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**Statement of**

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**On**

***S1963/A3442 - Asset Forfeiture and Reporting Requirements***

**Before the  
New Jersey Senate Law and Public Safety Committee**

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## Introduction

Chairwoman Greenstein, Vice Chairman Lagana, and members of the Law and Public Safety Committee, thank you for giving me the opportunity to testify before you.

The general thrust of my comments today is that bad incentives exist in the law enforcement practice known as Civil Asset Forfeiture (“CAF”) that lead to violations of our citizens’ civil rights. Without the support of the New Jersey legislature, it will be next to impossible to identify where and how those incentives are working to undermine our justice system. Thus, S1963, and its counterpart in the General Assembly, A3442, provide a crucial first step in the process of coming to understand how CAF is practiced in New Jersey, and where our legislature will need to look next to root out any systematic injustices being perpetrated through CAF programs.

I believe there is a problem with how civil asset forfeiture is practiced on the whole, but even for those relatively more supportive of the practice, there is a way to conceptually divide the potentially problematic aspects of CAF in order to find areas for reform.

The problems of CAF are separable into two conceptual groups: in the first group there are bad systemic incentives that are distinct from the second group of more specific problems of procedural justice in individual cases. Indeed, if bad incentives exist within a legal system, that surely constitutes a breach of procedural justice as well, but the problems associated with systemic incentives operate on a global scale and are addressable as such, whereas the procedural justice issues such as presumptions, proof standards, and civil rights guarantees are typically more cognizable within a particular case.

When we talk about the incentives that drive CAF as a general law enforcement program, we think about things like whether law enforcement can retain the proceeds of the program and what utility those programs have generally on proceedings against criminal networks. On the other hand, when we think about procedural justice concerns, like the right to representation or the standard of proof, we are focused more on how the operation of a program affects individual citizens that are brought into the system as defendants (or, more precisely, parties with claims to property that is subject to a forfeiture proceeding).

The procedural justice problems that exist in CAF programs are troubling, and deserve the careful consideration of this body. Today, however, I intend to focus my remarks on the incentive problems with CAF programs because they are more directly implicated, and would stand most to be rectified, by the pending legislation before the Senate and Assembly.

As detailed further below, there are due process protections, guaranteed by the U.S. and New Jersey Constitutions, that are owed to individuals subjected to CAF proceedings. Yet, as CAF programs operate, these protections are systematically undermined. Based on the relevant case law from the Supreme Court, the due process protections are clear: individuals entrusted with protecting the

public good, like prosecutors and other law enforcement officers, have an obligation to act on behalf of the community, free from incentives to bend the power of their offices to self-serving ends.

CAF has a place in law enforcement, and can be a useful tool for disrupting criminal networks. There must be, however, systemic protections that disrupt the possibility for bad incentives to work on our public servants. First, these protections should include a requirement that seized property be sent to some neutral fund – the general fund, a fund for drug treatment or prisoner reentry, or something of similar general applicability. By allowing law enforcement personnel to retain seized property for use by their department, we allow a distorting pressure to be placed on our public servants that is flatly unconstitutional.

Second, and the subject of today's hearing, there should be general, standardized reporting requirements applied through uniform legislation on all agencies that seize property. These reports should be publicly available, and presented in a format that helps citizens to understand what property is being taken, what sorts of people it is being taken from, how much is being taken, and what exact uses it is being put to. Without this sort of transparency, we introduce yet more distortion into the administration of justice.

There is much more to do. We need, I believe, strong civil rights protections for persons who are subject to CAF proceedings. But I also believe that starting with greater transparency requirements like those contained in the bills under consideration would go a long way toward rectifying some of the major flaws in CAF proceedings.

### **My Background**

In addition to being a concerned citizen of New Jersey, I am also the Associate Director for Innovation Policy at the International Center for Law & Economics ("ICLE"). As a lawyer and legal scholar at ICLE, I spend my time researching the intersection of law, public policy, and the incentives of individuals to act within legal frameworks. Relevant here, I spend much of my research time examining the incentives of regulators, law makers, and law enforcement personnel as they operate within their statutory duties.

I am also a member of the New Jersey State Advisory Committee ("SAC") to the United States Commission on Civil Rights. As a member of the SAC, my job is to investigate violations of civil rights that occur within New Jersey. Pursuant to that, I am keenly interested in looking at necessary reforms for CAF practices in our state in order to guarantee the fair administration of justice.

### **Asset Forfeiture in New Jersey**

CAF has been a controversial practice in New Jersey for over two decades. Although there have been occasional opportunities to shine light on the practice, little, if anything, has actually been done to rectify the systematic problem of bad incentives connected to CAF.

Since at least the early 1990s, problematic CAF cases began to emerge. In one well-publicized case from 1999, Cumberland County Deputy Sheriff Carol Thomas found herself in a legal dispute with her own employer over seizure of the family car.<sup>1</sup> The case arose as a result of the arrest of Carol's son for selling marijuana to an undercover police officer.<sup>2</sup> Her superiors opted to permanently confiscate the family car under New Jersey's civil asset forfeiture laws as an instrumentality of the crime, even though doing so would have no impact on the local drug trade since they knew that Carol was not a drug dealer.<sup>3</sup> They were ostensibly drawn instead by the clear title on the car, making it an easy target for the prosecutor to seize and sell.

Following her involvement in that case, Carol acknowledged that, as an officer for the Cumberland County Sheriff's office, she had been often used as a tool for gathering money, drugs and property from suspects.<sup>4</sup> In her time there she had been curious why the activities of the office had not focused on major players in the drug trade, but had instead been routinely targeted at smaller offenders.<sup>5</sup> She finally had her answer: more money was to be made by taking the property of small-time suspects who would not have the wherewithal to fight back.

Unfortunately, Carol's story was not an isolated occurrence, but was part of a pattern that had been developing for years. To take another earlier example, Kathy and Mark Schrama's hoquse, two cars, and personal possessions were seized in 1992 when Kathy allegedly stole UPS packages from a neighbor's property.<sup>6</sup> The forfeiture laws intended to destroy the drug trade were used to financially ruin the lives of Kathy, Mark, and their 12-year old son during a protracted legal battle.

