 15 days of receiving a notice of seizure *or* actual knowledge of seizure, whichever is earlier.<sup>6</sup> In all court proceedings, the burden is on the property owner to prove, by a preponderance of the evidence, that they in fact have a protectable interest in the seized property and that their property is not subject to forfeiture.<sup>7</sup> A property owner may not seek to have any of the government's evidence suppressed on the ground that the evidence was acquired in violation of the Constitution's protections against unreasonable searches or seizures because such protections only apply in criminal proceedings against an individual, not civil proceedings against property.<sup>8</sup>

An individual who seeks to prove that his or her property should not be forfeited must file with the court a signed and sworn claim within 30 days of the notice of forfeiture that sets out “all facts supporting” the owner’s claim.<sup>9</sup> No extension of time may be granted for the filing of a claim.<sup>10</sup> After the claim is filed, the government then files its complaint alleging why the property should be forfeited.<sup>11</sup> This is completely backwards—the government should be required to lay out its complaint first. The property owner must then respond, within 20 days, not only to the government’s complaint but also to any written questions the government asks of the property owner.<sup>12</sup> A hearing is then scheduled.<sup>13</sup>

At the hearing, the government need only show that the property is subject to forfeiture by a preponderance of the evidence.<sup>14</sup> A preponderance of the evidence standard means that the government must persuade the court that their claim—that the property was subject to forfeiture—is more likely true than not true.<sup>15</sup> By contrast, in a criminal proceeding the government must prove that an individual is guilty beyond a reasonable doubt.<sup>16</sup>

The burden then shifts to the property owner to prove that the property should not be forfeited *and* to prove that he or she is the owner of the property in question.<sup>17</sup> In other words, the burden is on the property owner to establish his or her innocence. To prove that the property is exempt from forfeiture, the owner must show: (1) when he or she obtained the ownership interest in the property; (2) that the owner did not enable the individual whose conduct gave rise to the forfeiture to transfer his or her interest and that he or she was not married to that person, and (3) that the owner did not know and *could not reasonably have known* of the act that gave rise to the forfeiture or that it was *likely to occur*.<sup>18</sup> Property owners are thus charged with proving a negative—that they did not know and could not have reasonably known of the activity giving rise to the forfeiture.<sup>19</sup> If the property owner is unable to meet his or her burden, the property is forfeit to the state.

Any property owner who tries and fails to prove that his or her property should not be forfeited is required to pay “the state’s costs and expenses of the investigation and prosecution of the matter, including [the government’s] reasonable attorneys’ fees.”<sup>20</sup>

### **Arizona’s Civil Forfeiture Scheme Injects Improper Financial Incentives into Law Enforcement Priorities**

Arizona law enforcement agencies are entitled to keep 90 percent of all funds raised through forfeiture, which provides significant motivation to pursue profit.<sup>21</sup> As a recent Institute for Justice study noted, “When laws make forfeiture easier and more profitable, law enforcement engages in more of it.”<sup>22</sup> Given Arizona’s stacked legal deck and the profit incentive inherent in

the law, it should come as no surprise that forfeiture is a significant revenue source for Arizona law enforcement agencies.

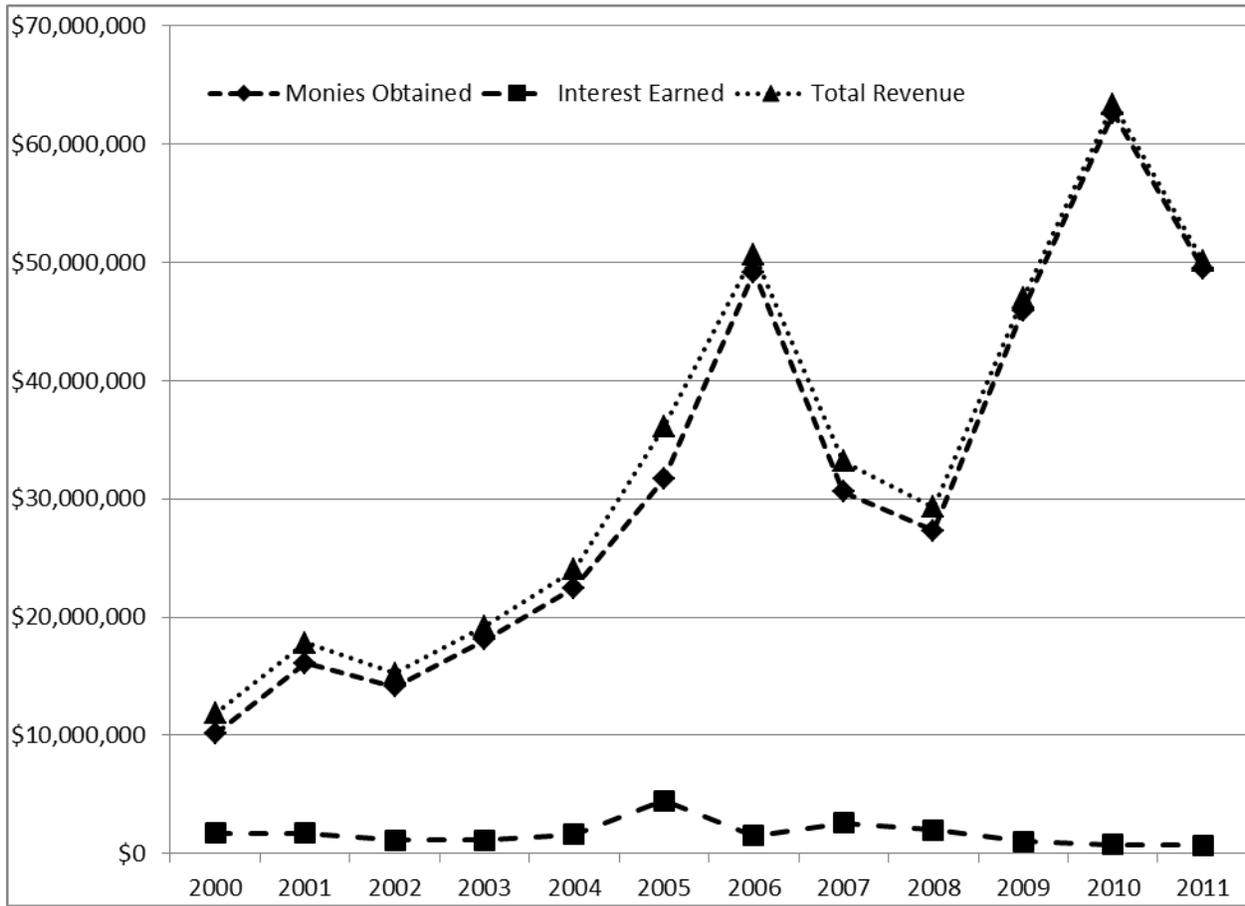
As indicated in Table 1, total forfeiture proceeds approached \$400 million from 2000 to 2011.<sup>23</sup> Eighty percent of forfeiture revenue came from actions initiated under state, as opposed to federal, forfeiture laws. This is not entirely surprising, given how generous and easy the forfeiture process is for law enforcement in Arizona. In other states, federal forfeitures constitute a larger share of total revenues because of the federal government’s equitable sharing program, which returns up to 80 percent of federal forfeiture revenues back to state and local agencies.<sup>24</sup>

