Superior Court of New Jersey

STATE OF NEW JERSEY, By and through the COUNTY OF CUMBERLAND, Plaintiff, v. ONE 1990 FORD THUNDERBIRD, bearing New Jersey Registration YB158W, Defendant-in-Rem. CAROL THOMAS, Counterclaimant v. STATE OF NEW JERSEY, et al., Defendants-Appellants.	:	**APPELLATE DIVISION** Docket No. A-003879-02T1 Civil Action On Appeal, on Leave Granted, From an Interlocutory Order of the Superior Court of New Jersey, Law Division, Cumberland County. Sat Below: Hon. G. Thomas Bowen, J.S.C.

BRIEF ON BEHALF OF APPELLEE/COUNTERCLAIMANT CAROL THOMAS

JOSEPH M. CHIARELLO
JACOB & CHIARELLO
600 West Main Street
Millville, NJ 08332
(856) 825-0700

SCOTT BULLOCK
INSTITUTE FOR JUSTICE
1717 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006
(202) 955-1300

Attorneys for Appellee/Counterclaimant

TABLE OF CONTENTS

Page

<u>TABLE OF AUTHORITIES</u>

<u>Page(s)</u>

<u>Cases</u>

Page(s)

Constitutional Provisions

Codes, Rules and Statutes

Page(s)

Other Publications

PRELIMINARY STATEMENT

The due process clauses of the U.S. and New Jersey constitutions guarantee to all New Jersey citizens fair and impartial administration of justice. The instant lawsuit challenges on due process grounds the ability of officials involved in the enforcement and prosecution of civil forfeiture laws to profit directly from the operation of those laws. Section 2C:64-6a of New Jersey's Code of Criminal Justice mandates that property civilly forfeited by the government at the state and county levels go directly to police and prosecutors' offices to be used for "law enforcement" purposes.

From 1998-2000, New Jersey police and prosecutors collected an astonishing nearly $32 million in property and currency through application of the civil forfeiture laws, and the very bodies charged with enforcing and prosecuting those laws benefited directly from the forfeitures. Forfeiture funds were used for everything from the purchase of automobiles to a golf outing, from office renovations to expenses at conferences.

The trial court below rightly held that Section 2C:64-6a violated the due process clauses of the U.S. and New Jersey constitutions and was contrary to the U.S. Supreme Court's holding in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). Letter Opinion ("Op."), reproduced in Plaintiff's Appendix ("Pa"), Pa1—19. The trial court granted the summary judgment motion of Counterclaimant-Appellee Carol Thomas ("Thomas"). *Id.* The State of New Jersey ("State") has now appealed the trial court's interlocutory order. Plaintiff's Brief ("Pb."). Perhaps realizing that the Court's *Marshall* decision is ruinous to its argument that Section 2C:64-6a satisfies due process, the State devotes a substantial portion of its brief to arguing, incredibly, that the *Marshall* decision has no application whatsoever to the facts of the instant matter. Pb28-36. As a fallback position, the State asserts that even if *Marshall* is controlling, Section 2C:64-6a satisfies due process requirements. Pb36-40.

County prosecutors in New Jersey are the primary beneficiaries of Section 2C:64-6a. Indeed, New Jersey's 21 county prosecutors collected over 24 million in forfeiture funds between 1998-2000 alone. It is perhaps not surprising then that their advocacy organization, the County Prosecutors' Association of New Jersey ("CPANJ") has filed a lengthy *amicus curiae* brief urging this Court to reverse the decision below and protect prosecutors' ability to continue to profit from civil forfeiture. *Amicus* Brief ("Ab"). In contrast to the State, CPANJ grudgingly admits that the *Marshall* decision probably does apply to the instant case but strains to find numerous grounds, none of them persuasive, upon which to distinguish it.