More recently, the weak civil protections of CAF have been used to undermine the civil rights protections guaranteed to criminal defendants. Luis Melendez was arrested during a narcotics raid of his apartment in 2010.<sup>7</sup> As part of that raid, officers seized approximately \$3 thousand in cash.<sup>8</sup> During proceedings to retain the property – governed under civil standards – Luis presented evidence that the cash was his in the form of a canceled check. Unfortunately, this check, which demonstrated that he resided at the apartment where money was seized, also provided evidence that he resided where drugs and other contraband were seized. This had major implications for his

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<sup>1</sup> State v. One 1990 Ford Thunderbird, No. L-000720-99, at 1, (N.J. Super Ct. Law Div. 1999).

<sup>2</sup> *Id.*

<sup>3</sup> Carol Thomas, *Police Seizures Violate Innocent Owners' Rights*, Star Ledger, January 25, 2001.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Jeff Brazil, *The Cost Of Kleptomania: A \$130,000 House*, Orlando Sentinel, Aug. 2, 1992, at A21; See also *State v. Real Property known as 451 Rutherford Ave.*, No. S.S.X-L-120-91, (Sussex County Ct. 1991).

<sup>7</sup> Brief of the ACLU of New Jersey as Amicus Curiae at 2, *State v. Melendez*, No. A-1301-15TL (App. Div. 2018) available at [https://www.aclunj.org/files/1315/0522/9317/2016\\_8\\_24\\_Filed\\_Melendez\\_Amicus\\_Brief\\_opt.pdf](https://www.aclunj.org/files/1315/0522/9317/2016_8_24_Filed_Melendez_Amicus_Brief_opt.pdf)

<sup>8</sup> *Id.*

criminal case, and because of the civil nature of the CAF case, he had no opportunity for appointed counsel to advise him on how best to navigate the interconnected civil and criminal proceedings.

The prosecutors in the criminal case promptly seized on the opportunity to introduce proof of his residence. Last month, the Appellate Division ruled against Luis's motion to bar evidence that originated from his *pro se* appearance in the CAF case.<sup>9</sup> Largely, this decision hinged on a fairly technical understanding of due process requirements – likely a legal reality that would be beyond the ken of any *pro se* litigant.

And this demonstrates one of the truly grievous realities of CAF in New Jersey. Whether or not Luis was in fact a drug dealer is immaterial to the more general question of how we administer the rule of law. Luis had no guarantee of legal representation in a matter that, to reasonable people, was very much a criminal case. CAF proceedings, as civil matters, enjoy none of the civil rights protections – access to counsel, evidentiary burdens on the State, presumptions of innocence – that defendant in criminal matters have. Yet, the CAF proceedings are very much related to criminal cases, and the evidence generate in CAF proceedings can have relevance to the related criminal matters. Thus, even apart from direct economic benefits to prosecutors, CAF's civil proceedings provide opportunities for prosecutors to structure criminal proceedings against accused persons in a way that is more favorable for the state.

This sort of systematic disdain for civil rights breeds opportunities for intentionally bad actors to emerge. In 1996, Nicholas Bissel, the so-called “forefeiture king” of New Jersey was found guilty of fraud and abuse of power.<sup>10</sup> Among the variety of abuses which Bissel was charged with was an instance in which Bissel used his office to bully a person arrested on a minor cocaine charge into surrendering property valued at \$174,000. After seizing the property, Bissel later resold it for \$20,000 to a friend of one of his detectives.<sup>11</sup> Although Bissel is surely an outlier among our public servants, his example highlights the extraordinarily bad ends this power can be subverted to serve.

These perversions of the justice system can occur even without cartoonishly villainous behavior like that of a Nicholas Bissel. Recently, the ACLU of New Jersey detailed practices in Hudson County whereby prosecutors would bundle together many disparate, small CAF cases.<sup>12</sup> By doing so, prosecutors would be able to bring aggregated cases in Superior Court – which would mean that anyone who wanted to defend their property would have to pay higher fees when making an appearance. In many instances, however, the fees to appear in court are equal to or greater than the

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<sup>9</sup> State v. Melendez, No. A-1301-15TL (App. Div. 2018).

<sup>10</sup> Robert Hanley, *Jury in New Jersey Finds Ex-Prosecutor Guilty on 30 Counts*, N.Y. Times, June 1, 1996, available at <https://www.nytimes.com/1996/06/01/nyregion/jury-in-new-jersey-finds-ex-prosecutor-guilty-on-30-counts.html>.

<sup>11</sup> *Id.*

<sup>12</sup> *Hudson County Prosecutor forces people to pay \$175 fee to challenge seizures as low as \$11*, ACLU-NJ.ORG, <https://www.aclu-nj.org/news/2017/02/24/hudson-prosecutor-routinely-violates-rights-forfeitures> (last visited May 29, 2018).

value of the property being contested. Thus, even though it is unjust, it is often more efficient to simply let the property go to the state rather than contest a seizure.

### **Asset Forfeiture Disproportionately Affects the Poor**

The sad fact is that it is low income people who tend to face CAF proceedings the most,<sup>13</sup> thus the practice of prosecutors like those in Hudson can guarantee further impoverishment for our more vulnerable residents. According to a recent report by a think tank that studied the problem in Las Vegas:<sup>14</sup>

Forfeitures correlate with high poverty areas

- Among the 12 most targeted zip codes, the average poverty rate is 27 percent
- Comparatively, the average poverty rate in the remaining 36 zip codes is 12 percent
- The countywide poverty rate (Clark) is 16 percent

The same research discovered that forfeitures also tend to correlate with areas of large minority populations:

- Among the 12 most targeted zip codes, the average non-white population is 42 percent
- Comparatively, the average non-white population in the remaining 36 zip codes is 36 percent
- The countywide non-white population is 36 percent<sup>15</sup>

Another project done on Chicago's asset forfeiture practices have revealed similar findings: When police seizure locations are mapped, it shows that, although seizures happened nearly everywhere in Chicago and the surrounding area, low-income neighborhoods like the South Side and West Side were more frequently the targets of asset forfeiture.<sup>16</sup>

Without the transparency provided by the legislation under consideration by this committee, it is hard to know exactly how CAF is affecting our most vulnerable populations. The data from other jurisdictions, however, suggest that it is the low income populations who are hurt the most.

