



RESPONSE TO STATE ATTORNEY GENERAL'S OFFICE RICO INVESTIGATION from Sheriff Mark D. Napier

Prior to my being elected Sheriff, there was a comprehensive federal corruption investigation regarding the illegal expenditure of RICO funds at the Pima County Sheriff's Department. This resulted in the indictment of former Chief Deputy Chris Radtke. Upon taking office, it became clear that there were still lingering concerns in the community and within the department that current/former members of the department may have escaped justice in this matter and/or that the federal investigation failed to address possible state corruption charges.

On June 22, 2017, to ensure sustained public trust, I requested the Arizona State Attorney General's Office investigate this matter from a state perspective. This is the only additional investigative avenue available. The Attorney General agreed to investigate.

On July 7, 2020, I received the investigative report from the Attorney General's Office. The report is comprehensive and complete. The report does not find criminal culpability on the part of existing members of the Sheriff's Department. Supposition to the contrary is irresponsible and not supported by this investigation or the prior federal investigation. The Attorney General's Office declined to file state corruption charges against Mr. Radtke or other former members of the department. The report does document an elaborate multi-year scheme orchestrated by former employees Chris Radtke and Brad Gagnepain to shield illegal and inappropriate RICO expenditures. They accomplished this by channeling funds to an account of the Sheriff's Auxiliary Volunteers to mask expenditures. This included illegal or inappropriate expenditures to purchase personal items, support extravagant department ceremonies, and purchase items for a café. The report does place some responsibility on former Sheriffs Dupnik and Nanos. Ultimately, the agency head is responsible for thoroughly reviewing and recommending approval of RICO expenditures with respect to both legality and appropriateness.

This dark chapter in the history of the Sheriff's Department is now closed. As is always the case, the bad actions of a few should not tarnish the honorable service of the many. We have been serving this county with honor since 1865 and will continue to do so.



**OFFICE OF ATTORNEY GENERAL
CRIMINAL DIVISION**

SO.AZ. WHITE COLLAR & CRIMINAL ENTERPRISE SECTION

MEMORANDUM

TO: Paul Ahler, Chief Counsel, Criminal Division
FROM: Nick Klingerman, Section Chief Counsel, SAWCCE
DATE: May 28, 2020
RE: Christopher Radtke Investigation

I. INTRODUCTION.

In 2016, the Federal Bureau of Investigation (FBI) investigated the potential misuse of Racketeer Influenced and Corrupt Organization (RICO) forfeiture monies at the Pima County Sheriff's Department (PCSD). Ultimately, the investigation focused on Chief Deputies Christopher Radtke and Bradley Gagnepain and whether they misused RICO monies that were awarded to the Pima County Sheriff's Auxiliary Volunteers (SAV). Gagnepain died during the criminal investigation, so the FBI could not completely investigate his conduct.

Radtke, however, was federally indicted in 2016 with one count of conspiracy to commit money laundering and six counts of theft for activity occurring between 2011 through July 2016 (*United States v. Radtke*, 4:16CR01830 (D. Ariz.)). As outlined in the indictment, Radtke had "conspired to circumvent the restrictions on the use of forfeiture funds" by misrepresenting to the Pima County Attorney's Office (PCAO) that the forfeiture funds were going to be used by the SAV, when the funds "were actually used by the Sheriff's Office." (*Indict. at 2.*) The indictment further stated that Radtke used SAV monies for his personal benefit. (*Id. at 3.*) It listed multiple transactions as exemplars of Radtke's conduct, ranging from \$30 to \$1,000, for items such as a \$250 restaurant bill and \$600 for two model airplanes, one which was a decoration for Radtke's office. (*Id. at 3-4.*) Radtke subsequently pled guilty to three counts of misdemeanor theft, and the District Court sentenced Radtke to one year on probation, a \$3,000 fine, 100 hours of community service, and an agreement to not seek any position in law enforcement with Pima County.