**Table 1: Forfeiture Revenue from State and Federal Actions, 2000 to 2011**

	State		
	Monies Obtained	Interest Earned	Total Revenue
Total	\$303,409,436	\$14,711,883	\$318,121,319
Mean	\$25,284,120	\$1,225,990	\$26,510,110
	Federal		
Total	\$74,231,080	\$5,517,283	\$79,748,363
Mean	\$6,185,923	\$459,774	\$6,645,697
	State and Federal		
Total	\$377,640,516	\$20,229,166	\$397,869,682
Mean	\$31,470,043	\$1,685,764	\$33,155,807

Over the time period studied here, law enforcement significantly increased its forfeiture revenue (see Figure 1). Annual revenues increased almost 400 percent, from \$11.8 million in 2000 to \$50.1 million in 2011.

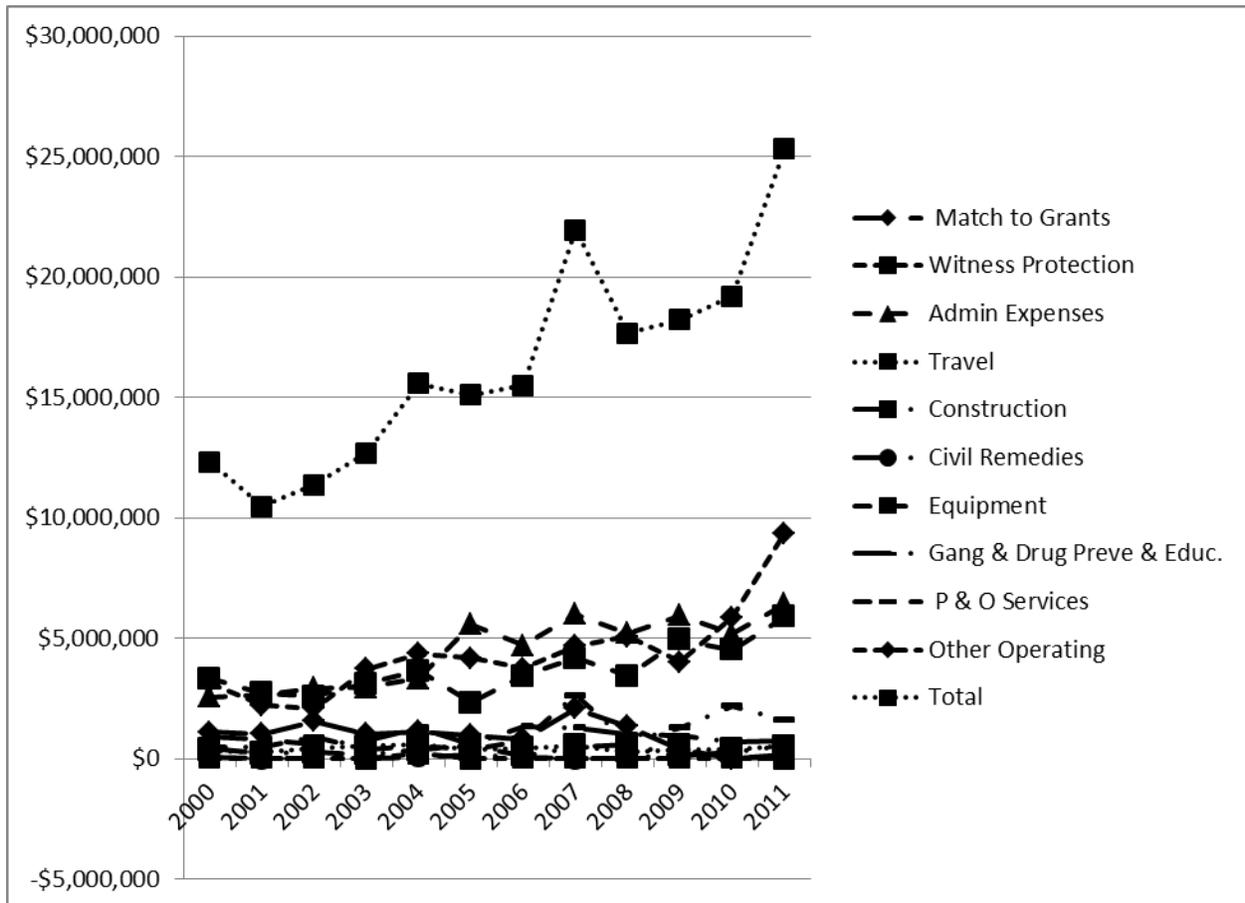
**Figure 1: State and Federal Forfeiture Revenue from 2000 to 2011**