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<sup>13</sup> C.J. Ciaramella, *Poor Neighborhoods Hit Hardest by Asset Forfeiture in Chicago, Data Shows*, HIT & RUN BLOG, (Jun. 13, 2017), <http://reason.com/blog/2017/06/13/poor-neighborhoods-hit-hardest-by-asset>.

<sup>14</sup> Daniel Honchariw, *Who Does Civil Asset Forfeiture Target Most*, NEV. POL'Y RES. INST. (2017) available at [https://www.npri.org/docLib/20170726\\_CompleteForfeitureReport.pdf](https://www.npri.org/docLib/20170726_CompleteForfeitureReport.pdf).

<sup>15</sup> *Id.*

<sup>16</sup> Ciaramella, *supra*, note 13.

## The Stakes are High

The stakes in asset forfeiture cases are very high. From 2004 through 2011, New Jersey's state forfeiture program seized over \$22 million in cash and property;<sup>17</sup> in 2009 alone over \$23.3 million was seized across all 21 counties.<sup>18</sup> Just four counties collected between \$9 million and \$13 million in the period from 2006-2010.<sup>19</sup> In 2011, \$95 million was seized in civil actions by the U.S. Attorney for the District of New Jersey.<sup>20</sup> Among the items seized at the county level in the period from 2007-2010 were electrical equipment, a WaveRunner, real estate, computer equipment, flat screen televisions, cameras, DVD players, microwave ovens, refrigerators, clock radios and GPS units.<sup>21</sup> Although, according to the Attorney General's guidelines, the funds obtained cannot be used for general salaries of prosecutors and officers, they can be used for items such as overtime pay and temporary employees.<sup>22</sup>

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<sup>17</sup> State Of New Jersey, *Revenue by Type - Prior Fiscal Year As of June 30, 2011*, (2011), [http://www.state.nj.us/transparency/revenue/data/prior\\_fy\\_rev\\_by\\_type.pdf](http://www.state.nj.us/transparency/revenue/data/prior_fy_rev_by_type.pdf). The raw data from this report is available at [http://www.state.nj.us/transparency/revenue/data/rev\\_multi\\_year.csv](http://www.state.nj.us/transparency/revenue/data/rev_multi_year.csv)

<sup>18</sup> Paula T. Dow, *Report of the County Prosecutor Study Commission*, Cnty. Prosecutor Stud. Comm'n, 32, (Feb. 4, 2011), <http://www.nj.gov/oag/dcj/pdfs/Report-of-the-County-Prosecutor-Study-Commission-2011.pdf>

Interestingly, there are state level data available that are more recent than 2011, but they do not reconcile with State's earlier data set as of 2011. *YourMoney Agency Revenue*, NJOIT Open Data Center available at <https://data.nj.gov/Government-Finance/YourMoney-Agency-Revenue/k9iw-i8yt> To take one example, the data cited above indicate that in 2007, the total for state-level forfeited funds was over \$4 million, but the more recent data indicate it was just \$250 thousand. It appears that more recent reporting is systematically excluding relevant data.<sup>18</sup> Regardless of which data set is more accurate – though I suspect that the earlier numbers represent more comprehensive reporting – the basic point demonstrated here is that it is not at all easy to understand the scope of CAF in our state, thus underscoring the importance of the legislation under consideration.

<sup>19</sup> Reviewing the statistics available on the web sites for Union, Essex, Cape May, and Mercer counties revealed that from 2006-2010 at least \$8,825,543.22 was seized. Only one of those counties even reported for all four years, however. Extrapolating from the available data yields the possibility that for just those four counties the total may be as much as \$12,991,253.61. Even without seeing the data on all 21 counties of New Jersey, the figure will certainly be in the tens of millions of dollars, and perhaps as much as \$50 million. THE UNION CNTY. PROSECUTOR'S OFFICE, ANNUAL REPORT 2009, 41 (2009) available at <http://ucnj.org/wp-content/uploads/2010/11/2009annualreportFINAL.pdf>; THE UNION CNTY. PROSECUTOR'S OFFICE, ANNUAL REPORT 2008, 14 (2008) available at <http://ucnj.org/wp-content/uploads/2010/11/UCPO-Annual-Report-2008.pdf>; ROBERT L. TAYLOR, THE CAPE MAY CNTY. PROSECUTOR'S OFFICE, 2010 ANNUAL REPORT 56 (2010) available at <http://www.cmcpros.net/2010%20Annual%20Report%20Final.pdf>; Robert L. Taylor, THE CAPE MAY CNTY. PROSECUTOR'S OFFICE, 2009 ANNUAL REPORT 5, 46 (2009) available at <http://www.cmcpros.net/2009%20Annual%20Report.pdf>; Robert L. Taylor, THE CAPE MAY CNTY. PROSECUTOR'S OFFICE, 2008 ANNUAL REPORT 10, 53 (2008), <http://www.cmcpros.net/2008%20Annual%20Report2.pdf>; Robert L. Taylor, The Cape May County Prosecutor's Office, 2007 Annual Report 12 (2007) available at <http://www.cmcpros.net/2007%20Annual%20Report2.pdf>; Joseph L. Bocchini, Jr., MERCER CNTY. PROSECUTOR'S OFFICE, 2008 ANNUAL REPORT 51 (2008) available at <http://www.mercercountyprosecutor.com/press/annual-report2008.pdf>; Joseph L. Bocchini, Jr., MERCER CNTY. PROSECUTOR'S OFFICE, 2009 ANNUAL REPORT 52 (2009) available at <http://www.mercercountyprosecutor.com/press/annual-report2009.pdf>; Essex County Forfeiture Unit available at <http://www.njecpo.org/forfeit.htm> (last visited May 30, 2018).

<sup>20</sup> *New Jersey U.S. Attorney's Office Recovers More Than \$137.5 Million In Civil And Criminal Actions In FY 2011*, U.S. Attorney's Office (Nov. 16, 2011) (on file with author).

<sup>21</sup> Bocchini (2008), *supra*, note 19, at 51; Bocchini (2009), *supra*, note 19 at 52; Taylor (2010), *supra*, note 19 at 56; Taylor (2009), *supra*, note 19 at 41; Taylor (2008), *supra*, note 19 at 14.