The dispute in this appeal is really over whether *Marshall* applies. If it does, then the State loses. In Section I of this brief, we explain the limited nature of the instant challenge. Thomas's claim will not end civil forfeiture in New Jersey but merely ensure that the distribution of forfeiture funds complies with due process guarantees. In Sections II through IV, we respond to the numerous misstatements of law contained in both the State's brief and the *amicus curiae* brief filed by the prosecutors' association and explain why *Marshall* and related cases are on point for determining the constitutionality of the statutory section at issue here. Finally, in Section V, Thomas sets forth how Section 2C:64-6a violates the standards established by the Supreme Court in *Marshall* for determining whether financial incentives to law enforcement officials violate due process guarantees. That section clearly demonstrates why the trial court's judgment must be upheld.

PROCEDURAL HISTORY

Because the State accurately sets forth the procedural history of this case, there is no need to offer a counterstatement here. Thomas does offer one clarification, though. While it is true that the federal court dismissed Thomas's action in May 2000, the court did not reach the merits of the claim. The court merely abstained from addressing the due process issue, ruling that it should be litigated in state, not federal, court. As a result of that decision, Thomas amended her answer and added the counterclaim at issue here.

COUNTERSTATEMENT OF FACTS

The State offers a largely accurate if somewhat selective recitation of relevant facts related to the instant matter. For example, the State neglects to mention the actual amount of assets and revenue generated by civil forfeiture. As the trial court recognized, governmental bodies at the state and county levels forfeited a total of $31,618,100.31 over the three-year period (1998-2000) addressed in this case. *See* Counterclaimant's Appendix ("Ca") Ca1-2,6. The State also claims in its Statement of Facts that forfeiture funds cannot be used for regular salaries of law enforcement officials, except for the hiring of temporary employees. Pb15-16. The State fails to mention another exception to this rule: forfeiture funds can be and are used to fund overtime pay for regular employees. *See, e.g.,* Ca37, Ca68, Ca138; Ca176; Ca310-311. In the interest of avoiding repetition, Thomas will incorporate any other relevant factual material that was considered by the trial court in the Argument section of her brief.[1]

[1] With regard to the standard of review in this case, the State is correct that because the instant case was decided on cross-motions for summary judgment and concerns a legal matter, the trial court's decision is entitled to "no special deference."

ARGUMENT

I. THE INSTANT LAWSUIT, WHICH RAISES A NOVEL LEGAL ISSUE NOT DECIDED BY OTHER COURTS, WILL NOT INTERFERE WITH THE POWER OF THE STATE TO ENGAGE IN CIVIL FORFEITURE BUT RATHER WILL ENSURE THAT THE DISTRIBUTION OF FORFEITED PROPERTY COMPLIES WITH CONSTITUTIONAL GUARANTEES.

At the outset of the Argument section of its brief, the State claims that the instant lawsuit "denigrate[s] the purposes and goals of New Jersey civil forfeiture laws." Pb21. But the instant lawsuit would not affect the ability of the State to engage in civil forfeiture. As the State rightly notes, the general power of civil forfeiture has been upheld. And affirming the trial court's decision would not interfere with the power of the State to "confiscate property used in violation of the law" or to "require disgorgement of the fruits of illegal conduct." Pb21 (quoting *United States v. Usery*, 518 U.S. 267, 284 (1996)).

The instant challenge is narrow: by ending the direct profit incentives under Section 2C:64-6a, it seeks only to ensure that the State's system of *distributing* forfeited property, proceeds, and currency complies with constitutional guarantees. Thus, only the method for distributing the property and proceeds gained through civil forfeiture would need to change. How the State would respond—by placing forfeiture

---

Manalapan Realty, L.P. v. Township Committee, 140 N.J. 366, 378 (1995).

proceeds in the general treasury of the State or county or a neutral fund such as education, or by reimbursing law enforcement officials only for the costs associated with investigations and prosecutions of forfeiture actions, or through some other method—will be a matter for the State, not this Court, to resolve. What is abundantly clear, however, is that by allowing police and prosecutors to reap large, direct and unlimited profits from civil forfeiture, New Jersey's current system carried out under Section 2C:64-6a violates the U.S. and New Jersey constitutions and must be struck down. A ruling in favor of Thomas will guarantee that the State's enforcement actions are not corrupted by the prospect of institutional and personal gain.