Current Pima County Sheriff Mark Napier asked the Arizona Attorney General's Office (AGO) to review Radtke's misuse of RICO monies because there was concern that federal indictment did not encompass the entirety of Radtke's conduct. Specifically, PCSD staff interviews had raised the possibility of larger scale fraud, meriting felony prosecution under

Arizona laws. There were also suggestions that Radtke had used RICO monies for personal benefit, such as giving a family member RICO monies for kitchen improvements at the Pima County Jail.

Initially, the AGO determined that the FBI's financial investigation relied exclusively on copies of bank statements provided by the SAV. As a result, both the AGO and FBI obtained the relevant financial documents directly from the financial institutions to ensure they were complete and accurate. After obtaining bank statements, the FBI audited the SAV's accounting records by comparing them to the independently obtained bank statements, looking for both felony fraudulent schemes and personal embezzlement. Additionally, AGO staff reviewed FBI interviews of former Sheriff Christopher Nanos, former Sheriff Clarence Dupnik, and Deputy Chief Christopher Radtke, multiple PCSD deputies, civilian employees, and SAV board members.

After completing the investigation, it is clear that the FBI's initial investigation identified Radtke's significant RICO misappropriations. There was no additional evidence of other frauds or personal embezzlement. Any proposed State charges would duplicate the federal charges and would be based on the same conduct and evidence that led to Radtke's federal convictions. Given the factual and legal concerns outlined below, I recommend declining prosecution.

II. DOUBLE JEOPARDY ANALYSIS.

At the outset, it is important to clarify whether or not Arizona can prosecute Radtke following the federal prosecution. First, the United States Constitution does not prohibit a state prosecution after a federal prosecution, or a federal prosecution after a state constitution. *Bartkus v. Illinois*, 359 U.S. 121 (1959) (holding that a state prosecution after a federal prosecution was permissible); *Abbate v. United States*, 359 U.S. 187 (1959) (holding that a federal prosecution after a state prosecution was permissible). Second, Arizona's constitution does not prohibit a state prosecution after a federal prosecution. *State v. Poland*, 132 Ariz. 269 (1982) (applying *Bartkus* in Arizona); *State v. Berry*, 133 Ariz. 264 (App. 1982) (applying *Bartkus* in Arizona). Third, A.R.S. § 13-116 would not bar a subsequent prosecution because it only applies "to the extent the Constitution of the United States or of this state require."

Although there are no legal impediments, there are policy implications that caution against a subsequent State prosecution in this case. The Supreme Court in *Bartkus* admonished jurisdictions to use self-restraint before pursuing successive prosecutions. *Bartkus*, 359 U.S. at 137-38 ("The greatest self-restraint is necessary when that federal system yields results with which a court is in little sympathy."). To that end, the Department of Justice has a policy

intended to limit successive prosecutions based on “substantially the same act(s) or transaction(s).” Dep’t of Justice, *Justice Manual*, § 9-2.031, available at <https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.031>. This policy is intended to protect defendants, encourage cooperation between state and federal prosecutors, and promote efficient use of government resources. *Id.* It lists three considerations that must be satisfied to initiate a successive prosecution. The second qualification is of particular import here—“the prior prosecution must have left that interest [substantial federal interest] demonstrably unvindicated.” *Id.*

The prior federal prosecution in this case has not “demonstrably” left Arizona’s interest unvindicated. Any state prosecution would be based on substantially the same evidence and conduct. The AGO’s investigation unearthed no new facts meriting a second prosecution, and Radtke entered a plea agreement to resolve his case in its entirety based on those facts. Should the state successively prosecute him, it would create uncertainty for future pleading defendants and make plea bargaining more difficult. Although legally permissible, Radtke’s federal prosecution strongly cautions against successive state prosecution here.