<sup>22</sup> Office of N.J. Attorney General, FORFEITURE PROGRAM ADMINISTRATION STANDARD OPERATING PROCEDURE 5, (1998).



In addition to having little protection for innocent owners, and few, if any, criminal procedural protections for those owners of “accused” property, New Jersey stands apart as one of the few states that allows law enforcement agencies to retain between 95% and 100% of forfeited property for “official” use. This leads to incentives for police to forfeit property for its own sake.

In 2011, Assistant Prosecutor Sean McMurtry made a stir when he spoke publicly about the practice of CAF.<sup>23</sup> Lecturing on asset forfeiture for a Continuing Legal Education course, he advocated for heavy-handed seizure of private property, saying “If you want the car ... I’ll fight for it ... If in doubt ... take it!”<sup>24</sup> McMurtry himself acknowledged that “there is an incentive, yes. Civil asset forfeiture is a pretty important component of the criminal practice and the money that goes to the local police department does provide some assistance to them.”<sup>25</sup>

As detailed in the next section, the current structure of CAF in New Jersey creates a massive problem of bad incentives.

## **The Unconstitutional Systemic Incentives to Seize Property**

New Jersey’s CAF programs, as currently practiced, are either unconstitutional or dangerously close to being unconstitutional. Lest you think is an overstatement, consider a 2011 report to the New Jersey governor on a proposal to fund state prosecutors’ offices.<sup>26</sup> The report devoted substantial space to the task of discovering how best to side step constitutional due process requirements in order to use the potentially unlimited source of revenue from asset forfeiture to subsidize prosecutors’ offices.

In the governor’s report, the authors observed that “any relaxation of the current restrictions ... may substantially increase the likelihood that the entire forfeiture framework would be invalidated.”<sup>27</sup> Why would New Jersey’s laws be so precariously close to being invalidated? Because “the constitutionality of civil forfeiture laws continues to be controversial.”<sup>28</sup>

The criminal justice system frequently fails to live up to our ideals of fair administration. Though this can happen in many ways, it is importantly facilitated by the well-known misalignment of

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<sup>23</sup> *Civil Asset Forfeiture* (CLE Course), Garden State CLE available at <http://gardenstatecle.com/civil-asset-forfeiture/> (last visited May 30, 2018).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Paula T. Dow, *Report of the County Prosecutor Study Commission*, CNTY. PROSECUTOR STUDY COMM’N (2011) available at <http://www.nj.gov/oag/dcj/pdfs/Report-of-the-County-Prosecutor-Study-Commission-2011.pdf>.

<sup>27</sup> *Id.* at n. 32.

<sup>28</sup> *Id.*



incentives between the interests of the general populace and those of law enforcement.<sup>29</sup> In this sense, abuses of the criminal law are “less a problem with the substantive criminal law than it is with the lawmaking process.”<sup>30</sup> And in few places are systemic injustices more pronounced than in the practice of CAF.

Since a forfeiture proceeding is a civil action against the property itself,<sup>31</sup> New Jersey allows for civil forfeiture both in connection to criminal activity and also when no crime has been charged<sup>32</sup> – worse yet, it also allows for civil forfeiture to occur even if a prosecution results in an acquittal.<sup>33</sup> New Jersey allows a prosecutor to wait 90 days after forfeiture to begin a civil action concerning the property – essentially holding a seized car, family home, or other property in limbo until a prosecutor decides to act.<sup>34</sup> And if an answer to the suit is not timely filed by the property owner, the property permanently reverts to the state.<sup>35</sup> While a case is pending, prosecutors and police are legally entitled to apply for judicial permission to use the seized property for law enforcement purposes.<sup>36</sup> And even if property is seized in violation of the Fourth Amendment, although it cannot be used as evidence in a criminal proceeding, that property can still be seized.<sup>37</sup> Once a forfeiture proceeding has been resolved in favor of the state, the seized items become the property of the prosecuting agency,<sup>38</sup> and the property is divided up among the various agencies that participated in the course of investigation and litigation.<sup>39</sup>

All of these facts of asset forfeiture law in New Jersey add up to a single reality: law enforcement agencies and prosecutors are incentivized to act as bounty hunters who seize property under less exacting civil standards. As detailed below, this set of bad incentives likely violates the due process guarantees of both the United States and New Jersey constitutions.

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<sup>29</sup> Paul J. Larkin, Jr, *Public Choice Theory And Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 729–30 (2013) available at [http://www.harvard-jlpp.com/wp-content/uploads/2013/04/36\\_2\\_715\\_Larkin.pdf](http://www.harvard-jlpp.com/wp-content/uploads/2013/04/36_2_715_Larkin.pdf).

<sup>30</sup> *Id.*

<sup>31</sup> See *State v. Seven Thousand Dollars*, 136 N.J. 223, 232-33 (1994) (“A civil forfeiture proceeding is brought not against the owner or possessor of the property but as an *in rem* action against the property”).

<sup>32</sup> *Id.* at 233-34.

<sup>33</sup> N.J. Stat. Ann. § 2C:64-4(b) (Lexis Advance through New Jersey 218<sup>th</sup> First Annual Session, L. 2018, c.11 and J.R. 5).

<sup>34</sup> N.J. Stat. Ann. § 2C:64-3(a) (Lexis Advance through New Jersey 218<sup>th</sup> First Annual Session, L. 2018, c.11 and J.R. 5).

<sup>35</sup> N.J. Stat. Ann. § 2C:64-3(d) (Lexis Advance through New Jersey 218<sup>th</sup> First Annual Session, L. 2018, c.11 and J.R. 5).

<sup>36</sup> N.J. Stat. Ann. § 2C:64-3(h) (Lexis Advance through New Jersey 218<sup>th</sup> First Annual Session, L. 2018, c.11 and J.R. 5).

<sup>37</sup> *Farley v. \$168,400.97*, 55 N.J. 31, 48 (1969); *State v. Jones*, 181 N.J. Super. 549, 554, (Law Div. 1981). *State v. One 1994 Ford Thunderbird*, 349 N.J. Super. at 369.

<sup>38</sup> N.J. Stat. Ann. § 2C:64-6(a) (Lexis Advance through New Jersey 218<sup>th</sup> First Annual Session, L. 2018, c.11 and J.R. 5).