In its brief, the State also cites to and includes in its appendices state statutes that, similar to New Jersey's, permit law enforcement officials to keep all or a substantial portion of forfeited property. Pb22-24 and Pa280-410.[2] After describing

---

[2] It should be noted, however, that in several other states, forfeited property does not go to the law enforcement officials charged with enforcing and prosecuting forfeiture laws. *See, e.g.*, Ind. Code Ann. 16-42-20-5(e) (all proceeds from forfeiture in excess of expenses of prosecution are paid into the general school fund of the state); Mo. Const., Art. IX, Section 7; Mo. Ann. Stat. 513.623 (all forfeiture proceeds go to the schools); Utah Uniform Forfeiture Procedures Act (Initiative B, now codified at Section 24-1-15) (forfeiture funds go to Uniform School Fund and to compensate victims of crime). Indeed, as the State concedes in its brief, when New Jersey's civil forfeiture statute was first implemented in 1978, forfeiture proceeds went

several of the statutes, the State concludes: "[n]otably, to date, there has been no reported case invalidating any of these laws on the ground raised herein." Pb24. But what the State fails to mention is that apart from New Jersey's law, no other state statute or the federal statute has yet been challenged on the constitutional grounds raised here. The instant case presents a novel legal issue, so the fact that other states have similar or different systems of distributing forfeited property is irrelevant to deciding the constitutionality of New Jersey's statute.

While the instant case is the first time this constitutional issue has been presented to a court, legal commentators have expressed serious reservations about the constitutionality of the practice challenged in this case. Indeed, the author of the leading treatise on civil forfeiture practice, David B. Smith, the former Associate Director of the U.S. Department of Justice's Asset Forfeiture Office, concluded that "[s]tate statutes which allocate a portion of forfeited assets to local prosecutors would probably fail to pass constitutional muster . . . ." David B. Smith, *Prosecution and Defense of Forfeiture Cases*, Release 29, sec 1.01 at 1-8.1 n.21.1 (Lexis 2001). When addressing this issue in an earlier

---

to the State, not directly to law enforcement agencies. Pb6. Only later, through amendment, did the direct profit incentive of Section 2C:64-6a arise. Pb6-8.

version of the treatise, Smith adds that it is "remarkable that these statutes have not yet been challenged on due process grounds." David B. Smith, *Prosecution and Defense of Forfeiture Cases*, Release 27, sec 1.01 at 1-8.1 n.21 (Matthew Bender 2000). The latest version of the two-volume treatise notes the instant case and the decision below as raising for the first time the question of whether entitling law enforcement officials to forfeited property and currency violates due process. As set forth below, New Jersey's system fails to satisfy due process standards.

II. THE TRIAL COURT WAS CORRECT TO ANALYZE THE DISTRIBUTION PROVISION OF NEW JERSEY'S FORFEITURE STATUTE USING THE CRITERIA ESTABLISHED IN *MARSHALL v. JERRICO*.

According to the State, the trial court held that "a civil plaintiff cannot profit from the action he or she has filed," an unacceptable holding, the State charges, "in a nation which treasures access to the courts. . . ." Pb2. In truth, *the* trial court reached no such conclusion. Rather, acting on "precise and narrow grounds," Op. at 2, the trial court below invalidated New Jersey's civil forfeiture scheme only to the extent that it gives law enforcement officials a direct, substantial, and unlimited interest in the outcome of civil forfeiture cases that they prosecute. In doing so, the trial court handed down a decision firmly grounded in the law of due process and, in particular, based on the Supreme Court's decision in *Marshall, supra.* Undaunted by Supreme Court authority directly on point, the State insists that *Marshall* "has no relevance," and "does not apply in the present matter," Pb2. This section of Thomas's brief compares the State's inventive contentions to the actual language, facts, and logic of *Marshall* and demonstrates that *Marshall* provides controlling authority for deciding the matter at hand.