III. BACKGROUND ON RICO EXPENDITURES.

Arizona law authorizes the civil forfeiture of “[a]ll property, including all interests in such property, described in statute providing for its forfeiture,” A.R.S. § 13–4304, which primarily includes “[a]ll proceeds traceable to” a RICO offense as defined § 13–2301(D), A.R.S. § 13–2314(D)(6)(c). Once final, forfeited money, and the proceeds from assets sold following forfeiture, are placed into forfeiture accounts subject to spending restrictions. Currently, and at the time of the conduct in this case, §§ 13–2314.01(F)(1) and 13–2314.03(F), authorized RICO expenditures “for any purpose permitted by federal law relating to the disposing of any property that is transferred to a law enforcement agency.” Since April 2009, the following federal guidelines are applicable to the issue here:

f. Law enforcement awards and memorials—the cost of award plaques and certificates for law enforcement personnel, provided that the plaque or certificate is in recognition of a law enforcement achievement, activity, or the completion of law enforcement training, and the cost does not create the appearance of extravagance or impropriety. Shared funds may not be used to pay cash awards.

Shared funds may be used to pay the costs for modest commemorative plaques, displays, or memorials that serve to recognize or memorialize a law enforcement officer’s contributions, such as a

memorial plaque or stone at a police department facility in honor of officers killed in the line of duty.

m. Support of community-based programs—A state or local law enforcement agency or prosecutor’s office may use up to 15 percent of the total of shared monies received by that agency in the last two fiscal years for the costs associated with drug abuse treatment, drug and crime prevention education, housing and job skills programs, or other nonprofit community-based programs or activities that are formally approved by the chief law enforcement officer (e.g., chief, sheriff, prosecutor). All expenditures must be supportive of and consistent with a law enforcement effort, policy, and/or initiative.

...

Cash transfers to community-based programs are not permitted. State and local law enforcement agencies are prohibited from making cash transfers or donations to support community-based programs. Instead, agencies may directly purchase supplies, equipment, and/or services for eligible community-based programs, or reimburse such programs for eligible expenditures with a valid, itemized receipt.

...

2. Impermissible uses

...

f. Purchase of food and beverages—Shared funds generally may not be used to pay for food and beverages (alcoholic and non-alcoholic) for consumption by law enforcement personnel or their guests, except for the limited circumstances listed below:

(1) Conference package policy—Shared funds may be used to purchase food and beverages provided as part of a conference package. For example, a hotel provides complimentary coffee and bagels for breakfast with the rental of its conference room for an authorized training event. The same conference package rule applies to food or beverages served at a banquet or party to recognize law enforcement achievements.

(2) Meals during local operations—Shared funds may also be used to purchase food and beverages if state or local law or rules governing reimbursement of expenses permit officers to be reimbursed for such expenses, e.g., meals purchased while an officer is on official travel, attending a training conference, or engaged in a disaster operation, such as earthquake or hurricane relief.

g. Extravagant expenditures—Receiving agencies should use federal sharing monies prudently and in such a manner as to avoid any appearance of extravagance, waste, or impropriety. For example, tickets to social events, hospitality suites at conferences, or meals outside of the per diem are impermissible uses of shared funds.

U.S. Dep't Justice, Crim. Div., *Guide to Equitable Sharing for State and Local Law Enforcement Agencies*, at 17–21 (April 2009) [hereinafter 2009 Guidelines], available at <https://www.justice.gov/sites/default/files/usao-ri/legacy/2012/03/26/esguidelines.pdf>.

To ensure only authorized community-based programs received RICO monies PCAO created forms and a process to request these funds. As required by the equitable sharing guidelines, a chief law enforcement officer, in this case the Pima County Sheriff, must submit in writing to PCAO a request for RICO distributions to qualified community-based programs. To standardize the request process, PCAO developed a form that specified: (1) the community-based program to receive RICO money; (2) that the community-based program was eligible to receive money; (3) the amount of the request; (4) and the prior, or anticipated expenditures, for the funds if approved. PCAO's forfeiture supervisor would review the funding request, and if it complied with equitable sharing guidelines, would approve funding.

