ARIZONA COURT OF APPEALS
DIVISION ONE

In re $39,500 U.S. CURRENCY	No. 1 CA-CV 21-0060
STATE OF ARIZONA, Plaintiff/Appellee, v. JERRY JOHNSON, Claimant/Appellant.	Maricopa County Superior Court No. CV2020-012190

BRIEF OF CLAIMANT/APPELLANT JERRY JOHNSON

INSTITUTE FOR JUSTICE
Keith Diggs
State Bar No. 032692
398 S. Mill Ave., Ste. 301
Tempe, AZ 85281
(480) 557-8300, ext. 606
kdiggs@ij.org

INSTITUTE FOR JUSTICE
Dan Alban*
Alexa L. Gervasi*
*Admitted *pro hac vice*
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
(703) 682-9320
dalban@ij.org
agervasi@ij.org

Attorneys for Claimant/Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Codes, Rules, and Statutes

Other Sources

INTRODUCTION

Jerry Johnson is a small business owner who was traveling from North Carolina to Arizona to purchase a semi-truck at auction for his small trucking business when officers at the Phoenix Sky Harbor Airport seized the cash he planned to use for this purchase. Jerry was not charged with any crime, but he has been punished with the forfeiture of nearly $40,000 because he was traveling with a large amount of cash—a completely lawful activity. Due to an improper application of Arizona law by the Superior Court, a forfeiture order was entered against Jerry's property, permanently conveying it to the government. This error necessitates reversal.

This case is about what a property owner must do to merely have standing to contest the forfeiture of their property under Arizona law. The court below erred by finding that it is not enough for a property owner to show that they are the genuine owner[1] of seized property, but that they also must show that their ownership of that property is *innocent*. By requiring proof of *innocent* ownership—proof that a person's ownership interest is

[1] "Genuine" ownership simply means that someone is the real, actual owner of seized property and not someone making a false or fraudulent claim to seized property.

unconnected to criminal activity—property owners are effectively forced to prove their own innocence just to have standing to contest the forfeiture of their property.[2]

The ruling below fails to follow the statutory requirement for establishing standing to contest a forfeiture and it improperly merges the standing inquiry with the separate merits inquiry. Doing so flips the burden of proof for forfeiture in Arizona, effectively requiring people to demonstrate their own innocence at the very beginning of a forfeiture case. If followed, this new standard would completely undermine the 2017 amendments to Arizona's forfeiture statutes, which require the State to bear the burden of proving that property is subject to forfeiture by "clear and convincing" evidence. Forcing people to prove their own innocence to obtain the return of their seized property also violates due process under recent U.S. Supreme Court precedent. Because Arizona's forfeiture statutes should not be interpreted in a manner that renders them unconstitutional, this Court

[2] The term "innocent ownership"—which, again, refers to an ownership interest that is unconnected to criminal activity—is used interchangeably with "legitimate ownership." It does not refer to the separate statutory defenses codified at A.R.S. §§ 13-4304(4)–(5), which generally apply to third-party owners of seized property and are sometimes referred to as "innocent owner" defenses.

should reverse the Superior Court's misapplication of the standing provision of Arizona's forfeiture statute, A.R.S. § 13-4310(D).

STATEMENT OF THE CASE

I. Nature of the Case

Claimant/Appellant Jerry Johnson is the 45-year-old owner of a small trucking company, Triple J Logistics, LLC ("Triple J"), which was incorporated in Maryland in 2015 (and is now based in North Carolina). (*See* I #4–#6). He holds a North Carolina commercial driver's license and manages the two drivers of his two semi-trucks. (I #6, Exs. 2, 5). Jerry lives in Charlotte, N.C., with his fiancée and 3-year-old grandson. (*See* TR 16:10–12).

A. With No Evidence of a Crime, Phoenix Police Confiscated Jerry's $39,500 in Cash and Threatened Jerry with Money Laundering Charges Unless He Signed an On-the-Spot Waiver.

Currently, Triple J owns two Peterbilt semi-trucks. (TR 9:7–12; I #6, Ex. 6). Last August, Jerry flew to Phoenix to explore buying a third Peterbilt truck for his business. (TR 8:22–23). He planned to visit the Ritchie Bros. auction house to inspect a truck and make a cash offer in hopes of "get[ting] a better deal." (TR 8:22–9:2, 9:17–10:7). While Ritchie Bros. purports to not accept cash payments during the COVID-19 pandemic, Jerry was not aware

of that change, and even the State admits Jerry would have been allowed to visit the auction house to inspect its trucks in person. (TR 68:17–69:7).

This case was set in motion when the Phoenix Police Department confiscated $39,500 from Jerry's baggage at Phoenix Sky Harbor Airport. According to the confiscating detective, Jerry was stopped based on a tip "[f]rom a confidential informant" whose credibility the detective "d[id]n't think [was] something that we need to bring up here at a [probable cause] hearing." (TR 70:24–71:18). The detective stopped Jerry in the baggage carousel area. (TR 51:21–52:3). Jerry told the detective that he was in Phoenix to buy a truck. (TR 58:12). The detective asked Jerry "if he ha[d] any large amounts of cash or currency" in his baggage, and Jerry showed him the money. (*See* TR 53:15–55:5). The detective claimed that the money smelled like marijuana, but Jerry does not smoke marijuana. (*See* TR 61:7–62:10). After the detective failed to find any contraband in Jerry's possession, the detective pressured Jerry into signing an on-the-spot "disclaimer of ownership of currency form." (TR 62:25–63:18); (I #17). As Jerry relayed to his counsel, the detective "threatened to . . . charge[him] with money laundering . . . unless he signed." (*See* TR 89:11–22). The detective never recommended to the Maricopa County Attorney's Office that Jerry be

charged. (TR 71:19–72:14). And the State has not charged Jerry with any crime. (TR 75:17–19). Yet, Jerry's seized cash has now been ordered to be forfeited to the State.

B. The Superior Court Denied Jerry Standing After Recognizing that Jerry "Clearly Established His Interest in the Property."

This is an appeal from the Superior Court's application of A.R.S. § 13-4310(D) both at and following a probable cause hearing. That statute provides:

> In any judicial forfeiture hearing, determination or other proceeding pursuant to this chapter, the applicant, petitioner or claimant must establish by a preponderance of the evidence that he is an owner of or interest holder in the property seized for forfeiture before other evidence is taken.

A.R.S. § 13-4310(D) ("The burden of proving the standing of the claimant . . . is on the claimant . . . ."). At the hearing below, the court advised counsel at the close of Jerry's testimony that:

> you clearly established [Jerry's] interest in the property, so I don't think you need to . . . put on any other evidence on ownership.

(TR 38:18–20 (cleaned up)). But the next day, the court implicitly retracted this finding in a written order holding that "[Jerry] is not an owner of or

interest holder in the property." (I #15 at 1 (citing A.R.S. § 13-4310(D))). More on the Superior Court's disposition of Jerry's claim is given in Part III below.

There is a set of statutory burdens that the opposing parties bear in judicial forfeiture proceedings. These statutory burdens each relate to different inquiries:

A.R.S.	**Burden to show**	**Held by**	**Standard**
§ 13-4310(B)	seized property is subject to forfeiture	the State	probable cause
§ 13-4310(D)	ownership of seized property	claimant	preponderance of the evidence
§ 13-4311(M)	seized property can be forfeited	the State	clear and convincing evidence
§§ 13-4304, 13-4311(N)	exemption from forfeiture[3]	claimant	preponderance of the evidence

As mentioned above, this appeal is from the Superior Court's application of the ownership standard at a hearing on probable cause.

Ownership is a threshold inquiry at "any judicial forfeiture hearing." A.R.S. § 13-4310(D). The ownership inquiry evaluates different facts than the probable cause inquiry. *Compare id.* (requiring "evidence that [a claimant] is an owner of or interest holder in the property seized for forfeiture"), *with id.*

[3] A.R.S. § 13-4304 exempts from forfeiture certain property that would otherwise be subject to forfeiture. None of these § 13-4304 exemptions are at issue in this case.