Because Arizona law allows law enforcement to keep such a significant portion of the forfeiture revenues they take in, civil forfeiture is a particularly attractive mechanism for agencies to raise additional revenues. Proceeds may be used for a variety of expenditures, ranging from equipment to travel to salaries, benefits and overtime, as represented by the Admin Expenses category (see Figure 2). In both state and federal forfeiture expenditure reports, the Admin Expenses include those personnel expenses. State law imposes no limit on the personnel costs that may be covered by forfeiture revenue. The salaries and benefits of regular, full-time law enforcement personnel can be paid for with forfeiture funds, to the extent that any work is related to forfeiture activities. Arizona and Texas stand alone in permitting forfeiture funds to be used for direct salaries. By contrast, federal rules prohibit the use of federal forfeiture revenue to “pay the salaries and benefits of current, permanent law enforcement personnel, except in limited circumstances.”<sup>25</sup> According to the U.S. Department of Justice, “The purpose of this rule is to protect the integrity of the forfeiture and equitable sharing programs so that the prospect of receiving equitable sharing monies does not influence, or appear to influence, law enforcement decisions.”<sup>26</sup> Several states have explicit bans on the use of forfeiture funds for salaries.<sup>27</sup>

From 2000 to 2011, law enforcement in Arizona spent almost \$200 million from forfeiture funds (not including encumbrances and commitments—money set aside for future expenditures). Similar to revenues, expenditures increased significantly (more than 100 percent) from 2000 to 2011 (see Figure 2).

**Figure 2: State and Federal Forfeiture Expenses from 2000 to 2011**



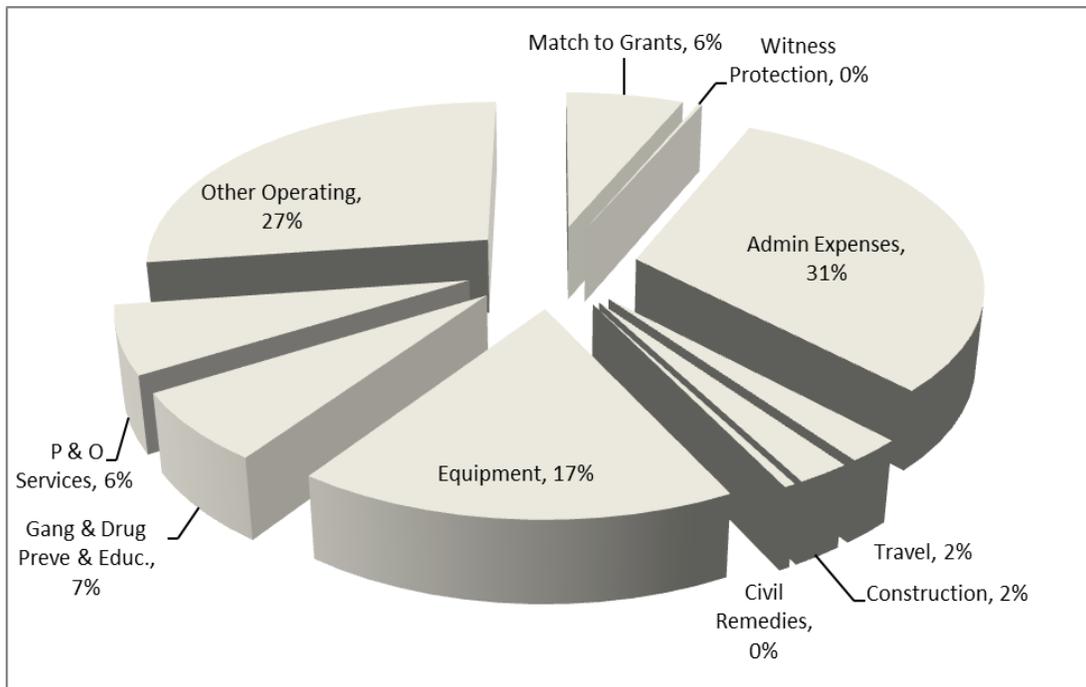
The incentive created by forfeiture laws to self-fund is troubling enough, but when the funds can be used to personally and directly benefit law enforcement personnel, the incentive is even more perverse. As Table 2 indicates, this direct financial incentive—in the form of salaries, benefits and overtime—is the largest category of expenditures, at more than \$53 million. But these totals—that combine state and federal expenditures—mask an important finding in how much of forfeiture proceeds went to personnel expenses.

**Table 2: Expenditures by Type using State and Federal Forfeiture Funds, 2000-2011**

	Total	Mean
Match to Grants	\$11,628,226	\$969,019
Witness Protection	\$376,951	\$31,413
Admin Expenses (salaries, benefits, and overtime)	\$53,495,985	\$4,457,999
Travel	\$5,136,417	\$428,035
Construction	\$4,093,238	\$341,103
Civil Remedies <sup>28</sup>	\$736,592	\$61,383
Equipment	\$44,099,050	\$3,674,921
Gang & Drug Prevention & Education	\$10,973,879	\$914,490
Professional & Outside (P&O) Services <sup>29</sup>	\$12,343,834	\$1,028,653
Other Operating	\$52,504,643	\$4,375,387
Total	\$195,387,217	\$16,282,268