Prior to *Marshall*, the Supreme Court had already held that personal interests posing "a possible temptation to the average man as a judge" to favor the state over an accused deny the accused due process of law. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Subsequently, the Court extended the holding to institutional interests. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). Relying on *Tumey* and *Ward*, an employer challenged the practice of using civil penalties from child-labor infractions as a source of funding for the federal Employment Standards Administration ("ESA"), the agency within the Department of Labor that initiates enforcement proceedings. *See Marshall*, 446 U.S. at 240-41. The funding practice, the company charged, might "create[] an impermissible risk and appearance of bias by encouraging the [ESA's] assistant regional administrator to make unduly numerous and large assessments of civil penalties." *Id*. at 241. It was the assistant regional administrator's job, the Court explained, to initiate child-labor enforcement proceedings by "determining violations and assessing penalties," a function "akin to that of a prosecutor or civil plaintiff." *Id.* at 240, 247.

The rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions, are "not applicable to those acting in a prosecutorial or plaintiff-like capacity," the *Marshall* Court held. *Id.* at 248. But, the Court said, there still are limits, imposed by the Due Process Clause, on the injection of "irrelevant or impermissible factors into the prosecutorial decision. . . ." *Id.* at 249. Thus, the *Marshall* Court established two tiers of review for the personal or institutional interests of participants in the adjudicatory process: a strict standard, nearly a rule of *per se* impermissibility, for judges and quasi-judicial officers under *Tumey* and *Ward* and a less stringent, but still formidable standard for prosecutors under *Marshall*. In examining the alleged interest of the ESA's assistant regional administrators, the *Marshall* Court identified the factors that must be considered in order to resolve allegations of prosecutorial bias. Section V of this brief discusses the substance of the *Marshall* criteria.

It seems almost as if the State has read a different case. According to the State, *Marshall* applies "only to cases involving administrative agency enforcement actions. . . ."

Pb19. Thus, in the State's scheme of things, there are (at least) three tiers of review: a strict standard for judges under *Tumey* and *Ward*; an intermediate standard for "administrative prosecutors" under *Marshall*; and *no standard at all* for state prosecutors, at least in civil cases. *See* Pb27 ("There is simply no due process requirement that there be a neutral, impartial civil plaintiff. . . ."). This assertion is truly extraordinary, and totally unsupported by any caselaw.

The State's theory seems to be that, if it can list enough differences between New Jersey prosecutors and the ESA's assistant administrators, relevant or not, it can disregard all the Court's references to "prosecutors" and relegate *Marshall* to a narrow corner of administrative law. In the process, the State misreads *Marshall*; recites facts that contradict the Court's opinion; and imports into *Marshall* supposed grounds of decision that the Court did not even mention. The rest of this section exposes the major errors – interpretive, factual, and conceptual – that underlie the State's argument and then affirmatively demonstrates that *Marshall* controls the matter at hand.

A. There Is No Substantive Difference Between the Functions That Administrative Prosecutors Perform in *Marshall* and Those That New Jersey Prosecutors Perform in Civil Forfeiture Cases.

The State correctly notes that the New Jersey forfeiture statute "imposes no adjudicative duties upon the county prosecutors and the Attorney General." Pb25. It then goes on to assert, quite *in*correctly, that "*unlike administrative agency prosecutors*, [New Jersey prosecutors do not] determine that violations have occurred and assess penalties." Pb26 (emphasis added). The State also repeatedly asserts that New Jersey prosecutors do "not hold the hearing, appraise the credibility of any witnesses, or adjudicate the matter. . . .," Pb16, as if that fact distinguished them from the administrative prosecutors in *Marshall*. *See also* Pb1 ("The prosecutor in a civil forfeiture action . . . does not hold a hearing, assess credibility and find facts. . . ."). In fact, the roles of New Jersey prosecutors and ESA administrative prosecutors are remarkably similar.