IV. PIMA COUNTY SHERIFF'S AUXILIARY VOLUNTEERS.

The SAV is a nonprofit corporation (501(C)(3)) first incorporated with the Arizona Corporation Commission in 1983. As with any registered corporation, the SAV has articles of incorporation and a corporate board. Under the SAV's articles, two board members are PCSD deputies.

As implied in its name and corporate structure, the SAV supports PCSD in its daily operations. The SAV accomplishes its mission through a group of trained citizen volunteers who assist with patrol, crime prevention assignments, welfare checks, fingerprint services, and

various other services. During the timeframe reviewed here, Calendar Years (CY) 2012 through 2015, PCSD oversaw the SAV's daily operations and controlled much of its budget.

Fingerprinting comprised the majority of the SAV's earned revenue, generating nearly \$100,000 in CY 2015. RICO monies, however, were the largest single source of SAV revenues, accounting for between 44% and 54% of annual revenues. Expenditures were varied, but consistently included items such as equipment purchases, mileage, fuel costs, recruiting, and training.

Between 2012 and 2015, the SAV maintained a checking and savings account at Chase Bank. Administratively through accounting software, the SAV allocated revenue and expenses to the following different cost centers: (1) general operating, the day-to-day SAV operating account; (2) juvenile services, community-based events for children such as the car seat program; (3) special awards, PCSD awards, primarily the annual ball; (4) building maintenance, costs and expenses for the SAV's building, website, and internet; (5) community services, funding for PCSD's website with crime reports; and (6) regional memorial, expenses for the annual fallen officers' memorial. With the exception of the general operating cost center, the remaining cost centers were collectively identified as the "special services" funds.

Whether the cost centers served any valuable function or not, is beyond the scope of this memo, but they enabled Radtke's misappropriations by compartmentalizing the SAV's funding and by making it more difficult to track revenues and expenditures. The majority of the SAV's earned revenue was generated, and allocated, to the general operations center, with donations, vehicle sales, and special event ticket sales comprising the majority of the "All Other Revenues" category listed below. A small portion of RICO monies were deposited into the general operating cost center and paid for administrative costs, such as bookkeeping. The majority of RICO fund funds were allocated to the "special services" cost centers. The SAV's revenues and expenditures for CY 2012 through 2015 are depicted below.

	<u>FY 2012</u>	<u>FY 2013</u>	<u>FY 2014</u>	<u>FY 2015</u>
<i>General Operating</i>				
Fingerprinting	\$ 89,051.00	\$ 79,648.10	\$ 84,089.33	\$ 94,260.76
<i>RICO Monies</i>				
General Operating	\$ 16,000.00	\$ 16,000.00	\$ 17,200.00	\$ 17,200.00
Special Awards	40,000.00	60,000.00	60,000.00	60,000.00
Building Maintenance	20,000.00	27,000.00	40,000.00	75,000.00
Community Services	20,000.00	13,000.00	13,000.00	15,000.00
Regional Memorial	-	7,500.00	5,000.00	5,000.00
Total RICO	\$ 96,000.00	\$123,500.00	\$135,200.00	\$172,200.00
All Other Revenues	<u>\$ 31,813.48</u>	<u>\$ 30,205.85</u>	<u>\$ 32,816.76</u>	<u>\$ 52,894.88</u>
Total Revenue	<u>\$216,864.48</u>	<u>\$233,353.95</u>	<u>\$252,106.09</u>	<u>\$319,355.64</u>
RICO % of Total Revenue	44.27%	52.92%	53.63%	53.92%
<i>Expenditures</i>				
General Operating	\$103,246.03	\$ 76,682.48	\$135,561.97	\$ 96,725.64
Special Awards	56,472.98	72,778.50	71,787.06	70,118.33
Juvenile Services	100.00	979.44	100.00	2,967.07
Building Maintenance	14,336.03	32,325.80	36,912.83	21,301.80
Community Services	15,367.72	17,916.74	18,691.95	14,110.66
Regional Memorial	<u>9,009.37</u>	<u>5,077.46</u>	<u>7,948.88</u>	<u>8,701.95</u>
Total Expenditures	<u>\$198,532.13</u>	<u>\$205,760.42</u>	<u>\$271,002.69</u>	<u>\$213,925.45</u>
RICO % of Total Expenditures	48.35%	60.02%	49.89%	80.50%