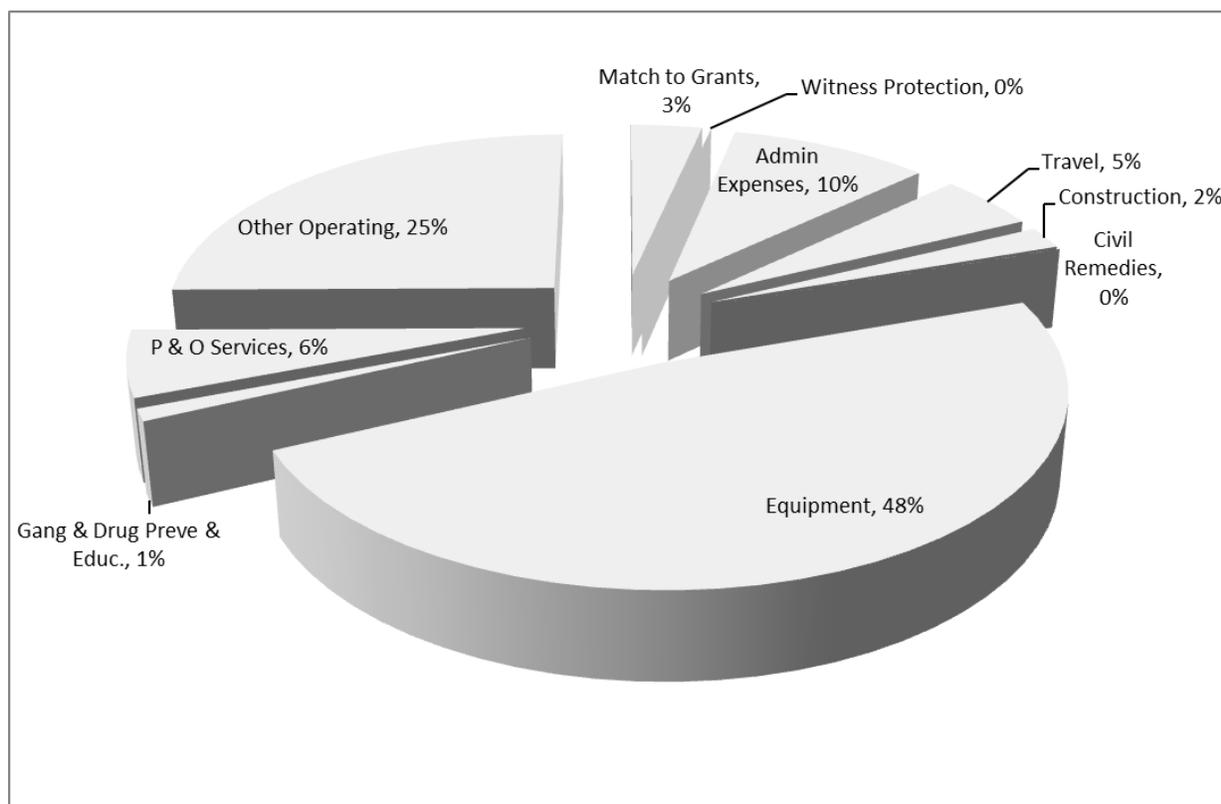
Figures 3 and 4 illustrate the distributions of expenditures for state and federal forfeitures respectively. Of expenditures from forfeitures under state law, agencies spent 31 percent on salaries and benefits—the largest amount of any other category of expenditures—but salaries and benefits constituted only 10 percent of expenditures from federal forfeiture funds. As a reminder, federal rules limit the use of federal forfeiture revenue on personnel expenses, but Arizona law imposes no such limitations.

**Figure 3: Expenditures by Type, State Forfeitures, 2000-2011**



The expenditure category from which law enforcement personnel can benefit most directly under state law is, in fact, where the largest share of the spending was dedicated.

**Figure 4: Expenditures by Type, Federal Forfeitures, 2000-2011**



By giving law enforcement a direct financial stake in forfeiture efforts, Arizona laws encourage policing for profit.

### **The Perverse Financial Incentives Inherent in Arizona’s Civil Forfeiture Laws Put Law Enforcement Officers At Risk**

In 2010, Chandler police detective Carlos Ledesma was shot and killed when a reverse sting operation in west Phoenix went awry.<sup>30</sup> In a reverse sting, undercover police officers bring the drugs to a drug buy and then they seize and forfeit the cash that criminals bring to purchase the drugs. The Chandler Police Department had anticipated netting \$250,000 in exchange for 500 pounds of marijuana.<sup>31</sup> Instead, the officers took home \$999—\$1 bills stuffed into counterfeit \$100 bills—and a dedicated police officer and father of two lost his life.<sup>32</sup>

The Goldwater Institute's Mark Flatten conducted an extensive investigation after Officer Ledesma's death and discovered the following disturbing facts:

- In the last five years, Chandler police raised more than \$6.8 million through forfeitures.
- Of the \$3.2 million Chandler police raised through forfeitures in one 12 month period, more than \$2.7 million came through reverse stings. That is the equivalent of about one-fourth of Chandler's annual budget for its entire criminal investigations bureau, which includes its narcotics unit.
- There were 35 forfeiture cases in all. Twenty of them were reverse stings.
- The reverse sting operations almost always take place far away from Chandler, most often in west Phoenix.<sup>33</sup>

### **A Person Acquitted of a Crime Can Still Lose Her Property**

In 2008, a Picture Rocks woman named Emily Dennis was charged with dogfighting and animal cruelty.<sup>34</sup> Shortly after Dennis' arrest, her dogs and property were seized using forfeiture laws.<sup>35</sup> Dennis was acquitted of the charges—meaning a jury could not find sufficient evidence that she had committed the crimes of which she was accused—but the state was still able to forfeit her property.<sup>36</sup> All of her dogs were euthanized and the title of her home was transferred to the state.<sup>37</sup>

### **A Person Never Charged with a Crime Can Still Lose His Property**

In 2010, Demouriee Franklin was detained by a Maricopa County Sheriff at the Phoenix Greyhound Station.<sup>38</sup> The police found no weapons or narcotics.<sup>39</sup> Franklin was never arrested.<sup>40</sup> Franklin was carrying \$6,310 in cash—his life savings—on a trip to San Diego where he intended to join the Air Force.<sup>41</sup> The police seized his money and returned it only after the ACLU of Arizona sent a letter threatening litigation and offering evidence that the money was not the proceeds of any illegal activity.<sup>42</sup> Forcing Franklin to prove his innocence turns the American conception of innocent until proven guilty on its head.

### **A Person Who Possess No Contraband Can Have His Property Forfeited**

James Huff, an 81-year-old Nevada resident, was traveling west on Interstate 40 near Winslow, Ariz. on Dec. 23, 2011.<sup>43</sup> He was pulled over by Navajo nation police officer for allegedly making an unsafe lane change. Mr. Huff informed the officer that he accidentally left

his driver's license in Nevada, but provided the officer with his State-of-Nevada-issued medical marijuana card as identification.