§ 13-4305(A)(3)(c) (conditioning seizure for forfeiture on peace officer's "probable cause to believe that the property is subject to forfeiture"), *and id.* § 13-4310(B) (providing for post-seizure hearing on probable cause). Somewhat circularly, property is legally considered "subject to forfeiture" whenever it is "described in a statute providing for its forfeiture." A.R.S. § 13-4304; *see also, e.g.*, *id.* § 13-2314(G) (making property used in and proceeds traceable to a racketeering offense subject to forfeiture); *id.* § 13-3413 (making property used in and proceeds traceable to a drug offense subject to forfeiture); *id.* § 13-2301(D)(4)(b) (defining certain offenses as "racketeering" when "committed for financial gain").

When a claim is filed in a forfeiture case, it entitles the claimant to "a hearing to adjudicate the validity of his claimed interest in the property." A.R.S. § 13-4311(D). A claimant can and ordinarily will establish ownership even when the State shows probable cause. The probable cause hearing statute provides:

> If property is seized for forfeiture without a prior judicial determination of probable cause . . . the court, on an application filed by [a claimant] within fifteen days after notice of its seizure for forfeiture . . . may issue an order to show cause to the seizing agency for a hearing *on the sole issue* of whether *probable cause* for forfeiture of the property then exists.

A.R.S. § 13-4310(B) (emphases added). At this probable cause hearing, the ownership inquiry applies independently as a threshold matter. *See id.* § 13-4310(D) (requiring proof of ownership at "any judicial forfeiture hearing"). In the hearing below, the court recognized that Jerry had met his ownership burden, and then heard the State's evidence on the separate matter of probable cause for seizure. (*See* TR 38:18–39:18).[4] It was not until the next day that the court dismissed Jerry's claim for an ostensible failure to prove ownership. (*See* I #15); *infra* Statement of the Case, Part III.

As described above, A.R.S. § 13-4311 lays out the procedure for judicial *in rem* forfeiture whenever a claim is filed. Regardless of the outcome of any probable cause proceeding under A.R.S. § 13-4310(D), a judicial *in rem* forfeiture proceeding culminates in a determination on the merits of the State's case for forfeiture. A.R.S. § 13-4311(K)–(N). "In accordance with its findings at th[is] hearing" on the merits, the court must order the property returned to the claimant or else forfeited to the State based on whether the State meets its "burden of establishing by clear and convincing evidence that the property is subject to forfeiture." *Id.* § 13-4311(M)–(N). Property *must* be

[4] As he made his case for probable cause, State's counsel also intimated "concerns about the legitimacy of [Jerry's] interest." (TR 39:3–4).

returned if the State "fail[s] to establish by clear and convincing evidence that the interest [in property] is subject to forfeiture." *Id.* § 13-4311(N)(1)(a).

Dismissing a forfeiture claim effectively relieves the State from having to meet its forfeitability burden. "If no . . . claims are timely filed," then the State is entitled under the forfeiture statutes to "apply to the court for an order of forfeiture," and the State's standard of proof falls from clear and convincing evidence to mere "probable cause." A.R.S. § 13-4314(A). The Supreme Court of this State has written that "this proceeding [i]s essentially *ex parte*" and "virtually assur[es] a forfeiture." *Wohlstrom v. Buchanan*, 180 Ariz. 389, 391 (1994).

II. Course of Proceedings

In the proceedings below, the State filed notice of pending forfeiture of the seized cash on October 1, 2020. (I #1). The notice included a notice of seizure for forfeiture. (I #1). Jerry filed a timely and verified claim on October 9, asserting that the seized cash belonged to him and attaching Triple J's articles of incorporation, Jerry's Commercial Driver's License (CDL), Triple J's June 2020 Wells Fargo bank statement showing a $24,299.80 balance, a notarized affidavit from Jerry's uncle, Gary L. Johnson, attesting that he had loaned Jerry $9,000 to finance a truck purchase, Jerry's tax returns from 2015

to 2018, and the Maryland cab registrations for Triple J's two Peterbilt trucks. (I #3–#5).

The State filed its complaint for forfeiture on November 25. (I #6). The complaint makes bare assertions that Jerry's seized cash "was used or intended to be used to facilitate a transaction involving prohibited drugs," that it "constituted proceeds of a transaction involving prohibited drugs," and that Jerry "was transporting and concealing the existence and nature of racketeering proceeds knowing or having reason to know that they were proceeds of a racketeering offense." (I #6 at ¶¶ 9–11). Much of the State's complaint invokes Jerry's criminal history,[5] but the State alleges no facts that would connect Jerry's criminal history to the seized cash. (I #6 at ¶¶ 37–50). The complaint's only factual allegation about the seized cash is that Jerry "had" the cash on the date of the seizure. (*See* I #6 at ¶ 14).

Jerry timely answered on December 14. (I #7). Concurrently with the answer, Jerry requested a probable cause hearing. (I #7). The State objected

[5] Jerry has been living "a crime-free life" since 2012. (TR 13:16–14:5). His last criminal offense was for possession of marijuana in North Carolina. (*See* I #7 at ¶¶ 48-50 (answer)). In the mid-2000s, Jerry went to federal prison for distributing cocaine in Maryland. (*See* I #7 at ¶¶ 37–46). Jerry moved on "after [his] last conviction" and got his CDL. (TR 13:16–14:5). He started his trucking business three years later, in 2015. (TR 13:19–14:5); (I #3 at 1–2).

to the probable cause hearing request as untimely, (I #8), but the Superior Court rejected the State's objection and proceeded to set a "Probable Cause Evidentiary Hearing" via video conference for January 6, 2021, and the parties submitted briefs and exhibits. (I #9); (*see also* I #10–#13).

III. Disposition in the Court Below

When the Superior Court called the probable cause hearing to order, it was immediately apparent that the parties disputed who held which burdens:

> THE COURT: [I]f I understand [the State's] position, [the State] believe[s that Jerry] is required first to prove an interest in the property before we proceed further. Is that your position today?
>
> MR. GARDNER: Yeah, [Jerry] ha[s] to establish by a preponderance [of the evidence] that [Jerry is] a legitimate interest holder.
>
> THE COURT: Mr. Martinet, do you agree with that?
>
> MR. MARTINET: Judge, I believe the burden is on the State to prove that they have probable cause to seize the property, not the other way around. I don't think the burden is on us [i]n any way . . . .
>
> THE COURT: Okay. Well, I find that, under A.R.S. § 13-4310(D), that [Jerry] has to first establish by a preponderance of the evidence that he is an owner or interest holder in the property.

(TR 5:2–18). This was a correct statement of the requirement for standing under A.R.S. § 13-4310(D). After this, Jerry took the stand and testified that the State had confiscated his cash, which he had borrowed from relatives and saved from the proceeds of his trucking business. (*See* TR 6:19–12:12). In support of Jerry's claim, counsel introduced eleven exhibits: a CPA certification of Jerry's 2015 federal and state tax returns; Jerry's 2015 federal and state tax returns; Jerry's 2016 federal and state tax returns; Jerry's 2017 federal and state tax returns; Jerry's 2018 federal and state tax returns; Triple J's June 2020 bank statement at Wells Fargo showing a $24,299.80 balance; a photo and Maryland registration cards for Triple J's two Peterbilt trucks; another photo of one of the trucks from an angle showing Triple J's corporate decal; Jerry's North Carolina commercial driver's license; the notarized affidavit sworn by Jerry's uncle vouching that he had loaned Jerry $9,000 cash "in an effort to expand Jerry's trucking company"; and a Wells Fargo summary documenting $19,500 in cumulative transfers from Triple J's account to its corporate owner Jerry from August 2018 to August 2020. (*See* I #10, #34–#44). All of these exhibits were admitted. (TR 12:13).