V. RADTKE'S CONTROL OVER THE SAV.

It is important to note the Attorney General's Office review did not identify any personal embezzlement or misappropriations that were not identified in the federal prosecution. The SAV's revenues and expenditures were well documented and verifiable. As explained below, however, Radtke controlled and misused RICO monies by using the SAV to circumvent the equitable sharing rules and Pima County procurement policies.

The SAV's day-to-day operations were controlled by PCSD, specifically deputies in the Administrative Services Bureau. In 2011, Gagnepain was the Chief Deputy overseeing the

Administrative Services Bureau, while Radtke reported directly to Gagnepain and was the Captain overseeing the Administrative Services Division. As a result, both Gagnepain and Radtke were the highest ranking officers overseeing the SAV. In the years that followed, both maintained high-ranking leadership positions following various reorganizations. When Nanos was appointed Sheriff in 2015, Gagnepain became his Senior Executive Advisor while Radtke became the Chief Deputy overseeing the Administrative Services Bureau.

Originally, Gagnepain oversaw the SAV's funding. Based on numerous interviews, it appeared general knowledge within PCSD that the SAV had control over only the general operations cost center. In other words, PCSD deputies controlled the special services cost centers. In fact, the former SAV president told the FBI that the special services funds were not discussed at board meetings. Radtke's control over the special services cost centers was apparent from a 2016 email where Radtke stated, "We will be immediately closing the below listed SAV funds [special services cost centers] and returning the funds to the PCAO."

Gagnepain and Radtke exploited their position within PCSD to control the SAV's RICO requests and subsequent expenditures in special services cost centers. Interviews make it clear that Gagnepain and Radtke controlled every aspect of the SAV's RICO request. Internally, the process began with a memo often written to Gagnepain, and later in time to Radtke, requesting RICO funding for the SAV. The body of the memo listed an aggregate dollar request. Attached to the memo was the planned funding allocation between cost centers. The former financial administrator stated that although the funding memos were not written by Radtke, Radtke would determine how much money was requested in the memo. As one former deputy stated, questioning Gagnepain or Radtke could destroy a career, so deputies would comply.

Once approved by Gagnepain, Radtke, or both, then former Sheriffs Dupnik or Nanos would use the aggregate dollar request to complete PCAO's RICO funding request form. The form itself was generic and provided no specific detail explaining how PCSD planned to use the money. Each memo had the following use-of-funds explanation:

The Sheriffs Auxiliary Volunteers assist the Pima County Sheriff's Department in its commitment to provide the best crime prevention and public safety programs possible. Programs include: 1.) Patrol Division- manage and assist Neighborhood Watch organizations in the County, provide patrol support in County parks, assist in search and rescue, and respond to calls for service. 2.) Field Operations Division- provides non-law enforcement roles at major incidents such as traffic control at accident scenes, natural disasters, and crime scenes.

The SAVs is responsible for driving and maintaining the department's Mobile Command Center vehicles. 3.) Crime Prevention Division- services include teaching safety classes, home security checks, and video identification. 4.) Fingerprinting Division- provides fingerprinting services for employment and educational purposes. SAVs are also skilled at child identification. 5.) Special Activities Division- participates in safety fairs and public events. 6.) Administrative Division- provides administrative support at Sheriff's headquarter and district offices including clerical, facilities, employee recognitions, memorial programs, and other related functions.

Although technically accurate, the use of funds was misleading. While the funding request gave the impression that RICO monies were being used for a variety of expenses, PCAO attorneys never saw PCSD's internal expenditure plans.