After being asked, Mr. Huff told the officer that he did not have any drugs or any large amounts of cash in the car. The officer then asked if he could search the vehicle. Mr. Huff refused to consent to the search. The officer then used a police dog to sniff the vehicle. After the sniff, the officer told Mr. Huff that the dog "said" there were drugs in the car and proceeded to search the vehicle. The officer found an empty duffle bag, luggage with Mr. Huff's personal effects, and \$8400 in cash. No drugs or other contraband were found.

The officer informed Mr. Huff that he was going to confiscate the money and presented Mr. Huff with a form titled "Disclaimer of Ownership of Currency or Property." Mr. Huff was told that if he signed the form disclaiming knowledge and ownership of the money, he would never hear from the police again, but that if he failed to do so there would have to be further proceedings. Mr. Huff refused to sign the disclaimer.

Six months later, the Apache County Attorney's office published a Notice of Pending Forfeiture and Notice of Seizure for Forfeiture of "\$8400.00 in U.S. Currency" in the local newspaper. The notice was to "all persons claiming to be an owner of or an interest holder in any of the property described simply as '\$8400.00 in U.S. Currency.'" The notice was so generic that it did not even state the circumstances under which, or the date on which, the money was seized.

Not realizing that the forfeiture action had been filed, Mr. Huff and his attorneys missed the deadline to file his notice of claim. Prior to the entry of a final judgment ordering the money forfeited, Mr. Huff's attorneys did file a motion to dismiss the action. The judge denied the motion to dismiss because Mr. Huff's failure to file a timely notice of claim meant that he was not a party to the proceeding. The judge entered a final judgment ordering the currency forfeit.

Mr. Huff was told by a local newspaper employee that what happened to him is known as "paying the I-40 Tax." Based on notices of publication in the *White Mountain Independent*, officers in the area routinely seize small amounts of cash—even as small as \$135.00.<sup>44</sup> According to the same source, law enforcement focuses their attention on westbound traffic because the drugs come out of California and are sold in the east, but that the drug runners return to California with large amounts of cash. In other words, Mr. Huff was told that the police target the cash, not the drugs.<sup>45</sup>

A recent Ninth Circuit case arising from a vehicle stop along Interstate 40 by Arizona's Department of Public Safety (DPS) illustrates that Mr. Huff is not alone—and that forfeiture laws have eroded our property rights. In *U.S. v. \$133,420.00*, a DPS officer pulled over an

individual for failing to use his turn signal. A police dog “alerted” to a sniff of the vehicle’s exterior, which allegedly gave the officer probable cause to search the vehicle. The officer found two boxes of decorative rocks, a set of black throwing daggers, and \$133,420 in United States currency. No contraband was found. The officer seized the cash, and the government instituted an action to forfeit the currency. Even though there was no evidence that the vehicle’s owner had engaged in any criminal activity—or that the currency itself was the proceeds of or connected to any criminal activity—and the owner was never charged with any wrongdoing, the government was ultimately successful in forfeiting the entire sum of money.<sup>46</sup>

### **The Minimal Reporting Requirements Leave Many Questions Unanswered**

All forfeiture funds, whether derived from cash deposits or the proceeds of selling real property, are deposited in interest-bearing anti-racketeering accounts controlled by prosecutors.<sup>47</sup> The Attorney General and the County Attorneys’ Offices administer the anti-racketeering revolving funds.<sup>48</sup> Proceeds forfeited as a result of a seizure instigated by any subdivision is held for the benefit of the agency responsible for the seizure to the extent of their contribution.<sup>49</sup> Law enforcement agencies maintain control over the funds and are entitled to withdraw the funds for their own use without any independent approval.

Law enforcement agencies are required to file quarterly reports with the Arizona Criminal Justice Commission itemizing the sources of funds and expenditures.<sup>50</sup> The reports, which are distributed to executive and legislative officials, are bare bones and do not provide comprehensive information, such as the number of forfeitures filed, how many accompanied a criminal charge, how many accompanied a criminal conviction, or precise details of how the funds were spent.

### **Investigative Reporting Has Revealed Questionable Forfeiture Expenditures**

State law allows forfeiture funds to be spent in any of the following broad categories: (1) gang and drug prevention programs, (2) investigation and prosecution of an offense that subjects property to forfeiture, or (3) relocation of a threatened law enforcement officer.<sup>51</sup> Within those categories, agencies may use the funds for administrative expenses, equipment, operating expenses, professional/outside services, travel, and witness protection.<sup>52</sup> Administrative expenses consist of employee-related expenses, i.e., salaries, and overtime wages.<sup>53</sup> Operating expenses include payments to confidential police informants, office supplies, maintenance—both maintenance of forfeited property and standard office maintenance—among others.<sup>54</sup>

The legislative branch should ensure that police and prosecutors are given the resources they need to do their jobs, but law enforcement agencies should not be allowed to supplement their own budgets from forfeiture proceeds. It is extremely dangerous for one branch of

government to wield both the power of the sword *and* the power of the purse. And yet, forfeiture funds are routinely used to supplement law enforcement budgets. Tolleson Police Chief Larry Rodriguez stated, “It helps us to get some of the items that we may not have budgeted for but we find a need.”<sup>55</sup> Forfeiture funds have been used by local agencies to purchase a number of pieces of equipment that should be provided for in the normal legislative budgeting process:

- The Avondale Police Department used forfeiture funds to provide tasers for their officers, who previously had to share.<sup>56</sup>
- The Buckeye Police Department used forfeiture funds to purchase a prisoner-transport van.<sup>57</sup>
- The Goodyear Police Department used funds to purchase projectors and laptops.<sup>58</sup>
- The Tolleson Police Department directed funds toward SWAT equipment.<sup>59</sup>
- The Yuma Police Department used funds to create a new canine unit.<sup>60</sup>
- The Scottsdale Police Department purchased a new 17,000 square foot building with forfeiture funds.<sup>61</sup>
- Bisbee Police Department used \$82,000 in forfeiture funds to acquire two new police vehicles.<sup>62</sup>