Upon admitting Jerry's exhibits, the Superior Court paused the direct examination to advise Jerry's counsel:

> THE COURT: Mr. Martinet . . . at this point, your only burden is to establish an interest in the property. If you want to keep questioning your client on the probable cause issue, you're more than welcome to. But . . . in terms of interest in the property, [Jerry] *testified that that was his cash, and I think that's sufficient*, although Mr. Gardner may want to cross-examine it.

(TR 12:14–21 (emphasis added)). Counsel wrapped up with questioning that established Jerry's payment of taxes, crime-free record after 2012, entrepreneurship of Triple J, and use of business and personal bank accounts. (TR 12:22–14:18).

On cross-examination, State's counsel established that Jerry's uncle was laid off from a furniture business during the pandemic and had loaned his severance payment to Jerry; that Jerry's fiancée helped with his finances; that Jerry owned the Triple J trucking business and filed his taxes; that Jerry had visited Phoenix before with his cousin; that Jerry's cousin and uncle had each been incarcerated before; and that Jerry had wired each of them commissary money while they were incarcerated. (*See* TR 14:23–28:12).

As the State's counsel pressed Jerry on having previously supported his relatives while they were incarcerated, the witness–examiner rapport broke down, prompting Jerry to repeat that "[t]he money belonged to me" and that "[w]hen the police stopped me, I told them the money belonged to

me." (TR 28:13–23). The State moved to strike Jerry's testimony, but the Superior Court overruled with an admonition that "I don't think you actually asked [Jerry] a question. . . . [Y]ou started arguing with [Jerry] and he argued back." (TR 28:24–29:6). State's counsel finished cross-examining. (*See* TR 29:7–37:16). Jerry testified on redirect that his prior financial assistance to incarcerated family members was unrelated to his trucking business. (TR 37:19–38:16).

After Jerry finished testifying, the Superior Court again advised counsel that "you clearly established [Jerry's ownership] interest in the property, so I don't think you need to" "put on any other evidence on ownership." (TR 38:18–20); *see also* A.R.S. § 13-4310(D). Jerry's counsel rested. (TR 38:22).

With ownership established, State's counsel called the confiscating detective to the stand to demonstrate probable cause for forfeiture. (*See* TR 39:10–79:9). The detective began with anecdotal testimony based on his training and experience that he understood the illegal drug trade and that money in the drug trade travels east to west with couriers who fly on "last minute" reservations. (TR 39:10–47:9). The State's exhibits, which consist exclusively of the on-the-spot waiver Jerry was pressured to sign along with

several photographs of Jerry's luggage, were admitted without objection. (TR 47:10–19); (*see also* I #17–#33). After a break, the detective continued testifying that he found Jerry's travel plans suspicious, associated Jerry with his criminal history as well as that of his relatives, and questioned why Jerry would travel with so much cash on his person. (TR 48:22–68:9).

On cross-examination, it emerged that the detective's attention had been drawn to Jerry in the first instance by "a confidential informant." (TR 68:15–71:7). When counsel asked "[h]ow [the detective could] assess the credibility of this confidential informant," the detective evaded the question by noting "that could be something that could be drawn up *once we go to trial. I don't think that's something that we need to bring up here at a PC* [probable cause] *hearing*." (TR 71:9–18 (emphasis added)). The detective admitted that he never recommended charging Jerry, never found any drugs on Jerry, and that it is legal to "travel with as much money as you can." (TR 71:19–73:12). The detective also testified that he did not "find any evidence of drug trafficking" by Jerry. (TR 75:22–24). After the detective's testimony on redirect, counsel made closing arguments and the court took the matter under advisement. (*See* TR 93:4–9).

At this point, having determined that Jerry was the owner or interest holder of the seized cash, the court should have ordered that Jerry had standing to assert a claim for the cash, and it should have then addressed "the sole issue" of whether the State had probable cause for forfeiture. *See* A.R.S. § 13-4310(B). If the State met this burden, then the court should have ordered that the property would remain with the State until the forfeiture hearing, where the State would be required to show forfeitability by clear and convincing evidence. If the State did not meet its probable-cause burden, then the cash should have been returned to Jerry pending the forfeiture hearing. *Id.* But the court did not follow this prescribed chain of events.

Instead, the next day, the Superior Court ruled "that [Jerry] is not an owner of or interest holder in the" seized cash, even while allowing that Jerry's testimony was plausible. (I #15 at 1, 3 ("It is possible that Claimant brought cash to Phoenix for the purpose of possibly buying a truck . . . .")). "As between two possibilities," the court observed, "that [Jerry] flew with his own cash to possibly buy a truck, or that [Jerry] was transporting the proceeds of drug transactions—the latter is more likely." (I #15 at 3). Finding "the latter [possibility] more likely," the court concluded that Jerry "ha[d] not met his burden of proving that *he owns the $39,500 seized from him*." (I #15

at 3 (emphasis added)). With no claimant remaining in the case, the court issued a judgment of forfeiture in favor of the State. (I #48).

IV. Basis of Appellate Jurisdiction

This is an appeal "[f]rom a final judgment entered in an action . . . commenced in a Superior Court." A.R.S. § 12-2101(A)(1); (*see also* I #48 at 4 ("No further matters remain pending and this judgment is entered [under] Rule 54(c) . . . .")).

STANDARD OF REVIEW

This appeal concerns the Superior Court's application and the constitutionality of A.R.S. § 13-4310(D). As this Court has recognized, "[i]nterpretation and application of statutes present questions of law and are subject to *de novo* review." *Matter of U.S. Currency In the Amount of $315,900.00*, 183 Ariz. 208, 211 (App. 1995). Likewise, "constitutional questions," such as the one posed in this case, "are reviewed *de novo*." *Id.*

STATEMENT OF THE ISSUES

1. Did the Superior Court err in applying A.R.S. § 13-4310(D) to hold that Claimant/Appellant Jerry Johnson did not establish that he is an owner or interest holder with standing to challenge the forfeiture of cash that was seized from him because he failed to prove by a preponderance of

the evidence that his ownership of the seized cash is unconnected to criminal activity?

2. If the Superior Court did not err in applying A.R.S. § 13-4310(D) to require that Claimant/Appellant Jerry Johnson demonstrate his *innocent* ownership of the seized cash to have standing, does A.R.S. § 13-4310(D) violate due process under the Arizona and United States constitutions by requiring claimants to prove their own innocence in order to contest the forfeiture of their property?

SUMMARY OF ARGUMENT

To have standing to challenge a forfeiture, A.R.S. § 13-4310(D) requires only that a claimant demonstrate "by a preponderance of the evidence that he is an owner of or interest holder in the property seized for forfeiture." It does not require that a claimant demonstrate his *innocent* ownership of the property; and the Superior Court erred by effectively reading this requirement into the statute. In so doing, the Superior Court improperly merged the preliminary standing inquiry with the ultimate merits inquiry, and erroneously shifted the burden of proof to Jerry to demonstrate his own innocence merely to have standing to contest the forfeiture of his property,

in violation of Arizona's statutes and the due process clauses of both the Arizona and U.S. constitutions.

Part I of the Argument addresses how the Superior Court erred by improperly requiring that Jerry demonstrate more than proof of ownership to satisfy the standing requirement in A.R.S. § 13-4310(D). Part II of the Argument explains the constitutional consequences of the Superior Court's error.

Together, these arguments demonstrate why this Court should reject the Superior Court's application of A.R.S. § 13-4310(D) to impose an innocent ownership requirement on claimants: because it is unsupported by the text of the statutory provision, because it would undermine other statutory provisions that were recently amended, because it contradicts the entire body of case law on separating the standing inquiry from the inquiry, because it would run directly counter to existing Arizona Supreme Court precedent on what is necessary to satisfy the standing requirement, because it would undermine the Legislature's recent legislative changes to raise the burden of proof under A.R.S. § 13-4311(M), and because doing so would violate the due process rights of would-be claimants under both the federal and Arizona constitutions.