Marshall does indeed say that an administrative prosecutor, "the assistant regional administrator of each office[,] has been charged with the duty of determining violations and assessing penalties." *Marshall*, 446 U.S. at 240. But it goes on to say that "[t]he assistant regional administrator . . . performs no judicial or quasi-judicial functions. He hears no witnesses and rules on no disputed factual or legal questions. The function of assessing a violation is akin to that of a prosecutor or civil plaintiff." *Id.* at 247. If the employer charged with an infraction requests a hearing, "as he has a statutory right to do . . . the assistant regional administrator acts as the complaining party and bears the burden of proof on contested issues. Indeed, . . . the notice of penalty assessment and the employer's exception 'shall, respectively, be given the effect of a complaint and answer thereto. . . .'" *Id.* at 247-48 (quoting Department of Labor regulations, 29 C.F.R. § 580.21(a) (1979)).

When an assistant regional administrator "determines violations," *Marshall* makes clear, he ascertains the facts in order to make allegations of fact in the complaint that he prepares, and when he "assesses penalties," he determines the relief that he will seek if the case goes before an administrative law judge ("ALJ"). 466 U.S. at 240. His function is not to adjudicate the case. Rather, he prepares the case and, if the employer accused of a violation contests the charge, he presents his factual "contention[s]" to the ALJ for adjudication. *Id.* at 240-41. That is about as close to a description of the function of New Jersey prosecutors in the civil forfeiture proceeding as one could get. A New Jersey prosecutor ascertains the facts germane to an intended civil forfeiture and incorporates them into a complaint to file in Superior Court. Just as the administrative prosecutor seeks a fine that he specifies, a New Jersey prosecutor seeks particular relief, namely, the forfeiture of assets that he specifies in the complaint. An employer may choose to let the administrative prosecutor's notice of penalty assessment become final and thereby waive his right to a hearing before an ALJ. *See id.* at 244. But so may the New Jersey owner of an asset whose forfeiture is sought; she may decide not to seek a hearing and thereby allow forfeiture by default. *See* N.J.S.A. 2C:64-3e; *see also* Pb10. There are simply no relevant differences between the roles of the ESA's regional administrators and those of New Jersey prosecutors.

B. Once Proceedings Are Underway, There Is No Material Difference Between Administrative Adjudication and Judicial Adjudication.

The State argues that the adjudication available to New Jersey civil forfeiture claimants suffers none of the faults that the State finds in federal agency adjudication, such as is available to employers accused of child-labor violations. *See* Pb29 (suggesting that it "makes perfect sense," in light of perceived weaknesses in agency adjudication, for the *Marshall* Court to have directed careful scrutiny to the allegations of possible bias at issue there). Unfortunately for the State's argument, however, there is no indication that the Supreme Court shares the State's perceptions about the supposed weaknesses of administrative adjudication.

The *Marshall* Court seemed quite satisfied with the adjudication available to the employer there, and the Court reported that the company itself "alleged no unfairness in the proceedings before [the ALJ]." *Marshall*, 446 U.S. at 241. Indeed, with ALJs' "decisional independence" protected by statute, their "functional comparability to judges has gained recognition." *Nash v. Califano*, 613 F.2d 10, 15 (2d Cir. 1980). Accordingly, the Court noted that the ALJ in *Marshall* "preside[d] over the initial adjudication," and in doing so, satisfied the employer's "entitle[ment] to a neutral and detached judge in the first instance." *Id.* at 247 n.9. The ALJ owes no deference to the ESA's assistant regional administrators, and indeed, he "is required to conduct a *de novo* review of all factual and legal issues." *Id.* at 245. Neither the ALJ nor the Office of Administrative Law Judges participates in the distribution of civil penalties, the alleged source of bias on the part of the administrative prosecutors. *See id.* at 248 & n.10. By applying stringent due process criteria in such a setting, *Marshall* demonstrates that no amount of adjudicatory neutrality or detachment is alone enough to satisfy the dictates of due process.