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

## The Constitutional Due Process Requirements for Asset Forfeiture

In short, where a government actor has a personal or systemic incentive to gain from a forfeiture action, there is likely to be a federal due process violation. A line of cases starting with *Tumey v. State of Ohio* emerged from the U.S. Supreme Court that guides the analysis of due process considerations in asset forfeiture cases.

In *Tumey*, certain statutes in Ohio empowered the mayor of villages to try cases of alleged violation of prohibition laws.<sup>40</sup> A significant part of the holding in *Tumey* found that judges or quasi-judicial officers who receive a personal or official pecuniary interest in the outcome of a case violated due process constitutional requirements.<sup>41</sup> However, also in the decision the Supreme Court elaborated that when the nature of a proceeding encouraged an official to increase income to their office, it could very likely violate due process.<sup>42</sup>

Specifically:

[T]he pecuniary interest of the mayor in the result of his judgment is not the only reason for holding that due process of law is denied to the defendant here. The statutes were drawn to stimulate [local governments]... to organize and maintain courts to try persons accused of violations of the Prohibition Act everywhere in the county. The inducement is offered of dividing between the state and the village the large fines provided by the law for its violations.<sup>43</sup>

Connected to this legislative inducement to vigorous prosecution, the law authorizes the village to employ [officers to] detect crime of this kind ... and it offers to the [local government] a means of substantially adding to the income of the village to relieve it from further taxation.<sup>44</sup>

Although *Tumey* itself was concerned with the facts of a mayor and his pecuniary incentives, the language of the holding is broader. The law in question was designed to “awaken the interest of all those ... charged with the responsibility of raising the public money” that would then be brought in to the coffers of the city.<sup>45</sup> The mayor was especially suspect as the chief executive officer for his locality, however the vital reasoning of the rule could readily be applied to consider any person whose official conduct can bring in substantial financial gain to his or her own office.

*Marshall v. Jerrico* elaborated upon the rule set forth in *Tumey*. Under the Fair Labor Standards Act (FLSA), administrators from the Employment Standards Administration (ESA) were empowered to

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<sup>40</sup> *Tumey v. Ohio*, 273 U.S. 510, 514-15 (1927).

<sup>41</sup> *Id.* at 523.

<sup>42</sup> *Id.* at 532-34.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

collect penalties from companies that violated the child labor provisions of § 16(e).<sup>46</sup> In contrast to *Tumey*, the Court found that the ESA administrator, acting as something closer to a prosecutor than a judge, would be subject to less stringent scrutiny when collecting fines that would, through a bureaucratic procedure, eventually end up as revenue in his unit.<sup>47</sup> However, even though the Court recognized that “prosecutors are permitted to be zealous in their enforcement of the law”<sup>48</sup> they will nonetheless be subject to limitations when the systemic incentives to over-zealously perform their duties are not “too remote.”<sup>49</sup>

Importantly, merely being in a prosecutorial capacity would not absolutely bar a due process challenge because “the decision to enforce—or not to enforce—may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication” – suggesting that when a prosecutor bears discretion greater than a mere adversarial position accords, that prosecutor’s actions would be subject to heightened scrutiny.<sup>50</sup>

The Supreme Court has consistently supported the proposition that merely being in an adversarial relationship will not insulate a prosecutor from scrutiny over self-interested bias. For example, in *Young v. United States ex rel. Vuitton* special prosecutors were appointed from the ranks of the Vuitton company’s lawyers to pursue contempt charges against companies violating a court order against trademark infringement.<sup>51</sup> A successful prosecution would have meant a substantial recovery for the Vuitton company.<sup>52</sup> Even though there was a judge observing the whole process, the Court held that the special prosecutors’ interest in the outcome of the case created a conflict of interest with their public duty.<sup>53</sup>

In just the same way the Court in *Jerrico* observed that the judgment of law enforcement officers can be “distorted by the prospect of institutional gain as a result of zealous enforcement efforts”<sup>54</sup> and, in *Ward v. Village of Monroeville*, held incentives that will trigger due process scrutiny do not have to be merely personal interests, but can also be institutional in nature. *Ward* was focused on the case of a mayor who served occasionally in a quasi-judicial capacity.<sup>55</sup> The Supreme Court recognized that a mayor whose quasi-judicial activities brought income to the municipality offered an institutional

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<sup>46</sup> *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 238 (1980).

<sup>47</sup> *Id.* at 243.

<sup>48</sup> *Id.* at 239.

<sup>49</sup> *Id.* at 243-44.

<sup>50</sup> *Id.* at 247.

<sup>51</sup> *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805-07 (1987).

<sup>52</sup> *Id.* at 805.

<sup>53</sup> *Id.* at 805-07.

<sup>54</sup> *Jerrico*, 446 U.S. at 250.

<sup>55</sup> *Ward v. Monroeville*, 409 U.S. 57, 60 (1972).

temptation to be a partisan on behalf of the municipality's pecuniary interest.<sup>56</sup> The mayor's role as a fundraiser came at the expense of the interests of justice.

The role of a prosecutor in a civil asset forfeiture case analogously straddles the fence between a purely prosecutorial role and a legislative one, at least in New Jersey. In *Jerrico*, the Court opined that "the assistant regional administrator simply cannot be equated with the kind of decision makers to which the principles of *Tumey* and *Ward* have been held applicable"<sup>57</sup> because his discretion was narrowed to that of a general prosecutor who was constrained by the terms of the law. Such constraint is one that typically allows the prosecutor to decide such things as whether or not to charge a suspect with a crime at all, or whether or not to offer plea deals.

However, asset forfeiture law is unique. Since in New Jersey it is unlinked from particular crimes, and occurs within a civil context where the burdens on the government are substantially less, the prosecutor has a powerful discretion to determine which classes of conduct should be subject to forfeiture. This is a power not present in the normal prosecutorial quiver in the criminal context. As such, broad asset forfeiture laws vest in the prosecutor a quasi-legislative prerogative to determine the effective shape of criminal law.