ARGUMENT

I. THE SUPERIOR COURT ERRED BY APPLYING A.R.S. § 13-4310(D) TO REQUIRE MORE THAN PROOF OF OWNERSHIP TO SATISFY STANDING.

The Superior Court incorrectly applied A.R.S. § 13-4310(D) by requiring Jerry to demonstrate more than proof of ownership in order to attain standing to contest the forfeiture of his seized cash. Part A below discusses how § 13-4310(D) should be applied and why the standing inquiry conducted under § 13-4310(D) should never be merged with the ultimate merits inquiry. Part B explains how the Superior Court erred by requiring Jerry to demonstrate not only that he owned the seized property, but that his ownership was innocent, which improperly merged the standing inquiry with the merits inquiry.

A. Arizona Requires Only that Parties Demonstrate Ownership of or an Interest in Seized Property in Order to Have Standing to Challenge a Forfeiture.

A.R.S. § 13-4310(D) requires forfeiture claimants to establish their standing—i.e., an ownership interest in the property sought for forfeiture—by a preponderance of the evidence.

When a claimant fulfills the "two primary substantive concerns" of (1) sworn verification and (2) timely filing—as Jerry did—he or she

presumptively has standing to contest the forfeiture. *State v. Benson* (*In re $70,269.91*), 172 Ariz. 15, 19–20 (App. 1991) ("In a civil forfeiture action, one acquires standing by alleging an interest in the property. . . . Once the owner or interest holder files a proper claim, he becomes a 'claimant' and is entitled to a hearing to adjudicate the validity of his interest."). The purpose of this verification requirement is to avoid "[t]he danger of false claims." *Id.* at 20; *see also Wohlstrom*, 180 Ariz. at 393 (noting the "goal of avoiding fraudulent claims"). That is, Arizona courts seek evidence that the person claiming to be an owner or interest holder in seized property genuinely has an ownership interest in that property. As explained below, (1) one of the many ways a claimant can satisfy Arizona's ownership requirement for standing is to satisfy a simple, three-part inquiry. But regardless of how a claimant attempts to satisfy the standing requirement, (2) it is critical in forfeiture cases that the standing inquiry not be merged with the merits inquiry, because that shifts the burden of proof to the claimant to prove his or her own innocence at the very first stage of proceedings.

1. **The Arizona Supreme Court has recognized that a claimant can satisfy Arizona's ownership requirement for standing when (a) they timely file a sworn claim, after (b) property is seized directly from them, and (c) there are no competing claims of ownership.**

Arizona's ownership requirement for standing is satisfied, among other ways, when (a) the claimant timely files a sworn claim, (b) property (particularly currency) was seized directly from the claimant, and (c) there are no other claimants. Indeed, the Arizona Supreme Court has recognized that a forfeiture claimant has established standing when he fulfills both *Benson* requirements (verification and timeliness), there are no competing claims to the property, and the property was "taken directly from [the claimant's] possession." *Wohlstrom*, 180 Ariz. at 393 (citing federal caselaw holding that "possession alone may be sufficient to permit standing"). This is particularly true when the seized property is currency. *Id.*; see also *In re U.S. Currency in Amount of $26,980.00,* 199 Ariz. 291, 296 ¶ 11 (App. 2000) ("possession of currency is prima facie evidence of ownership" (internal citation omitted)).

For example, David Wohlstrom, whose $127,000 cash was seized from him by the Tucson Airport Authority as he flew in from out of state—and who refused to give "any additional information concerning the

circumstances of the acquisition of his property" on Fifth Amendment grounds—was found to have standing by the Arizona Supreme Court. *Wohlstrom*, 180 Ariz. at 390–91. In *Wohlstrom*, the Court held that a claimant's reticence to fully disclose how he acquired the property *did not matter* because the claimant "asserted that he owned the currency in question . . . . The property was taken directly from his possession. No one else claimed an interest in it." *Id.* at 393 (citing *Benson*, 172 Ariz. at 20 (finding similar facts sufficient to establish valid forfeiture claim)).

2. **The preliminary standing inquiry in a forfeiture case should not be merged with the ultimate merits inquiry.**

In considering whether a claimant has standing to contest a forfeiture, it is critical that courts not merge this inquiry (which asks the claimant to show, by a preponderance of the evidence, he has an ownership interest in the property) with the ultimate merits inquiry (which asks the State to show, by clear and convincing evidence, that the property is connected to criminal activity). This is because each inquiry has a different purpose and a different burden of proof imposed on each party. Requiring a claimant to prove that his property is unconnected to criminal activity—in other words, proof of his *innocent* ownership—for standing purposes wrongly conflates the

preliminary issue of standing with the merits of the forfeiture action and is contrary to the law's requirement that these remain separate inquiries.

Arizona law sets forth two distinct burdens for two distinct questions: one for standing and one for the merits. To establish standing, § 13-4310(D) requires only that "the applicant, petitioner or claimant must establish *by a preponderance of the evidence* that he is an owner of or interest holder in the property seized for forfeiture before other evidence is taken." (emphasis added). In other words, the person requesting the return of seized property must show that—more likely than not—he has a real, genuine ownership interest in that property. Of note, § 13-4310(D) does not require that the claimant prove this ownership is innocent or non-criminal. This is because the purpose of the preliminary standing inquiry is simply to filter out fraudulent claims, *not* to resolve whether the property is forfeitable. *See Wohlstrom*, 180 Ariz. at 393; *Benson*, 172 Ariz. at 20.

Section 13-4311(M), in contrast, sets forth the burden at the merits stage: "the state has the burden of establishing *by clear and convincing evidence* that the property is subject to forfeiture." (emphasis added). So, while the responsibility of establishing standing is on the claimant, the responsibility

of establishing the merits lies with the government, and the burden of proof is increased beyond a preponderance of the evidence.

Imposing an innocent ownership requirement at the standing stage conflates these two inquiries and effectively places the burden on the claimant to prove that the property is not subject to forfeiture. *See United States v. Phillips*, 883 F.3d 399, 404 (4th Cir. 2018) ("Requiring [claimant] to prove that [the cash is not drug money] . . . impermissibly shifts the burden to him—essentially requiring *him* to prove that the money is *unconnected* to drug activity." (emphasis in original)). Conflating these inquiries would mean that if the claimant fails to prove that his ownership of the property *is not* connected to criminal activity (meaning his ownership is innocent), then the claimant is prohibited from pursuing his claim, and the property can be forfeited without the government needing to provide any evidence—let alone clear and convincing evidence—that the seized property *is* connected to criminal activity. *Id.*

Such an atextual burden-shifting undermines the "clear and convincing" requirement set forth in § 13-4311(M), which places the burden of proving criminality *on the State*, rendering that burden superfluous. This violates "[a] cardinal principle of statutory interpretation," which "is to give

meaning, if possible, to every word and provision so that no word or provision is rendered superfluous." *Ariz. Chapter of the Associated Gen. Contractors of Am. v. City of Phoenix*, 247 Ariz. 45, 47 ¶ 9 (2019) (internal quotation omitted).

Though Arizona courts have not yet squarely grappled with the problems created by imposing innocent ownership requirements at the standing stage, federal courts—interpreting the analogous Civil Asset Forfeiture Reform Act ("CAFRA")—have. Uniformly, the federal courts of appeals have rejected this heightened burden on claimants. *See, e.g.*, *United States v. $8,440,190.00*, 719 F.3d 49, 60 (1st Cir. 2013); *Phillips*, 883 F.3d at 404; *United States v. $31,000.00*, 872 F.3d 342, 350–51 (6th Cir. 2017); *United States v. Funds in the Amount of $239,400*, 795 F.3d 639, 645 (7th Cir. 2015); *United States v. JP Morgan Chase Bank Account Number Ending 8215*, 835 F.3d 1159, 1166 n.7 (9th Cir. 2016); *United States v. Seventeen Thousand Nine Hundred Dollars*, 859 F.3d 1085, 1091 (D.C. Cir. 2017).