In reality, the majority of the SAV's RICO requests were diverted to the special awards cost center. The primary purpose of that cost center was the annual ball. Held in December, the annual ball, by all appearances, was an extravagant event. RICO monies were used to rent a conference room at the Marriott University Park Hotel, which for example, had the following dinner choices in 2013: "Grilled Top Sirloin paired with Herbed Chicken Breast, Roasted Potatoes, White Mushrooms, Zinfandel" or "Exotic Mushroom Ravioli with Malted Ale Beurre Blanc." The Marriott's fee alone was usually around \$30,000. The special awards cost center also paid for tuxedo rentals, dress purchases at Dillard's, and gift bags with laser engraved pens. All told, costs related to the annual ball often approached \$50,000.

Turning to the building maintenance cost center, in 2012, the café at the PCSC administration building was managed by a worker who had been harassing another employee following a failed relationship. The café manager was fired, and Radtke suggested that his niece could run the kitchen because she was a professionally trained chef. SAV monies in the building maintenance cost center were then used to improve the café. For example, the SAV paid \$1,198.12 for new stainless steel cabinet doors. In 2014, a staff café was installed at the Pima County Jail. Radtke's niece also managed that café, and RICO monies from the building maintenance cost center were used for a chalk board and artwork for the kitchen. RICO monies, however, did not go directly to Radtke's niece, and the items purchased by the SAV remained PCSD property.

Ostensibly, this system was intended to subvert Pima County's procurement process and the federal equitable sharing guidelines, and conceal these purchases through lax accounting.

Because the SAV special services funds were not considered the SAV's money, reporting was limited. This allowed, according to one witness, Gagnepain to conceal his actions. The equitable sharing guidelines would prohibit direct expenditures by PCSD for food, the extravagant annual ball, trinkets, and clothing rentals and purchases. Gagnepain and Radtke effectively controlled an unchecked slush fund of public money and used that money to advance their own interests at PCSD.

VI. POTENTIAL CRIMINAL CHARGES.

At the outset, the facts here present several overarching defenses applicable to any specific criminal charges. Although these considerations, individually or collectively, do not preclude prosecution, when considered with the double jeopardy issue discussed above, they support declining state-level prosecution.

First, exploiting the SAV to obtain RICO funding through the special services cost centers was a well-known and open practice at PCSD that possibly predated Radtke. Despite statements that Gagnepain created the individual cost centers, the juvenile cost center was created in the late 1990s, and other cost centers were later created in 2009. There is no clear evidence that Radtke (or Gagnepain) created the cost centers expressly as part of a scheme to skirt federal equitable sharing guidelines and Pima County procurement regulations. It is possible for Radtke to claim that he assumed a leadership position at PCSD with the SAV cost center funding system in place and was not knowingly violating criminal statutes.

Second, the SAV RICO requests were approved by Sheriffs Dupnik and Nanos. Although both Sheriffs placed responsibility primarily on Gagnepain, they appeared to have general knowledge of the SAV cost centers and RICO allocations. Sheriff Dupnik, for example, had rented a tuxedo for the annual ball that was billed to the SAV special awards cost center. Additionally, funding memos sent to PCAO included a statement that RICO monies may be used for "employee recognitions, memorial programs, and other related functions." Although misleading given how PCSD planned to allocate RICO monies, PCAO approved the funding requests without requesting any additional details despite federal equitable sharing guidelines that prohibited "[c]ash transfers to community-based programs."