Of course, not all expenditures are nearly as “legitimate” as police vehicles and tasers. In 2008, the Maricopa County Attorney’s Office, under the leadership of then-County Attorney Andrew Thomas, donated \$5,000 in forfeiture funds to a drug program operated by the Assembly of God.<sup>63</sup> During Thomas’ tenure, forfeiture funds in the amount of \$168,000 were directed to church-based programs.<sup>64</sup> Sarah Fenske, the reporter who compiled the information, could not identify a single grant to a non-Christian religious group and very few to secular groups.<sup>65</sup> In addition to the religious donations, Thomas’ office used \$128,000 of the funds to create ads that seemed to promote Thomas more than to advance any agenda designed to protect the public. The forfeiture funds paid for billboards and ads in movie theaters to shame convicted drunken drivers. The ads included the convict’s mug shot—and Thomas’ name in bold letters.<sup>66</sup>

During the same time period, other law enforcement offices were making equally questionable forfeiture expenditures. In 2009, MCSO spent \$500,000 in forfeiture funds to lease expensive cars, trucks, and sport utility vehicles that MCSO personnel, including the Sheriff and his top commanders, drove to and from work.<sup>67</sup> The Maricopa County Attorney’s Office, again under Andrew Thomas, also used forfeiture funds to provide take-home cars to top officials.<sup>68</sup>

The MCSO also purchased a golf cart used to promote an anti-drug message in parades and rented a horse-drawn carriage (draped with anti-drug messaging) for the Sheriff to appear in the Parada del Sol Parade.<sup>69</sup>

In 2011, the Pinal County Sheriff's office spent \$53,000 to send a contingent of people to St. Louis to attend the National Sheriffs' Association annual conference to receive an award.<sup>70</sup> In 2008, MCSO came under significant criticism for spending approximately \$30,000 to send officers to Bay Islands, Honduras, to train Honduran police officers and develop other ties with the country.<sup>71</sup> Officers with MCSO also used \$11,620 in forfeiture revenues to attend a threat-management conference at the Disneyland Hotel.<sup>72</sup>

### **Needed Revisions to Arizona's Civil Forfeiture Laws**

Former Arizona Attorney General Grant Woods recently opined that, "I used to favor civil forfeiture prior to criminal conviction until I saw so many instances where, because of the money involved, no criminal prosecution ever occurred or was even seriously contemplated."<sup>73</sup>

Arizona's civil forfeiture scheme needs to be overhauled. There are four primary components to comprehensive reform.

#### **Eliminate Civil Forfeiture In Favor of Criminal Forfeiture**

The first solution is to eliminate civil forfeiture and replace it exclusively with criminal forfeiture. This would ensure that no individual loses property without actually being convicted of a crime. Further, property owners would not be tasked with proving their innocence, as the government is required to prove guilt beyond a reasonable doubt. Replacing civil forfeiture with criminal forfeiture would be the best solution to the current system; it would ensure that the egregious abuses would cease and rights would be restored to property owners.

#### **Eliminate the Profit Incentive**

Additionally, all funds recovered from forfeiture, whether criminal or civil, should be deposited in a neutral general fund account. In this way, law enforcement would not have a direct financial stake in the outcome of forfeiture proceedings. Law enforcement could still be reimbursed for their investigative costs related to forfeiture work, but all proceeds over and above legitimate, reimbursable expenses should be subject to appropriation by the legislative branch.

## **Place the Evidentiary Burdens on the Government**

Another necessary protection is to adjust the burden requirements. Currently, the government need only show that property is subject to forfeiture by a preponderance of the evidence. Instead, heighten the government's burden and require it to show that the property was connected to illegal activity by a standard of beyond a reasonable doubt or at least clear and convincing evidence.

Additionally, innocent property owners who claim they were not involved with the illegal activity currently have the burden of establishing their claim; they must prove their innocence by demonstrating a negative. This requirement needs to be eliminated such that the government always has the burden of showing an item is subject to forfeiture, both in the government's initial claim and in the event that an owner asserts her property is exempt.

Further, allow innocent spouses to defend their property. Today, spouses who claim they were not involved with the illegal activity are not entitled to relief unless the property was owned as separate property, which is to say it was acquired prior to the marriage or as a gift to the named spouse only during the marriage. If a husband and wife are both named owners of their home and the house is seized due to the wife's illegal activity, the husband loses the house and is not entitled to exemption or even due process: "A spouse binds his spouse by his act or omission."<sup>74</sup> This anachronism is exceedingly unfair to a blameless spouse who would be entitled to keep his property but for the concept of guilt by association.

## **Better Reporting**

Under a republican form of government, it is the legislature—the body closest to the people—that is responsible for setting priorities and appropriating funds. Today, legislative officials and others are poorly informed about how much and what type of forfeiture is occurring in Arizona. Reporting should be improved to include comprehensive information, such as each forfeiture filed, what was the accompanying criminal charge, was there a criminal conviction, what was the type of property and its value, how was the property disposed of, and how did each agency spend forfeiture funds. Only with such information can the legislative branch avoid having its responsibilities usurped by the executive branch.

## About the Authors

**Tim Keller** serves as the Institute for Justice Arizona Chapter's executive director. He joined the Institute as a staff attorney in August 2001 and litigates school choice, economic liberty, and other constitutional cases in state and federal court. Tim successfully defended Mesa brake shop owner Randy Bailey, when the City sought to take his property through eminent domain so it could hand the property over to the owner of an Ace hardware store. He also helped author Arizona's landmark property rights protection initiative, Proposition 207. Tim currently serves on the board of the Phoenix Lawyers' Chapter of the Federalist Society and is a volunteer lawyer with the Arizona Center for Disability Law. He received his law degree from Arizona State University where he was the president of the Arizona State Federalist Society chapter and a member of the National Moot Court team. Before that, he earned his bachelor's degree in Economics from Arizona State University, graduating magna cum laude. Prior to starting law school, Tim worked as a research assistant at the Goldwater Institute, a state-based free market public policy organization. Upon graduation from law school, Tim clerked for the then-Presiding Judge of the Maricopa County Superior Court, Robert D. Myers. After leaving the Superior Court, Tim accepted a clerkship with the Honorable Ann A. Scott Timmer on the Arizona Court of Appeals.