Like Arizona law, federal law requires civil-forfeiture claimants to prove their ownership to establish standing, *see* Fed. R. Civ. P. G(8)(c)(ii)(B), and it requires the government to prove the merits—the forfeitability of the property, *see* 18 U.S.C. § 983(c)(1). Also like A.R.S. § 13-4310(D), federal law

is "silen[t] on any requirement to prove 'legitimate' ownership." *Funds in the Amount of $239,400*, 795 F.3d at 645. Though this silence is alone persuasive in demonstrating that the law does not require proof of innocent ownership to establish standing, federal courts have explained that "the most compelling reason to reject such a requirement as part of the . . . standing inquiry is that it would undermine the statutes governing civil forfeiture," which "placed the burden on the government to prove . . . that property is forfeitable," meaning connected to criminal activity. *Id.* As federal courts have acknowledged, "[d]emonstrating legitimate ownership is . . . tantamount to demonstrating that property is not subject to forfeiture." *Id.* at 646 (internal quotation omitted). Therefore, requiring a claimant to demonstrate innocent ownership to establish standing "would effectively shift the burden of proof from the government back to the claimant, contrary to 18 U.S.C. § 983(c)." *Id.*

Instead of shifting the burden onto the claimant—and undermining the statute that places the burden of proving the merits squarely on the government—federal courts have consistently reiterated that a claimant satisfies the statutory standing requirement simply by "articulat[ing] an interest in the property that is recognized by law." *JP Morgan Chase*, 835 F.3d

at 1166 n.7. As the Ninth Circuit has clarified, requiring some proof of a "lawful possessory interest," does "not mean that a claimant must prove that his possession is lawful." *Id.* That "is an inquiry better left for the merits stage of an asset-forfeiture action." *Id.*

The reasoning of the federal courts is equally relevant to Arizona's forfeiture law. *See, e.g.*, *Wohlstrom*, 180 Ariz. at 393 (referring to federal forfeiture statutes for guidance); *Higdon v. Evergreen Int'l Airlines, Inc.*, 138 Ariz. 163, 165 & n.3 (1983) (looking to federal law as persuasive authority in interpreting analogous state statute). The Arizona legislature has intentionally created two separate and different burdens of proof: one requiring claimants to prove their "ownership" to establish standing by a preponderance of the evidence, and the other requiring the government to prove the seized property's connection to criminal activity by clear and convincing evidence. Any conflation of these two standards places an undue burden on claimants and contradicts the law.

B. The Superior Court Erred by Finding that Jerry Is Not an Owner or Interest Holder of the Seized Property and Thus Has No Standing to Challenge the Forfeiture Under A.R.S. § 13-4310(D).

Though § 13-4310(D) requires only that a claimant prove his ownership—not his *innocent* ownership—and Jerry provided more than

sufficient evidence of his ownership interest in the property, the court erroneously concluded that Jerry was not the owner of the seized cash because he had not demonstrated his own innocence by a preponderance of the evidence. As discussed below: (1) the Superior Court improperly required that Jerry prove his innocent ownership of the seized cash; (2) the Superior Court erred in merging the preliminary standing inquiry with the ultimate merits inquiry, considering a great deal of evidence that was not relevant to whether Jerry was the genuine owner of the seized cash (while ignoring Jerry's evidence that he was the genuine owner); (3) the Superior Court failed to follow binding Arizona precedent that Jerry satisfied the standing requirement by timely filing a sworn claim after the cash was seized directly from him where there were no competing claimants; and (4) Jerry's case demonstrates how interpreting § 13-4310(D) to impose an innocent ownership requirement for standing would undermine the Legislature's 2017 amendments, which raised the State's burden of proof in A.R.S. § 13-4311(M) to show by "clear and convincing" evidence that property is subject to forfeiture.

1. **The Superior Court improperly required that Jerry demonstrate his *innocent* ownership of the property.**

The Superior Court acknowledged the proper standard for determining whether a claimant has standing: whether the claimant can prove that he is an owner of or interest holder in the seized property. (*See* TR 5:2–18). And the court repeatedly acknowledged that Jerry satisfied this burden. (*See* TR 12:14–21 ("[A]t this point, your only burden is to establish an interest in the property. . . . [Jerry] testified that that was his cash, and I think that's sufficient.")); (TR 38:18–20 ("[Y]ou clearly established [Jerry's ownership] interest in the property, so I don't think you need to" "put on any other evidence on ownership.")). Yet the court ultimately found "that [Jerry] is not an owner of or interest holder in the" seized cash. (I #15 at 1). In reaching its conclusion that Jerry "ha[d] not met his burden of proving that he owns the $39,500 seized from him," the court determined that, "[a]s between two possibilities—that [Jerry] flew with his own cash to possibly buy a truck, or that [Jerry] was transporting the proceeds of drug transactions—the latter is more likely." (I #15 at 3). In other words, the court found that Jerry had not proven that he was an *innocent* owner of the $39,500 taken from his person.

2. **The Superior Court erroneously merged the initial inquiry of whether Jerry had standing to challenge the forfeiture with the merits question of whether the property was forfeitable.**

As explained *supra*, requiring a claimant to show his *innocent* ownership—as the court did here—improperly conflates the initial inquiry of standing with the merits of the forfeiture action, which undermines both the text and spirit of §§ 13-4310(D) and 4311(M). A.R.S. § 13-4310(D), which places the burden on the claimant to prove his ownership interest, speaks only to a standing requirement. As soon as the claimant has demonstrated his ownership interest (regardless of the source of that interest), § 13-4311(M) unequivocally shifts the burden of proof onto the government to demonstrate that the seized property is related to criminal activity and, in turn, forfeitable.

That the court here merged these two tests into one and improperly placed the burden on Jerry is clear from the court's order of denial. The court erred in concluding that Jerry did not meet his burden of proving ownership: (a) even though the government did not argue, and the court did not find, that the money belonged to someone else; (b) based on irrelevant evidence concerning the merits of the forfeiture action; and (c) despite Jerry's extensive evidence of ownership.

a. The State did not argue, and the Superior Court did not find, that the seized cash belonged to someone else.

First, the State did not argue, and the Superior Court did not find, that the money belonged to someone else. Without a doubt, the property seized from Jerry's luggage must have belonged to *someone*—irrespective of whether it came from a legitimate, non-criminal source. Yet, without any evidence to suggest that the money actually belonged to any other person, the court concluded that the money was not Jerry's.

This conclusion highlights just one of the problems with merging standing and the merits. Because Jerry is the only purported owner of the seized property, excluding his claim for failure to demonstrate *innocent* ownership orphans the property and leaves it for the government to take by default. All without the government having to provide any evidence (much less clear and convincing evidence) that the property meets the statutory requirements for forfeitability. *See Wohlstrom*, 180 Ariz. at 391 (noting that dismissing a claim "virtually assur[es] a forfeiture").

b. The Superior Court improperly considered evidence about probable cause that was not relevant to whether Jerry was the owner of the seized property under A.R.S. § 13-4310(D).

Second, the Superior Court erred in dismissing Jerry's claim for lack of standing based on irrelevant evidence related to the merits of the forfeiture action—specifically, the evidence adduced as part of the probable cause hearing, which concerned who would retain possession of the cash pending the forfeiture proceeding, not whether the cash should in fact be forfeited. For instance, in Item 1 of its opinion, the court noted that "[t]he evidence Claimant provided does not show the source of that $39,500." (I #15 at 1). Putting aside whether Jerry did provide evidence of the source of his funds—such as his trucking business and a loan from his uncle—this is a question about the merits, not whether Jerry is the owner of the money. *See, e.g.*, *Wohlstrom*, 180 Ariz. at 391; *Phillips*, 883 F.3d at 404 ("[D]emanding more than 'some evidence' of ownership . . . would be inappropriate in part because . . . it['s] difficult to prove that any cash is legitimate, no matter its source." (quoting *Seventeen Thousand Nine Hundred Dollars*, 859 F.3d at 1090–91)).

