



BACKGROUND

IN RE ONE 2000 JEEP WRANGLER

Executive Summary

The Goldwater Institute filed this case to protect the private property rights of all Arizonans. Although Arizona made significant improvements to its civil forfeiture laws in 2017, significant problems remain. Innocent owners—whose property is used by someone else to commit a crime—are still required to prove themselves innocent, rather than the government being required to prove them guilty. Law enforcement agencies can still keep forfeiture proceeds for their own use. And there is no requirement that the value of the forfeiture be remotely proportional to the crime allegedly committed.

All of these problems are demonstrated by this case, in which Tucson resident Kevin McBride's Jeep Wrangler was seized after his girlfriend took it to go to the convenience store. Kevin thought she was buying soda and gas, but she was allegedly using it to sell \$25 worth of marijuana to an undercover police officer. Even though the charges against his girlfriend were dropped, police have kept Kevin's Jeep and are attempting to have it forfeited. Kevin is innocent in all of this; there is no allegation that he committed any crime. But he is still without his Jeep, which means he cannot find work in his vocation as a handyman. That is why Kevin is fighting for his right to get his Jeep back and to have Arizona's forfeiture scheme declared unconstitutional.

The Problem

Civil forfeiture is a legal fiction that has existed for decades. By using civil forfeiture, the police can take, keep, and profit from someone property without even charging them with a crime—much less convicting them of one. That is because they can use civil forfeiture to seize property that is merely *suspected* of involvement in criminal activity.¹ Unlike criminal forfeiture, the government does not need to prove that a crime occurred.² In Arizona, no one even has to be charged with a crime for their property to be confiscated. That makes it easy and lucrative for the

¹ *In re \$15, 379 in U.S. Currency*, 241 Ariz. 462, 467 (App. 2016)

² *In re One 1983 Toyota Silver Four-Door Sedan*, 168 Ariz. 399, 402-03 (App. 1991).

government to take and keep property, regardless of whether the owner was guilty or innocent. It is such an effective tool that hundreds of millions of dollars are forfeited in just this way every year across America.³

Once the property is seized, it is up to the owner of the property to hire a lawyer and go to court to attempt to get his or her property back. No attorney is provided by the government, which means the property owner will need to spend thousands of dollars to even get into court. Furthermore, unlike in criminal cases, the government does not have to prove its case “beyond a reasonable doubt.”⁴ It must merely show by “clear and convincing” evidence that the property was being used in connection with a crime.⁵ (This standard was actually strengthened, from “preponderance of the evidence,” in 2017.⁶)

Innocent owners—whose property was used by someone else—face an additional hurdle. Arizona requires them to show that they “did not know, and could not reasonably have known”⁷ that their property would be used in the commission of a crime. In other words, Arizona requires innocent owners to prove a negative, a notoriously challenging burden of proof in legal cases.

If the owner is lucky enough to get property back, whoever held it still gets a paycheck because the government and their tow companies can charge hundreds or even thousands of dollars just for the privilege of having them confiscate and hold that property.

Like many laws, civil forfeiture was designed to address one problem and grew to be used in ways its creators never imagined. It started as a way to punish criminals who were beyond the reach of the law, either because they were beyond the jurisdiction of the government (like pirates) or because they were part of a vast criminal enterprise (like drug lords).⁸ Arizona adopted its civil forfeiture laws to take the profit out of the sale of illegal drugs so that the mafia and gangs would be forced out of the business. It has now dissolved into an asset-focused cash grab that can harm innocent people.

It was never meant to be used to take property from people at a traffic stop, or to seize the homes of people whose adult children might be arrested for dealing drugs. But that is exactly what happens, every day.⁹ The worst part is who tends to find themselves on the wrong side of a civil asset forfeiture. It is often the poor, the ones who can least afford the loss of what little property they have, and the ones who do not typically have the financial capacity to protect themselves in court.¹⁰

³ Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture, Second Edition* (August 17, 2020) <https://ij.org/report/policing-for-profit/introduction/>.

⁴ *In re Real Property Known as 3567 Alvarado Rd.*, 2020 WL 4036585, ¶ 9 n. 4 (2020).

⁵ *Id.*

⁶ *Id.*

⁷ *In re One 1983 Toyota Silver Four-Door Sedan*, 168 Ariz. 399, 403-04 (App. 1991).

⁸ Alan Nicgorski, *The Continuing Saga of Civil Forfeiture, The ‘War On Drugs’ and the Constitution*, 91 NW. U. L. REV. 374, 380-83 (1996); Charlena Toro, *From Piracy to Prostitution –State Forfeiture on an Innocent Owner’s Property*, 11 BYU J. PL. 209, 225 (1997).

⁹ Scott G. Bullock, *Policing for Profit: First Edition; The Abuse of Civil Asset Forfeiture* (March 2010) <https://ij.org/report/policing-for-profit-first-edition/>.

¹⁰ Jennifer McDonald, *Civil Forfeiture Hurts America’s Poor*, SPOTLIGHT ON POVERTY & OPPORTUNITY, (August 17, 2020) <https://spotlightonpoverty.org/spotlight-exclusives/civil-forfeiture-hurts-americas-poor/>.

McBride is Fighting for the Property Rights of All Arizonans

Kevin McBride is the embodiment of a down-to-earth guy. He wakes up almost every morning to go to work under the Arizona sun just to keep a roof over his head and food on the table. He was a proud locomotive engineer for over twenty years, but the relentless sound of the heavy engines slowly wore away his hearing until one day he found himself unable to meet company qualifications. So he was cast off and he did what a guy like Kevin does: He pulled together the resources he had and went to work. Kevin didn't have much, but what he did have was an old Jeep he had lovingly restored, some tools, and a fierce determination to be successful.