An additional worthwhile consideration is that prosecutors in an asset forfeiture case will not be bound to the normal constraints of a criminal process. Since the proceeding is civil, the prosecutor will enjoy a number of procedural advantages, including, *inter alia*, an easier burden of proof (preponderance of the evidence) and, often, a lack of an adversary, since counsel is not guaranteed to indigent defendants. In fact, over 80% of federal forfeiture proceedings go completely uncontested – suggesting that the prosecutors' behavior in this regard verges much closer to that of setting policy rather than enforcing laws.<sup>58</sup>

It is also relevant to the consideration of asset forfeiture laws that the holding of *Jerrico* lays out more than an abstract formula for evaluating due process violations.<sup>59</sup> Instead, due process violations will need to be evaluated in a fact-sensitive manner, looking at various aspects of the asset forfeiture practice including the nature and limits of incentives to law enforcement, the relationship of seized assets to the office's funding, and the nature and extent of legislative control over the domain of asset forfeiture.<sup>60</sup>

*Connally v. Georgia* provided yet another component to the relevant due process analysis. In *Connally*, the Court found that a justice of the peace's direct, personal incentive to issue warrants was

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

<sup>57</sup> *Jerrico*, 446 U.S. at 247.

<sup>58</sup> Stefan D. Cassella, *Overview of Asset Forfeiture Law in the United States*, Asset Forfeiture, Nov. 2007, at 12. (on file with author).

<sup>59</sup> *Marshall v. Jerrico*, 446 U.S. at 242.

<sup>60</sup> *Id.*

constitutionally problematic.<sup>61</sup> Importantly, this was not the only part of the analysis. The presence of the incentive to issue a warrant combined with the absence of an incentive to *not issue warrants* was constitutionally problematic.<sup>62</sup> Thus the analysis for prosecutorial incentives in collecting fines, fees, and forfeited property is at heart governed by a balancing test.

Further, although the justice of the peace was a part of the judiciary, he was acting only in his capacity as an issuer of warrants when his conduct violated the due process clause of the constitution.<sup>63</sup> Thus, the justice of the peace was not acting as a decision maker of a controversy, but merely as a member of an investigatory process. Moreover, the fee the justice of the peace collected was only \$5.00 in 1970's currency, but when viewed as part of a whole scheme, it constituted more than a *de minimis* concern and would warrant heightened due process scrutiny.<sup>64</sup>

Following from the available U.S. Supreme Court case law set forth above, it becomes clear that there is a two-pronged analysis for evaluating whether a particular incentive to government officials violates constitutional due process. First, the question is whether the official is in a judicial or quasi-judicial role.<sup>65</sup> If so, direct personal incentives are *per se* unconstitutional. If the incentives are systemic, such as funding a locality or a department, they will be unconstitutional unless the official in question exercises very little relative influence over budgets and management.<sup>66</sup>

Second, when the individual is acting in a prosecutorial role, their actions will not be *per se* unconstitutional because the zealous pursuit of their office is proper.<sup>67</sup> Instead, a balancing test will be applied that weighs a variety of non-exclusive factors including, *inter alia*, whether the prosecutor has a direct, personal stake in the outcome of the case;<sup>68</sup> whether the amount taken from defendants exceeds the amount that office returns to the general treasury;<sup>69</sup> how much of the office's budget the suspect income accounts for;<sup>70</sup> whether there are statutory maximums on how much can be collected;<sup>71</sup> whether the prosecutor is in a position to decide what classes of crimes, what types of

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<sup>61</sup> *Connally v. Georgia*, 429 U.S. 245, 250 (1977).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 246.

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

<sup>65</sup> *Tumey v. Ohio*, 273 U.S. at 523.

<sup>66</sup> *Ward v. Monroeville*, 409 U.S. at 60-61.

<sup>67</sup> *Marshall v. Jerrico, Inc.*, 446 U.S. at 239.

<sup>68</sup> *Id.* at 251-52.

<sup>69</sup> *Id.* at 252.

<sup>70</sup> *Id.* at 251-52.

<sup>71</sup> See *Marshall v. Jerrico*, 446 U.S. at 238 (the ESA administrator was statutorily prevented from seeking more than \$1,000.00 in a particular fine. Although the Court did not cite to this fact, it appears to be a relatively important aspect of the case.).

property, and how much of that property will be subject to the proceeding;<sup>72</sup> and whether the income is used solely to remunerate the office for the expenses incurred as part of prosecution.<sup>73</sup>

Finally, in evaluating whether the prosecutorial action crosses the constitutional line, a court will consider whether the prosecutor's office has established policies that either disincentivize forfeitures or create a systemic governor against unjust and excessive forfeitures.<sup>74</sup>

### **Due Process Requirements Applied to New Jersey Law**

In 2004, a New Jersey CAF case was reviewed by the Appellate Division in *State v. One 1990 Ford Thunderbird*.<sup>75</sup> In *Thunderbird*, Carol Thomas brought a counter-claim against the seizure of her vehicle based on the U.S. Supreme Court's *Jerrico* line of cases mentioned above. The primary argument advanced by the defendant was that the personal or institutional interests incentivizing prosecutors in forfeiture proceedings created federal due process violation. After prevailing on the constitutional claim at the trial level, *Thunderbird* was overturned on appeal. Even though the New Jersey Supreme Court later denied certification, the constitutional question has not been definitively settled at the federal level and remains to haunt CAF practices in New Jersey.

The appellate court in *Thunderbird* focused its holding on rather narrow grounds. Where the trial court, in harmony with U.S. Supreme Court precedent, saw the institutional incentives introduced by the current structure of New Jersey forfeiture law as a violation of due process,<sup>76</sup> the appellate court disagreed.<sup>77</sup>

The appellate court first focused on the fact that prosecutorial actions, and not judicial actions, were the ones being called into question<sup>78</sup> – thus implying that there was no need for heightened scrutiny. While a judge is certainly under special scrutiny as the final decision maker in a case, due process scrutiny is not limited solely to instances of judicial conflicts of interest. Prosecutors and law enforcement officers are employed to serve the public trust, and as such have a duty above and beyond narrow partisanship.

The appellate court also erred by finding the institutional incentives too limited and remote in CAF proceedings. The appellate court focused on the relative budgetary contribution that forfeiture provided on average to all participating state agencies, ignoring both the cases where the forfeitures

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<sup>72</sup> This factor was not explicitly cited by the Court, but was likewise a defining characteristic of the administrator's discretion. See *State ex rel. County of Cumberland v. One 1990 Ford Thunderbird*, 371 N.J. Super. 228, 244 (App. Div. 2004) [ hereinafter *Thunderbird*].