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**Dick M. Carpenter II, Ph.D.**, serves as director of strategic research for the Institute for Justice. He works with IJ staff and attorneys to define, implement and manage social science research related to the Institute's mission. Results of his work have appeared in academic journals such as *Urban Studies*, *Regulation and Governance*, *Independent Review*, *Journal of Advanced Academics*, *Journal of Special Education*, *The Forum*, *Education and Urban Society*, *Journal of School Choice and Leadership*, as well as magazines including *Regulation*, *Phi Delta Kappan* and the *American School Board Journal*. The results of his research are used by state education officials in accountability reporting, have been influential in crafting policy in state legislatures, and have been cited in briefs to state and federal courts, including the U.S. Supreme Court. Dr. Carpenter has served as an expert witness in several federal lawsuits and has been quoted in newspapers such as *The Wall Street Journal*, *New York Sun*, *Denver Post*, *Atlanta Journal-Constitution*, *Chronicle of Higher Education*, *Dallas Morning News*, *Education Week* and the *Washington Times*. Before working with IJ, Dick worked as a high school teacher, elementary school principal, public policy analyst and university professor. He holds a Ph.D. from the University of Colorado.

## Endnotes

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<sup>1</sup> Kim Smith, *Woman Must Forfeit Property*, Arizona Daily Star, Apr. 7, 2010, available at [http://azstarnet.com/news/local/crime/woman-must-forfeit-property/article\\_26658120-3cf4-5535-bbd1-573d7a500021.html](http://azstarnet.com/news/local/crime/woman-must-forfeit-property/article_26658120-3cf4-5535-bbd1-573d7a500021.html).

<sup>2</sup> In addition to forfeiture under Arizona law, police and prosecutors have an additional method with which to seize funds—an aggressive federal program known as equitable sharing. It is a legal loophole that enables state police and prosecutors to team up with federal law enforcement in seizing property. Equitable sharing is at once simple and lucrative for the state: Up to 80 percent of the proceeds of the seized property are returned to the local law enforcement agency. Dick M. Carpenter II, Larry Salzman and Lisa Knepper, Institute for Justice, *Inequitable Justice: How Federal Equitable Sharing Encourages Local Police and Prosecutors to Evade State Civil Forfeiture Law for Financial Gain* 1 (2011). Between 2000 and 2008, Arizona received over \$35 million in equitable sharing revenue. Marian R. Williams, Jefferson E. Holcomb, Tomislav V. Kovandzic, Scott Bullock, Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* 47 (2010). Many states with more demanding forfeiture laws than Arizona have significantly higher rates of equitable sharing. *Id.* Equitable sharing provides the same result as state law-based forfeiture but uses a different route to get there. In order to benefit from the distribution of equitable sharing funds, law enforcement must apply annually to the Department of Justice, setting out their eligibility. U.S. Dep't of Justice, *Guide to Equitable Sharing for State and Local Law Enforcement Agencies* (2009), available at <http://www.justice.gov/usao/ri/projects/esguidelines.pdf>. In doing so, they must attest that they are compliant with the program's requirements, which include conformity with federal civil rights laws. *Id.* Maricopa County is currently struggling with its application, specifically in attesting to its civil rights record. Michelle Ye Hee Lee, *Maricopa County Delays Applying for Federal RICO Funds*, Arizona Republic, Aug. 22, 2012, available at <http://www.azcentral.com/news/articles/20120822maricopa-county-delays-applying-federal-rico-funds.html#ixzz24NQtHIGs>.

<sup>3</sup> Ariz. Rev. Stat. (A.R.S.) § 13-2301(D)(4)(b). The complete list of racketeering offenses include:

- (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.

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- (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 section 34-252.
  - (xxv) Terrorism.
  - (xxvi) Money laundering.
  - (xxvii) Obscene or indecent telephone communications to minors for commercial purposes.
  - (xxviii) Counterfeiting marks as proscribed in section 44-1453.
  - (xxix) Animal terrorism or ecological terrorism.
  - (xxx) Smuggling of human beings.

Racketeering also includes terrorism. A.R.S. § 13-2301(D)(4)(a).

<sup>4</sup> A.R.S. § 13-4308(C).

<sup>5</sup> A.R.S. § 13-4308(A). If the government attorney determines that the property is not subject to forfeiture, the seizing agency is so notified and is allowed to release the seized property.

<sup>6</sup> A.R.S. § 13-4310(B).

<sup>7</sup> *Id.*

<sup>8</sup> A.R.S. § 13-4310(E)(3).

<sup>9</sup> A.R.S. § 13-4311(E).

<sup>10</sup> *Id.*

<sup>11</sup> A.R.S. § 13-4308(B).

<sup>12</sup> A.R.S. § 13-4311(G).

<sup>13</sup> A.R.S. § 13-4311(D).

<sup>14</sup> A.R.S. § 13-4311(M).

<sup>15</sup> State Bar of Arizona: RAJI (Criminal) No.5b(2) (2008), available at [http://www.azbar.org/media/58832/standard\\_criminal\\_instr.pdf](http://www.azbar.org/media/58832/standard_criminal_instr.pdf).

<sup>16</sup> A.R.S. § 13-115(A).

<sup>17</sup> A.R.S. § 13-4311(M).

<sup>18</sup> A.R.S. § 13-4304 (4)(a)-(c).

<sup>19</sup> A.R.S. § 13-4304(4)-(5).

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<sup>20</sup> A.R.S. § 13-4314(F).

<sup>21</sup> A.R.S. § 13-4311(N)(2)-(3). The remaining 10 percent of forfeiture funds are placed in the Arizona Criminal Justice Commission's victim compensation and assistance fund to be used to compensate injured victims for proven economic loss. *Id.*

<sup>22</sup> Marian R. Williams, Jefferson E. Holcomb, Tomislav V. Kovandzic, Scott Bullock, Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture* 7 (2010).

<sup>23</sup> All data used for this report came from quarterly RICO reports made available by the Arizona Criminal Justice Commission, *available at* <http://www.azcjc.gov/ACJC.Web/finance/ricomain.aspx>.