On a Friday in May of this year, Kevin was hard at work. His girlfriend stopped by his job site and asked if she could help him cool off by getting him a soda from a local convenience store. Because she had no other way to get there, she took his Jeep and he went back to work. When she didn't come back, he started to worry, so he bummed a ride to go and look for her. That was when he was met with a sight that spelled certain disaster for him: His Jeep was being hauled off. He saw his future disappearing, and he didn't understand why.

Kevin tried to flag down the tow truck to explain that the Jeep was his, but no one listened and no one seemed to care. A police officer on the scene gave him a handwritten phone number to call for information. It was a number that Kevin called again and again. He called it for three weeks before anyone answered, and when they did, Kevin was greeted with crushing news. The District Attorney was holding his Jeep as evidence of a \$25 crime they said his girlfriend committed, even though they had dropped all charges. It didn't make sense that they could hold his Jeep and all the tools in it when he had done nothing wrong.

After Kevin made a claim for the Jeep, the Pima County Attorney's Office told him he would have to pay \$1,900 to get his Jeep back—even though he has done nothing wrong. Kevin rejected this demand.

Kevin is simply trying to carve out a life of dignity by working as hard as he can. When the government took away his Jeep and tools, they stole his access to work. They have placed him on the brink of economic disaster when his only crime was allowing his girlfriend to buy him a soda. This is why Kevin McBride has joined with the Goldwater Institute to challenge Arizona's unconstitutional civil asset forfeiture laws.

The Law

Both the Arizona and U.S. Constitutions protect the rights of property owners against abusive civil forfeiture. This case presents two constitutional claims. The first is that Arizona unconstitutionally places the burden of proof in innocent-owner cases on property owners to prove their innocence, rather than on the government to prove their guilt. The second is that the seizure of Kevin's Jeep, over the alleged sale of \$25 of marijuana, violates the excessive fines clauses of both the state and federal constitutions.

In a criminal case, the government must prove that the accused is guilty of the crime. If it cannot, the accused goes free—the entire burden of proof is on the government. This is flipped in civil forfeiture cases. An innocent owner of property is effectively guilty until he proves himself innocent.¹¹ The increased burden (including substantial legal costs) with proving one’s innocence often results in owners abandoning rightful claims to seized property. And if owners do not fight civil forfeiture, the government wins by default.¹²

Furthermore, as Kevin’s case demonstrates, the government will often seize very valuable property over very low-level crimes. Kevin’s girlfriend was accused of using his Jeep to sell \$25 worth of marijuana. Because of this, the government is attempting to forfeit a Jeep worth thousands of dollars. But both the Arizona and U.S. Constitutions contain protections against excessive fines.¹³ As the U.S. Supreme Court ruled last year, “the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties.”¹⁴ Even if Kevin himself had allegedly sold \$25 worth of marijuana, forfeiture of the Jeep would be excessive. And this is doubly true here because Kevin is innocent. He thought his girlfriend was taking the Jeep to buy soda and gas.

Case Logistics

The property owner in this case is Kevin McBride, a Tucson, Arizona, resident.

The governmental entity that seized the Jeep is the Pima Counter Narcotics Alliance.

In addition to the return of his Jeep Wrangler, Kevin McBride seeks a declaration that it is unconstitutional to require innocent owners to prove their innocence, rather than requiring to government to prove their guilt. He also seeks a declaration that the attempted forfeiture of his vehicle violates the Excessive Fines clauses of the Arizona and U.S. Constitutions.

The government made Kevin an offer to “mitigate” the forfeiture if Kevin paid them \$1,900 to get his Jeep back. On August 20, 2020, Kevin delivered notice to the government that he is rejecting any demand that he pay for the return of his Jeep. The government must now decide whether to return the Jeep, or seek a declaration of forfeiture, which Kevin will contest.

The Legal Team

Matt Miller is a Senior Attorney at the Goldwater Institute, where he leads the Institute’s free speech litigation efforts. Before joining Goldwater, he served nine years as the Managing Attorney of the Institute for Justice’s Texas Office, which he opened in 2008. There, he won important victories for free speech and economic liberty. Prior to that, he worked as a land-use attorney at a large Dallas law firm. Matt’s cases have been featured in the *Wall Street Journal*, *Washington Post*, Associated Press, Reuters, *Dallas Morning News*, and other outlets

¹¹ Luis Suarez, *Guilty Until Proven Innocent: Rethinking Civil Asset Forfeiture and the Innocent Owners Defense*, 5 TX. AM. J. PL. 1001, 1013.

¹² A.R.S. § 13-4309 (3)(e).

¹³ U.S. CONST. AMEND XIV; ARIZ. CONST. ART. II, § 15.

¹⁴ *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019).

nationwide. Matt has testified by invitation on numerous occasions before state legislatures on many topics. In 2009, he led the effort to reform the Texas Constitution to better strengthen protections for private property owners. Matt holds an undergraduate degree from the University of Texas and a law degree from the University of Chicago Law School.

Martha Astor is a Staff Attorney at Goldwater Institute. She litigates cases across the United States relating to education, Second Amendment rights, freedom of speech and association, and fundamental civil rights, among others. Prior to joining the Goldwater Institute, Martha worked in higher education, and as an educational consultant to schools across the United States. She is also a Board Certified Counselor. She earned her JD from Notre Dame Law and is ABD in Clinical Psychology. She has a master's degree in Community Counseling and a bachelor's degree in Public Relations.

The **Goldwater Institute** opened in 1988, with the blessing of its namesake. Its early years focused on defending liberty in Barry Goldwater's home state of Arizona. Today, the Goldwater Institute is a national leader for constitutionally limited government, with hundreds of legislative and court victories to its name.