Third, and lastly, the federal equitable sharing guidelines on their face did not clearly prohibit the SAV's expenditures. To be sure, had PCSD directly applied for RICO monies, the federal equitable sharing guidelines would have prohibited many of the special services purchases, such as the annual ball, food, and clothing rentals. Those same restrictions do not expressly apply to community-based programs. The guidelines require that RICO recipient be "community-based" and "supportive of and consistent with a law enforcement effort, policy, or

initiative.” 2009 Guidelines, *supra*, at Appx. C, p. 35. This presupposes an independent relationship, which did not exist with the SAV here. The guidelines also assume that the chief law enforcement officer, and the approving RICO administrator, critically examine proposed expenditure plans submitted by community-based programs, which also did not occur here. Both these considerations will allow Radtke to argue that the SAV purchases satisfied the minimum federal equitable sharing requirements.

Against this backdrop, I considered three potential crimes: (1) duties and liabilities of custodian of public monies, § 35–301; (2) fraudulent schemes and practices, § 13–2311; and (3) fraudulent schemes and artifices, § 13–2310. This list is not exclusive, and an indictment could include other ancillary charges such as theft, money laundering, and conducting a criminal enterprise. Each potential primary defense is discussed in detail below.

1. Duties and liabilities of custodian of public monies, § 35–301.

Section 35–301 includes a list of 10 prohibited acts if committed by a “[a] public officer or other person . . . who is charged with receiving, safekeeping, transferring or disbursing public monies.” Each act is classified as a Class 4 felony offense, but not all acts are applicable here. The two most relevant provisions state:

A public officer or other person . . . who is charged with receiving, safekeeping, transferring or disbursing public monies is guilty of a class 4 felony who:

1. Without authority of law, appropriates the monies or any portion thereof to the person’s own use or to the use of another.

...

9. Knowingly transfers the monies when not authorized or directed by law.

A.R.S. § 35–301(A)(1), (9).

Any potential criminal prosecution under this statute would be complicated by the three defenses discussed above, and charges under this statute would duplicate federal efforts without any guarantee of different results. Although charges are possible here, it should not be the sole basis for a state criminal prosecution.

2. *Fraudulent schemes and practices, § 33–2311.*

The fraudulent schemes and practices statutes provides:

Notwithstanding any provision of the law to the contrary, in any matter related to the business conducted by any department or agency of this state or any political subdivision thereof, any person who, pursuant to a scheme or artifice to defraud or deceive, knowingly falsifies, conceals or covers up a material fact by any trick, scheme or device or makes or uses any false writing or document knowing such writing or document contains any false, fictitious or fraudulent statement or entry is guilty of a class 5 felony.

A.R.S. § 13–2311(A). Prosecution under this statute is complicated by PCSD’s general acceptance of the SAV funding practices, and the generic funding requests filed with PCAO. With no false statements, any prosecution would depend on proving, a scheme to deceive by covering up material facts through that scheme. As with § 35–301, any prosecution under 13–2311 would duplicate the federal prosecution without likelihood of a different result.

3. *Fraudulent schemes and artifices, § 23–2310.*

The fraudulent schemes and artifices statute is a class 2 felony offense, so a successful prosecution under this statute would impose a much harsher penalty than the federal prosecution. The statute provides, “A. Any person who, pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions is guilty of a class 2 felony.” A.R.S. § 13–2310.

The general fraud statute, however, is ill-suited for Radtke’s conduct because there is no clearly defined scheme to defraud. A scheme to deceive, as covered by § 13–2311, is not necessarily a scheme to defraud. *See* Bryan A. Garner, *A Dictionary of Modern Legal Usage*, 251 (2d ed. 1995) (“*Defrauding* leads a person to take action, whereas *deceiving* merely leads a person into a state of mind.”). Although the line between deceit and defraud is minimal, given the general defenses discussed above, a prosecution under § 13–2310 would likely be unsuccessful.

VII. CONCLUSION.

After reviewing witness interviews and financial records, there is substantial evidence that Radtke participated in a scheme to exploit RICO laws and the SAV to bypass federal equitable sharing guidelines and Pima County procurement regulations. A state prosecution would be based on substantially the same evidence and conduct as the prior federal case, but with no likelihood of a different result given Radtke's potential defenses. Based on the above, I recommend declining criminal charges.