Items 2, 3, and 4 of the court's opinion are simply irrelevant to ownership. Item 2 concerns Jerry's (common, reasonable) preference for cash

over bank accounts, credit cards, or wire transfers when traveling to negotiate the purchase of a used vehicle from strangers; Item 3 speaks to why Jerry separated and hid his cash inside his luggage; and Item 4 is related to Jerry previously wiring money on behalf of a friend who did not have ID. None of these factors relate to whether Jerry has provided evidence of ownership over the seized property. Yet, by including them in its reasoning, the court suggests that Jerry was required to counter these items to satisfy § 13-4310(D)'s standing requirement. He was not.

Most illustrative of the court's conflation of the merits and standing analyses is Item 7 of its opinion, where the court noted "[s]everal indicia of criminal activity," including that Jerry purchased his ticket to Phoenix approximately 24 hours in advance, had three mobile phones, was carrying "so much cash," and that the cash, disputedly, smelled like marijuana. (I #15 at 2–3). But even assuming, for the sake of argument, that each of these observations is a fact and that all suggest criminal activity, they speak only to the merits. Whether Jerry was engaged in criminal activity—which he was not—is an entirely separate question from whether he is the owner of the seized property. And for standing, only the latter is relevant. *See Phillips*, 883 F.3d at 404 (explaining that it would be impermissible to require a claimant

to prove "that the money is *unconnected* to drug activity" to establish standing).

c. Jerry presented far more evidence than necessary to establish his ownership of the seized property, but the Superior Court failed to rely on it.

Third, Jerry presented far more evidence than necessary to establish his standing under § 13-4310(D), and the Superior Court erred in failing to rely on it. It is difficult to reconcile the court's oral pronouncements at the hearing with its written conclusions the next day. During the hearing, the court repeatedly dissuaded Jerry's counsel from providing further evidence or eliciting additional testimony because, the court informed him, Jerry had "clearly satisfied" his burden to demonstrate ownership. (TR 38:18–20). The next day, the court ruled exactly the opposite, focusing its attention on the State's circumstantial evidence of alleged (but non-existent) criminal activity presented during the "probable cause" phase of the hearing.

Refocusing attention on Jerry's evidence of ownership—the evidence that the Superior Court observed "clearly proved" his standing—demonstrates that the court erred in its written order. As the Supreme Court of Arizona has recognized, proof of ownership is satisfied where the claimant asserts he is the owner, the property was taken from his possession,

and no one else has claimed an interest in it. *See supra* Argument, Part I.A.1. Each of these factors is met here: Jerry has repeatedly, under oath, stated he is the owner of the seized cash; the cash was seized directly from his luggage at the airport; and no one else has claimed an interest in the cash.

Though these facts alone are sufficient to establish Jerry's ownership interest and satisfy the standing requirement, Jerry provided even more evidence of his ownership. For instance, Jerry's counsel introduced eleven exhibits, which were all admitted, including tax returns, bank statements showing cashflow into Triple J and nearly $20,000 in transfers from the business to Jerry as its owner, photographs and registration cards for his Peterbilt trucks, and the notarized affidavit sworn by Jerry's uncle vouching that he had loaned Jerry $9,000 cash "in an effort to expand Jerry's trucking company." (*See* I #10, #18–#28). Together, these documents show Jerry's legitimate revenue sources and corroborate Jerry's explanation for why he was traveling with cash that day (which, of course, is not a crime). However, not a single piece of this evidence, including Jerry's own testimony, is found in the court's order.

d. The Superior Court gave undue weight to the "Disclaimer of Ownership," a coerced on-the-spot waiver that Jerry signed under duress and threat of criminal charges.

The only evidence that could arguably undermine Jerry's significant evidence of ownership is the "Disclaimer of Ownership" that Jerry was coerced into signing through threats of criminal charges. (*See* TR 89:11–22). But this evidence should have been given little or no weight on the issue of Jerry's genuine ownership of the cash that was seized from both his carry-on and checked luggage. The use of on-the-spot property waivers is a common coercive tactic used by interdiction officers to pressure a property owner into surrendering their property rights in the heat of the moment, often while they are far from home and unfamiliar with the local legal system. Without the advice of counsel or the benefit of time for a person to consider their options, and under pressure from law-enforcement officers, particularly threat of arrest, jail, or criminal investigation—all of which will be dropped if the waiver is signed—there is no credible argument that these on-the-spot waivers are signed knowingly or voluntarily.

Because of this, as both Arizona courts and the federal courts of appeals have recognized, on-the-spot waivers are not dispositive. *See In re $26,980.00*, 199 Ariz. at 295 ¶ 10 (finding substantial evidence of ownership

though claimant initially denied ownership of the money); *$8,440,190.00*, 719 F.3d at 60 ("The fact that [claimant] signed a notice of abandonment . . . does not change things."). And in this case, it should not have been given any weight. Jerry signed the waiver only after—and because—the detective threatened him with criminal charges; he did not read the waiver before signing it; and he did not understand the effect of the waiver. In other words, his waiver was not knowing or voluntary, and the government has not offered any evidence to the contrary. Notably, neither Jerry nor anyone else has faced any criminal charges related to this seizure. The detective did not testify about any attempt by law enforcement to conduct any further criminal investigation after the seizure, and Jerry is aware of none. This on-the-spot waiver cannot overcome the significant evidence supporting Jerry's ownership. *See $8,440,190.00*, 719 F.3d at 60–61 (holding that waiver of ownership was not knowing or voluntary where law enforcement threatened criminal prosecution if claimant did not sign form, claimant was not informed of his due process rights prior to signing, and the government did not offer evidence to contradict claimant's representations).

The law of this State requires only that Jerry prove—by a preponderance of the evidence—that he is the owner of the seized property.

As the court correctly observed twice, Jerry easily satisfied this burden, and his claim should not have been denied.

3. **The Superior Court failed to follow established Arizona precedent that a claimant can satisfy the requirements of A.R.S. § 13-4310(D) by timely filing a sworn claim when the property is seized directly from them and there are no competing claims of ownership.**

Arizona law is clear that a claimant satisfies their burden to demonstrate ownership under A.R.S. § 13-4310(D) when (1) the property is seized directly from the claimant, (2) the claimant timely files a sworn claim, and (3) there are no other claims of ownership. *See supra* Argument, Part I.A.1. Jerry satisfies each of these elements and should have been found to have standing to contest the forfeiture of his seized cash.

The Arizona Supreme Court's ruling in *Wohlstrom* controls here. No one other than Jerry has filed a claim to the property sought for forfeiture. As in *Wohlstrom*, Jerry "asserted that he owned the currency in question." 180 Ariz. at 393; (*see also* I #15 at 2 ("[Jerry] testified that the $39,500 in cash was his own money that he brought to Phoenix . . . .")). As in *Wohlstrom*, Jerry "gave the date and place of its acquisition." 180 Ariz. at 691; (*see also* I #3, #5, #34–#39, #43–#44); (TR 7:14–8:16). As in *Wohlstrom*, the seized cash "was taken directly from [Jerry's] possession. No one else claimed an interest

in it." 180 Ariz. at 691;(*see* I #15 at 1 (acknowledging "$39,500 in cash seized from [Jerry] at the airport")); *see also Benson*, 172 Ariz. at 20, (holding that forfeiture claims should be liberally recognized for standing purposes so long as claim is "verified" and "timely"). In other words, as the Superior Court (twice) correctly recognized on the record, Jerry "testified that was his cash, and I think that's sufficient" and "clearly established his interest in the property." (TR 12:19–20, 38:19–20).