<sup>73</sup> *Id.* at 250-52.

<sup>74</sup> *Connally v. Georgia*, 429 U.S. at 250.

<sup>75</sup> *State ex rel. County of Cumberland v. One 1990 Ford Thunderbird*, 371 N.J. Super. at 244.

<sup>76</sup> *State vs. One 1990 Ford Thunderbird*, No. L-000720-99, at 4, 7-11.

<sup>77</sup> *State ex rel. County of Cumberland v. One 1990 Ford Thunderbird*, 371 N.J. Super. at 244.

<sup>78</sup> *Id.* at 244.

proceeds contributed as much as 4% to 7% to the agency's operating budgets, and also the full nature of the analysis that *Jerrico* presents regarding the evaluation of the contributing amounts.

The appellate court limited its analysis in this regard to a consideration of whether the use of funds could be used for regular salaries; the funds could be used to set budgets based on anticipated forfeitures; and whether any forfeiture proceedings would be reviewed by a judge.<sup>79</sup> This decision, however, was blind to the realities of forfeiture proceedings, both in New Jersey and across the nation. Over 80% of forfeitures go uncontested nationally.<sup>80</sup> In New Jersey, if a forfeiture proceeding is not contested within 90 days<sup>81</sup> the property defaults to the state.<sup>82</sup> Since forfeiture is a civil proceeding, indigent defendants have no right to counsel – in fact it is even possible under the current law to proceed against the property without a criminal charge being pursued<sup>83</sup> or even after an acquittal is obtained.<sup>84</sup> Although there is a hint of formal due process by requiring judicial review of the proceedings, the actual operation of the law is functionally evading due process requirements.

### **The flaws in *Thunderbird's* holding**

It appears sufficiently clear that the appellate court's use of *Jerrico* was narrow and inapposite given the full reasoning of the case outlined above. CAF cases presents totally different sets of facts than the enforcement of the Fair Labor Standards act did in *Jerrico* for a number of reasons, which means that the presence of institutional incentives are not nearly as remote as the court believed them to be.

First, a criminal prosecutor operates in a significantly different environment than an agent of the ESA. The systematic bias for a prosecutor, whose state office is always under tight budgetary scrutiny and who is subject to changing political winds, is dramatically different than the entrenched bureaucracy of the FLSA. Further, while the prosecutor is entitled to act zealously as an adversary, many times forfeiture proceedings are *pro forma* with no defense being offered at all.<sup>85</sup>

Second, an important aspect of the fines at issue in *Jerrico* was that they were imposed to recoup the costs of investigation and enforcement, and accordingly were returned to the prosecuting agency.<sup>86</sup> More importantly, those civil fines were statutorily capped at not more than \$1,000.00 per

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<sup>79</sup> *Id.* at 243-44.

<sup>80</sup> Cassella, *supra* note 58, at 12.

<sup>81</sup> N.J. Stat. Ann. § 2C:64-3(a) (Lexis Advance through New Jersey 218<sup>th</sup> First Annual Session, L. 2018, c.11 and J.R. 5).

<sup>82</sup> N.J. Stat. Ann. § 2C:64-3(d) (Lexis Advance through New Jersey 218<sup>th</sup> First Annual Session, L. 2018, c.11 and J.R. 5).

<sup>83</sup> *State v. Seven Thousand Dollars*, 136 N.J. at 233-34.

<sup>84</sup> N.J. Stat. Ann. § 2C:64-4(b) (Lexis Advance through New Jersey 218<sup>th</sup> First Annual Session, L. 2018, c.11 and J.R. 5).

<sup>85</sup> Cassella, *supra* note 58, at 12.

<sup>86</sup> *Marshall v. Jerrico, Inc.*, 446 U.S. at 245.



violation.<sup>87</sup> In a civil asset forfeiture proceeding in New Jersey the seized property is that which was an instrumentality or proceed of the alleged crime, or was intended as such, and the amount recovered can far exceed any costs incurred in pursuing a suspect. In fact, the amounts collected by the agency in *Jerrico* amounted to substantially less than 1% of their total budget in each of the three years examined. And in total, the agency returned more money to the Treasury than it used, suggesting that there was no pressure to gain more income through the law.<sup>88</sup> By contrast, forfeiture proceeds in New Jersey are theoretically unlimited.

Finally, unlike the prescribed statutory maximum at issue in *Jerrico*, the decision of how much to seize in forfeiture actions is completely within the discretion of the prosecutor. The scope of what behavior was subject to a fine was likewise narrowly established by statute in *Jerrico*, while New Jersey law leaves it up to the discretion of the prosecutor to determine which crimes should have a forfeiture proceeding associated with them.<sup>89</sup>

### **Applying the full *Jerrico* due process analysis to *Thunderbird***

The appellate court's finding that "there are more similarities than differences between"<sup>90</sup> *Thunderbird* and *Jerrico* was seriously flawed. By contrast, a more careful consideration of the strong line of *Tumey*, *Jerrico*, *Ward*, and *Connally* directs the analysis differently. New Jersey's asset forfeiture laws need to be viewed through the lens of this line of cases and the factors implied in those holdings.<sup>91</sup> In fact, the trial court in *Thunderbird* performed the sort of fact-intensive balancing that the *Jerrico* line of cases requires when it ruled that the incentives provided to law enforcement in asset forfeiture violated due process.<sup>92</sup>

Clearly, the actions of prosecutors in asset forfeiture cases will not be *per se* unconstitutional. However, while they may be presumptively valid, since the question at hand involves the property interest of affected defendants, they will be subjected to due process scrutiny.<sup>93</sup> The glaring factual differences between *Jerrico* and *Thunderbird* notwithstanding, the point of *Jerrico* was not to look at facial similarities, but to apply the underlying factors that supported the holding to new cases of alleged improper incentivization. There are five factors that need careful consideration *viz* New Jersey's asset forfeiture law.

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<sup>87</sup> *Id.* at 244; *See also* *Tumey v. State of Ohio*, 273 U.S. at 533 (where the court used the fact that the mayor had a wide discretion in determining the amount of the penalty as a factor against the constitutionality of the law in question).