<sup>24</sup> Williams, Holcomb, Kovandzic, & Bullock, *supra* n.5.

<sup>25</sup> Weber, R., U.S. Department of Justice, *A Guide to Equitable Sharing for State and Local Law Enforcement Agencies* 19 (2009). The exceptions include matching funds in grant programs, overtime, new or one-year appointments and salary of an officer hired to replace an officer assigned to a task force.

<sup>26</sup> *Id.*

<sup>27</sup> *See* Mo. Ann. Stat. § 513.623; Mo. Const. art. IX, § 7; N.M. Stat. Ann. § 31-27-6(D)(1-2); N.C. Const. art. IX, § 7(a-b); N.D. Cent. Code Ann. § 29-27-02.1; and Vt. Stat. Ann. tit. 18, § 4244(d).

<sup>28</sup> This includes court costs and attorney fees.

<sup>29</sup> P & O services include financial auditing, court reporting, filing fees, expert witnesses and the like.

<sup>30</sup> Mark Flatten, *Risk vs. Rewards: Chandler Police Raise Risk to Officers as They Chase Lucrative Out-of-Town Drug Deals*, Goldwater Institute, 2011, *available at* <http://goldwaterinstitute.org/article/risk-vs-rewards-chandler-police-raise-risk-officers-they-chase-lucrative-out-town-drug-deals>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Kim Smith, *Woman Must Forfeit Property*, *Arizona Daily Star*, Apr. 7, 2010, *available at* [http://azstarnet.com/news/local/crime/woman-must-forfeit-property/article\\_26658120-3cf4-5535-bbd1-573d7a500021.html](http://azstarnet.com/news/local/crime/woman-must-forfeit-property/article_26658120-3cf4-5535-bbd1-573d7a500021.html).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Dan Pochoda, *What One Letter Can Do*, Civil Liberties in Arizona (ACLU of Arizona, Phoenix), Spring 2012, at 2, *available at* [http://acluaz.org/sites/default/files/documents/web%20aclunews\\_spring2012\\_06\\_view\\_red.pdf](http://acluaz.org/sites/default/files/documents/web%20aclunews_spring2012_06_view_red.pdf).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

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<sup>42</sup> *Id.*

<sup>43</sup> Information regarding Mr. Huff is based on a personal interview with the authors of this paper and the legal documents filed in Mr. Huff's civil forfeiture case, which are on file with the Institute for Justice Arizona Chapter.

<sup>44</sup> An online search of the *White Mountain Independent* newspaper's website (<http://www.wmicentral.com>) found published forfeiture notices for numerous small dollar amounts (\$677.00; \$313.00; \$321.00; \$420.39; \$633.00; \$344.00; \$316.00; \$274.00; \$135.00. etc...). The website search also found notices of forfeiture for currency amounts in the thousands, tens of thousands and even hundreds of thousands of dollars.

<sup>45</sup> Mr. Huff's "hearsay" is consistent with documented evidence from at least one other state's forfeiture tactics. Along the same interstate (I-40), Tennessee law enforcement officers are 10 times as likely to stop a suspected drug trafficking vehicle on the westbound freeway than the eastbound freeway. Phil Williams, *Middle Tennessee Police Profiting Off Drug Trade?*, News Channel 5, May 18, 2011, available at

<http://www.newschannel5.com/story/14643085/police-profiting-off-drug-trade>.

<sup>46</sup> *United States v. \$133,420.00 in United States Currency*, 672 F.3d 629 (9th Cir. 2012).

<sup>47</sup> A.R.S. §§ 2314.01(A), (D); 13-2314.03(A), (D).

<sup>48</sup> A.R.S. §§ 2314.01(D); 13-2314.03(D).

<sup>49</sup> A.R.S. § 2314.01(D).

<sup>50</sup> A.R.S. § 13-2314.01(F).

<sup>51</sup> A.R.S. § 13-2314.01(E)(1)-(3).

<sup>52</sup> Arizona Criminal Justice Comm'n, *RICO Report Training*, available at [http://www.azcjc.gov/ACJC.Web/pubs/Finance/RICO\\_Training.pdf](http://www.azcjc.gov/ACJC.Web/pubs/Finance/RICO_Training.pdf).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Elias C. Arnold, *Assets Seized in Crimes Pay for Police Equipment*, Arizona Republic, Aug. 31, 2007.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Yuma Police Department has New K-9 Unit*, Associated Press, Aug. 8, 2010.

<sup>61</sup> Peter Corbett, *City Silent on Facility for Police*, Arizona Republic, July 9, 2012.

<sup>62</sup> Shar Porier, *Bisbee Council OKs Property Tax Increase*, Sierra Vista Herald, July 6, 2012.

<sup>63</sup> Sarah Fenske, *Andrew Thomas Spends Public Money to Bring Sinners to Christ*, Phoenix New Times, June 5, 2008.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

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<sup>66</sup> Dennis Welch, *Goddard Booklet Criticized as Self-Promoting*, East Valley Tribune, Mar. 9, 2008, available at [http://www.eastvalleytribune.com/news/article\\_12175481-03db-5983-bae8-e35adabe7e96.html](http://www.eastvalleytribune.com/news/article_12175481-03db-5983-bae8-e35adabe7e96.html).

<sup>67</sup> Craig Harris & JJ Hensley, *Sheriff Cars Paid with Crime Funds*, Arizona Republic, Oct. 4, 2009.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Lindsey Collom, *Pinal County Sheriff's Office Used RICO, Jail Funds for Travel*, Arizona Republic, Aug. 28, 2011, available at <http://www.azcentral.com/community/pinal/articles/2011/08/28/20110828rico-jail-funds-used-travel.html>.

<sup>71</sup> E.J. Montini, *Toughest sheriff in . . . Honduras?*, Arizona Republic, Mar. 6, 2008.

<sup>72</sup> Harris & Hensley, *supra* n.69.

<sup>73</sup> Grant Woods, *Changing Your Mind*, Grant Woods Official Site, (Mar. 19, 2012, 9:01 PM), <http://grantwoods.com/changing-your-mind>.

<sup>74</sup> A.R.S. § 13-4301(5).