4. **Jerry's case illustrates how applying A.R.S. § 13-4310(D) to require a showing of *innocent* ownership would circumvent the recently increased "clear and convincing" burden of proof requirement in A.R.S. § 13-4311(M).**

Jerry's case serves to illustrate how inserting an atextual innocent ownership requirement into A.R.S. § 13-4310(D) would undermine and circumvent the Legislature's recent command that the State now prove forfeitability by "clear and convincing" evidence under the 2017 amendment to A.R.S. § 13-4311(M). Rather than holding the State to its burden to demonstrate that the property is subject to forfeiture, the Superior Court shifted the burden to Jerry to prove that "[a]s between two possibilities"—it was more likely (1) that Jerry's ownership interest was unconnected to criminal activity than (2) that Jerry's cash was acquired through illicit drug

transactions. Indeed, with its focus on alleged indicia of criminal activity, the Superior Court's ruling reads as though it is written about the merits of the case, or is at least a decision finding probable cause, but the court instead concludes that Jerry "has not met his burden of proving that he owns the $39,500 seized from him" and "does not reach the issue of probable cause." (I #15 at 3).

First, as Jerry's case shows, requiring a showing of *innocent* ownership at the standing stage plainly shifts the burden of proof to the claimant on the issue of innocence, since the claimant bears the burden of proof during the initial standing inquiry. That was clearly not the Legislature's intent in 2017 when it increased the burden of proof for establishing that property is forfeitable from a "preponderance of the evidence" to "clear and convincing evidence." 2017 Ariz. Sess. Laws, ch. 149, § 7 (codified as amended at A.R.S. § 13-4311); *cf. United States v. $125,938.62*, 537 F.3d 1287, 1293 (11th Cir. 2008) (explaining CAFRA was implemented to impose a heavier burden on the government to prove forfeitability "to rectify an unfairness to the individual vis-à-vis the government" (internal quotation omitted)); *Funds in the Amount of $239,400*, 795 F.3d at 646 ("[T]o require a claimant to demonstrate 'legitimate' ownership . . . would thus nullify a central reform of CAFRA.").

Second, if innocence is part of the initial standing inquiry under § 13-4310(D), few if any cases will ever reach the merits inquiry under § 13-4311(M) because claimants will either (a) be denied standing and lose their property by default, as Jerry did, or (b) have already demonstrated their innocence during the standing inquiry (when the burden of proof is on them), so the issue of their innocence would be *res judicata* and law of the case before the merits stage is reached. As a result, following the path blazed by the Superior Court here would judicially gut the new "clear and convincing" burden of proof and replace it with a new, judicially invented "innocent ownership" burden of proof borne by the claimant.

II. IF A.R.S. § 13-4310(D) REQUIRED CLAIMANTS TO DEMONSTRATE THEIR INNOCENT OWNERSHIP OF SEIZED PROPERTY, IT WOULD VIOLATE DUE PROCESS.

If the Superior Court's application of A.R.S. § 13-4310(D) was correct, and Arizona law does require claimants to demonstrate their *innocent* ownership of seized property to merely have standing, A.R.S. § 13-4310(D) violates the due process clauses of the United States and Arizona constitutions. Requiring claimants prove their own innocence just to have standing to contest the forfeiture of their property would create an unacceptable risk of erroneous deprivation of their property rights under the

test laid out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). As explained below in Part A, imposing such a burden, without first requiring the government prove claimants' personal culpability, runs directly afoul of on-point U.S. Supreme Court precedent, *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), which declared that people are presumed to be innocent—a bedrock principle of American law. Part B discusses how the concerns raised in *Nelson* should find even more traction here in Arizona, where the state constitution offers greater due-process protections than the federal Constitution. Finally, as discussed in Part C, this Court should follow the guidance of *Harjo v. City of Albuquerque* in applying *Nelson*'s holding in the context of civil forfeiture.

A. Requiring People to Prove Their Own Innocence to Merely Contest the Forfeiture of Their Property Would Violate the Federal Due Process Clause, as Established in *Nelson v. Colorado*.

If A.R.S. § 13-4310(D) is interpreted to require claimants to prove their own innocence just to have standing to contest the forfeiture of the property—and it should not be—this statute would run squarely against recent precedent from the United States Supreme Court, while the interpretation presented in Part I above is in-line with precedent and the Constitution. In *Nelson v. Colorado*, the Supreme Court held that it violates the federal Due Process Clause to force a property owner to prove his or her

innocence while putting no burden on the government to establish that owner's personal culpability. 137 S. Ct. 1249, 1257–58 (2017). In *Nelson*, the Supreme Court reviewed a Colorado statute that required people whose criminal convictions were overturned on appeal to prove their innocence in order to get back their property (namely, any costs, fees, and restitution they paid as part of their convictions). *See id.* at 1254–55. The *Nelson* Court applied the *Mathews v. Eldridge* framework because, like here, the case concerned a challenge to procedures used in civil proceedings. *Id.* at 1255. That framework looks at (1) the nature of the private interest at stake; (2) the risk of erroneous deprivation given the procedures already guaranteed and whether additional procedural safeguards would prove valuable; and (3) the government's interest and the burdens that additional procedures might impose. *Id.* (citing *Mathews*, 424 U.S. at 335).

The Supreme Court held that all three *Mathews* factors "weigh[ed] decisively against Colorado's scheme." *Id.* In particular, it held that forcing people to prove their own innocence gives rise to an unacceptable risk of erroneous deprivation. *Id.* at 1256–57. In reaching this conclusion, the Court observed that "to get their money back, defendants should not be saddled with any proof burden." *Id.* at 1256. The Court explained that imposing such

a burden on people trying to get back their property in a civil proceeding violates the "[a]xiomatic and elementary" principle that individuals are "entitled to be presumed innocent." *Id.* at 1255–56.

Courts have naturally applied *Nelson* to the forfeiture context, *see infra* Part II.C. And if A.R.S. § 13-4310(D) is applied in the manner it was applied by the Superior Court in Jerry's case, the same sort of due-process violations at issue in *Nelson* are presented here. The presumption of innocence held paramount in *Nelson* means the State cannot force people to prove their innocence or else lose their property. If people whose convictions have been overturned cannot be put to such a proof burden, then neither can owners of property seized pursuant to the State's forfeiture laws.[6] Doing so violates the federal Due Process Clause. As in *Nelson*, all three *Mathews* factors would weigh decisively against Arizona's forfeiture scheme if A.R.S. § 13-4310(D) were interpreted and applied in this manner.

[6] Property owners who have not been convicted of a crime related to their seized property are in the same position as the owners in *Nelson*, whose convictions had been vacated. Of course, if an owner *is* convicted, then the government can use that fact in a forfeiture proceeding, meaning it will have no trouble meeting its burden of proof.

B. The Arizona Constitution Provides Even Stronger Due Process-Protections Than the Federal Constitution.

The due-process concerns raised in *Nelson* should be even more acute in this State, which provides stronger due-process protections than are offered under the Fourteenth Amendment. The Arizona Supreme Court has recently reaffirmed that "the due process provision in Arizona's Declaration of Rights, Ariz. Const. art. 2, § 4, may provide "greater protection . . . than the Fourteenth Amendment" in some contexts. *Horne v. Polk*, 242 Ariz. 226, 230 ¶ 14 n.2 (2017); *see also Montano v. Superior Court*, 149 Ariz. 385, 390 n.3 (1986) (decisions under the Fourteenth Amendment's Due Process Clause "cannot account for the separate guarantees of the Arizona Constitution"); *Large v. Superior Court*, 148 Ariz. 229, 235 (1986) ("In construing the Arizona Constitution['s due process clause] we refer to federal constitutional law only as the benchmark of minimum constitutional protection."). And even where the Arizona Constitution's protections are "generally coextensive" with the U.S. Constitution, the courts have still "recognized more expansive

protections under the Arizona Constitution" in particular situations. *State v. Hernandez*, 244 Ariz. 1, 6 ¶ 23 (2018).[7]

Since Arizona's due-process protections are arguably even stronger than the federal due-process protections elucidated in *Nelson*, this Court should be particularly wary of the due-process implications of requiring claimants in forfeiture cases to demonstrate their own innocence to have standing to contest the forfeiture of their property.