<sup>88</sup> *Marshall v. Jerrico*, 446 U.S. at 246.

<sup>89</sup> *Id.* at 245 (Civil penalties were collected solely for violations of child labor laws).

<sup>90</sup> *State ex rel. County of Cumberland v. One 1990 Ford Thunderbird*, 371 N.J. Super. at 243.

<sup>91</sup> *Id.*

<sup>92</sup> *State vs. One 1990 Ford Thunderbird*, No. L-000720-99, at 4, 7-11.

<sup>93</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n. 4 (1938).

The first major factor that emerges from the *Jerrico* line of cases is an examination of the nature of incentives to law enforcement personnel.<sup>94</sup> As the *Thunderbird* trial court observed, *Jerrico* does not hold that only direct, personal incentives in asset forfeiture will violate due process requirements.<sup>95</sup> Instead, systemically created incentives that focus prosecutors and other law enforcement officers on enriching their own unit will suffice.<sup>96</sup> The laws in New Jersey provide an unlimited, substantial stake for law enforcement personnel in the outcome of asset forfeiture cases. Although the funds cannot be used for direct salaries, there is at least a quasi-direct element insofar as the seized assets can be used to pay for over-time hours. Those funds can also be used to pay for extra personnel and any equipment necessary for “law enforcement” purposes (however defined), not to mention the fact that the property can be put directly into service by the seizing agency.

A second factor to consider is how large the incentive needs to be relative to the law enforcement agency’s budget. Although, the amount seized and retained by law enforcement agencies was on average 2% of the general budget, the court in *Thunderbird* did acknowledge that the figure varied, and often amounted to between 4% and 7%.<sup>97</sup> Further, in *Jerrico* the 1% budgetary figure was not evaluated as an average of individual offices, but only as the budget for the entire national ESA office, where the locus of control of those funds was lodged.<sup>98</sup> By relying on an average across all prosecutors’ offices in New Jersey, the appellate court in *Thunderbird* essentially hid the real numbers of interest. The locus of control of funds is *per office*, and, accordingly and in harmony with the analysis in *Jerrico*, the examination of budgetary contribution should be on that same level. So averaging across all prosecutors offices – when some counties will have low numbers, and some very high – hides the really prolific seizing offices in a deceptively small number. Relatedly, the U.S. Supreme Court has also recognized that even small amounts of gain, when taken as part of a whole system, will constitute more than a *de minimis* concern that triggers due process scrutiny.<sup>99</sup>

The laws of New Jersey also do not require the direction of any seized funds to the treasury or to special programs. In fact, county and local law enforcement agencies are entitled by New Jersey law to the entire proceeds from a forfeiture action. Contrast<sup>100</sup> this to *Jerrico*, where the regional offices received funds strictly for reimbursement<sup>101</sup> and where all fees received were first sent to the national office where it was decided whether or not to disburse funds, and if so, how much.<sup>102</sup>

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<sup>94</sup> *Tumey v. Ohio*, 273 U.S. at 532-34; *Marshall v. Jerrico, Inc.*, 446 U.S. at 239.

<sup>95</sup> *State vs. One 1990 Ford Thunderbird*, No. L-000720-99 at 9-10.

<sup>96</sup> *Ward v. Monroeville*, 409 U.S. at 60.

<sup>97</sup> *State ex rel. County of Cumberland v. One 1990 Ford Thunderbird*, 371 N.J. Super. at 242-43.

<sup>98</sup> *Marshall v. Jerrico*, 446 U.S. at 250.

<sup>99</sup> *Connally v. Georgia*, 429 U.S. 245, 246 (1977).

<sup>100</sup> N.J. Stat. Ann. § 2C:64-6(a) (Lexis Advance through New Jersey 218<sup>th</sup> First Annual Session, L. 2018, c.11 and J.R. 5).

<sup>101</sup> *Marshall v. Jerrico*, 446 U.S. at 251.

<sup>102</sup> *Id.*

Neither do New Jersey's laws require that seized funds be limited relative to the amount of expense in a prosecution as remuneration, another stark contrast to the ESA in *Jerrico*.<sup>103</sup> Although the fact that, on average, 2% of law enforcement agency budgets across the state are funded by forfeiture proceeds may sound modest, 7%, the highest amount noted for any county agency, is surely a klaxon.

It is important to note that, as *Jerrico* would require, the lack of statutory control over the scope of asset forfeiture was an important issue at the trial level<sup>104</sup> and a fully ignored aspect at the appellate level in *Thunderbird*. As the *Thunderbird* trial court observed, the amount that can theoretically be seized and used to augment law enforcement budgets is unlimited by law and fully up to the discretion of prosecutors.<sup>105</sup>

Beyond Attorney General guidelines banning the use of forfeiture proceedings for primary salaries, there is relatively little restraint as to what those funds can be used for. For instance, in *Thunderbird* the State reported that funds from seizures had regularly been used for “rent for a motor pool crime scene facility, office furniture, telecommunications and computer equipment, automobile purchase, fitness and training equipment purchase [sic], a golf outing, food, including food for seminars and meetings, and expenses of law enforcement conferences, at various locations.”<sup>106</sup> Although the funds were not used for salaries, they were clearly used for more than basic remuneration for an investigation, and often to provide perks to the state officials who received the proceeds.

## Conclusion

The United States and New Jersey constitutions both guarantee to accused persons the fair and impartial administration of justice. Those who fall victim to the predatory practices endemic to civil asset forfeiture receive neither, and deserve better. Civil asset forfeiture can be a useful tool for law enforcement to fight criminal networks, but its operation needs to be reviewed and corrected to be in accordance with the demands of due process.

The bills pending before the Senate and Assembly would help our legislature find and correct any problems of systemic abuse. I commend the New Jersey legislature for taking up this timely and important issue.

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<sup>103</sup> *Id.*

<sup>104</sup> State vs. One 1990 Ford Thunderbird, No. L-000720-99 at 4, 7-11 (“There is no statutory or regulatory limit on the dollar amount or percentage total of forfeited funds ... A monumentally large asset seizure ... , or series of them, could force a percentage skyward.”).

<sup>105</sup> *Id.* at 11

<sup>106</sup> *Id.*