C. This Court Should Follow the Guidance of *Harjo v. City of Albuquerque* on Applying *Nelson*'s Holding in the Context of Civil Forfeiture.

The federal district court in *Harjo v. City of Albuquerque* provides strong guidance for applying *Nelson*'s due-process holding to the context of civil forfeiture, specifically how to use the three *Mathews* factors to evaluate the

[7] The Arizona Supreme Court has repeatedly indicated an interest in further addressing the differences between the protections found under the Arizona Constitution and the federal Constitution. *See State v. Jean*, 243 Ariz. 331, 353–54 ¶¶ 90–97 (2018) (Bolick, J., concurring in part and dissenting in part) (lamenting that potentially greater protections of Arizona Constitution were not developed and argued); *Samiuddin v. Nothwehr*, 243 Ariz. 204, 209 ¶ 13 n.2, (2017) (expressly noting party's failure to argue difference between Fourteenth Amendment and Ariz. Const. art. II, § 4); *State v. Jurden*, 239 Ariz. 526, 529 ¶ 10 n.1 (2016) (expressly noting court was "not called upon to reconsider" earlier jurisprudence holding the double jeopardy clauses in the Fifth Amendment and Ariz. Const. art. II, § 10 are coextensive).

constitutionality of an innocent ownership requirement for standing under A.R.S. § 13-4310(D). *See* 307 F. Supp. 3d 1163, *modified on other grounds on reconsideration*, 326 F. Supp. 3d 1145 (D.N.M. 2018).

Harjo was a challenge to Albuquerque, New Mexico's municipal forfeiture program, which authorized forfeitures based on a showing that "the law enforcement officer had probable cause to seize the vehicle." Albuquerque Code § 7-6-7(E). In other words, Albuquerque's ordinance did not require the government to prove the vehicle's owner was personally culpable, only that there was probable cause to believe that *someone* had used the property illegally. And like the ruling below in Jerry's case, once police made that initial showing, Albuquerque forced property owners to prove their innocence. Namely, property owners were required to show "by a preponderance of evidence that [they] could not have reasonably anticipated that the vehicle could be used in a manner" justifying forfeiture. Albuquerque Code § 7-6-7(A).

Police seized Arlene Harjo's car after her son took it under false pretenses and drove under the influence. She challenged Albuquerque's burden-shifting scheme in federal court, arguing that its requirement that she prove her own innocence violated procedural due process. The court

agreed. Using the *Mathews* framework, the court quickly concluded that Harjo—like would-be claimants in Arizona—had "an obvious and significant interest in her car." *Harjo*, 326 F. Supp. 3d at 1207.

Turning to the second *Mathews* factor, the court concluded that the "Forfeiture Ordinance's requirement that [] Harjo prove her innocence" created a significant risk of erroneous deprivation. *Id*. In so holding, the court recognized that Albuquerque's scheme did not require the city to prove anything regarding the owner's culpability. *Id*. at 1207. This, the court ruled, violated *Nelson*, under which "defendants are entitled to a presumption of innocence." *Harjo*, 307 F. Supp. 3d at 1211. "[E]ven in civil proceedings," the court recognized, this "proof burden creates a risk of erroneous deprivation." *Id*.[8] The same would be true here if A.R.S. § 13-4310(D) were to be interpreted to require claimants in forfeiture cases to demonstrate their innocent ownership of the property to even have standing to contest the forfeiture.

[8] Other courts applying *Nelson* in similar circumstances have reached the same conclusion. *See City of Lebanon v. Milburn*, 286 Or. App. 212, 215–17 (2017) (ordering that *Nelson* required the city to return a dog it had taken through civil forfeiture after its owner was acquitted on animal-abuse charges).

The court in *Harjo* explained why the risk of erroneous deprivation was particularly high in the civil forfeiture context. First, Albuquerque's ordinance allowed police and prosecutors to retain forfeited property and proceeds. Given that, the court held that a "neutral hearing 'is of particular importance' where, as here, 'the Government has a direct pecuniary interest in the outcome of the proceeding.'" *Id.* (quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55–56 (1993)).[9] The court also noted that the already untenable risk of erroneous deprivation was even more "acute" for Harjo and other owners who frequently could not afford representation, meaning they had to "not only . . . navigate the hearing process and the legal requirements to prove his or her innocence, but also face[] an experienced city attorney on the other side whose practice expertise is likely focused on the law at issue in the proceeding." *Id.* at 1211–12. Here, even though Jerry was able to hire an attorney and put on a strong showing of his ownership, he was still unable to prevail given the Superior Court's unexpected and

[9] Up to 100% of forfeiture proceeds in Arizona go to law enforcement agencies. *See* A.R.S. §§ 13-4315, 13-2314.01(D), 13-2314.03(D); *see also* Institute for Justice, *Policing for Profit* (3d ed. 2020) at 64, 170, *available at* https://ij.org/wp-content/themes/ijorg/images/pfp3/policing-for-profit-3-web.pdf.

unconstitutional imposition of an *innocent* ownership requirement under A.R.S. § 13-4310(D).

Given its concerns about the risk of erroneous deprivation, the *Harjo* court concluded that the third *Mathews* factor—the government's interest in keeping the vehicle after the initial seizure—only weighed "slightly in the Government's favor" and could not justify forcing people to prove their own innocence. *Id.* at 1213. The government's interest here in requiring that claimants demonstrate their innocent ownership of property to have standing to contest a forfeiture is even more slight. As noted *supra*, the very purpose of requiring claimants to file a verified claim is to deter fraud, not to resolve whether the property is subject to forfeiture. *See Benson*, 172 Ariz. at 20; *Wohlstrom*, 180 Ariz. at 393. Doing so would short-circuit the entire civil forfeiture framework. *See supra* Argument, Part I.B.4. There is simply no legitimate justification for collapsing the merits inquiry into the standing inquiry in the forfeiture context. While it would certainly make it much easier for the State to convert every seizure into a forfeiture, that would come at a tremendous cost to property owners—a cost that is weighed much more heavily under the *Mathews* framework, as applied in *Nelson* and *Harjo*. That is reason enough to reject the district court's application of A.R.S. § 13-

4310(D) to require a showing of *innocent* ownership in order to contest a forfeiture.

NOTICE UNDER RULE 21(a)

Claimant gives notice that, in the event he substantially prevails by an adjudication on the merits of his claim, he will seek reasonable attorney fees, expenses, and damages for loss of the use of property. A.R.S. § 13-4314(F); *see State v. Mauceli*, No. 1 CA-CV 18-0063, 2018 WL 6684216, at *3, ¶ 17 (Ariz. Ct. App. Dec. 20, 2018) (awarding claimant reasonable attorney fees on appeal).

CONCLUSION

For the reasons stated above, this Court should (1) reverse the Superior Court's finding that Claimant/Appellant Jerry Johnson is not the owner of the seized cash at issue in this case, (2) vacate the Superior Court's judgment of forfeiture, (3) find that Claimant/Appellant Jerry Johnson is the owner of the seized cash at issue in this case with standing to challenge the attempted forfeiture by the State, and (4) remand for further proceedings on the merits in this forfeiture case consistent with such an order.

Respectfully submitted this 12th day of April, 2021.

INSTITUTE FOR JUSTICE

/s/ Dan L. Alban
Dan L. Alban*
Keith E. Diggs
Alexa L. Gervasi*

Attorneys for Claimant/Appellant
*admitted *pro hac vice*