There is nothing in the Court's opinion in *Marshall* that addresses the concerns that the State expresses about the workings of administrative adjudication. Contrary to the State's claims, they did not influence the Court's decision. It is especially hard to imagine that the Court would have given much attention to the particular concerns to which the State gives voice. One is grounded in a misapprehension of the law; the second displays a willful refusal to accept the Court's focus on prosecutorial bias; and the third simply has no basis in the Court's opinion. The next several paragraphs deal with each of the three concerns in turn.[3]

1. Intra-Agency Review. According to the State, the "most significant[]" distinction between the *Marshall* proceeding and New Jersey civil forfeiture proceedings is that the ALJ in *Marshall*, unlike a judge in a civil forfeiture case, is not the last word. Pb30. Because the agency itself can override the

[3] *Amicus* CPANJ adds a fourth administrative-procedure argument, one so vague and contentless that it is almost impossible to evaluate. *See* Ab23 n.1. According to CPANJ, unspecified "differences between administrative and civil forfeiture proceedings" leave ALJs with less "control over administrative proceedings" than that exercised by judges over civil forfeiture cases. CPANJ never describes the purported differences; never explains why or how those differences so encumber ALJs; and indeed, never at all demonstrates that ALJs are weak and judges strong. *Amicus* nonetheless implies that the *Marshall* Court responded to the obscure differences and compensated for the unproven onus they inflict on ALJs. By CPANJ's line of reasoning, the *Marshall* Court needed to impose due process constraints on administrative prosecutors because ALJs have too little control over them to curb their bias. CPANJ seemingly overlooks the fact that the *Marshall* Court says nothing that supports any such theory.

ALJ, due process is more important. Pb30-31 (quoting and interpreting APA, § 8(a), 5 U.S.C. § 557(b)). This argument falls apart, however, because when Marshall was decided, there was no intra-agency review. The ALJ's decision was just as final that of a judge in a New Jersey civil forfeiture action.

It is true that agencies have the statutory authority to review ALJ decisions within the agency, a process in which "the agency has all the powers which it would have in making the initial decision. . . ." APA, § 8(a), 5 U.S.C. § 557(b). And most agencies have established procedures whereby they avail themselves of that statutory authority. But at the time when *Marshall* was decided, *there was one exception*:

> Only one instance has been found of a federal agency providing *no review* of an ALJ decision. In proceedings before ALJs at the Department of Labor challenging the imposition of civil penalties under the Fair Labor Standards Act for violation of the act's restrictions on use of child labor, the ALJ decision is the *final action* within the department.

Ronald A. Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U.L. Rev. 1, 11 n.48 (1986) (emphasis added). The Department of Labor itself noted, in a 1991 rulemaking,[4] that until then its regulations had

[4]In the 1991 rulemaking, the Department amended its regulations to let "any party . . . . appeal the decision of the administrative law judge to the Secretary of Labor." 56 Fed. Reg. 24,990 (amending regulations codified at 29 C.F.R. Part 580). But of course, the change had no effect on *Marshall*, which was decided in 1980.

not allowed intra-agency review of ALJ decisions. 56 Fed. Reg. 24,990 ("Heretofore no party to a child labor proceeding had the right to appeal an adverse decision of an administrative law judge to the Secretary. Subsequent proceedings were in United States District Court. . . .").

The Supreme Court was quite aware, as the State evidently is not, that the agency before it in *Marshall* conducted no further review of its ALJs' decisions. *See Marshall*, 446 U.S. at 244 (noting that "the *final determination* is made in an administrative hearing. . .") (emphasis added). The Court, then, could hardly have feared the application of APA Section 8(a) to child-labor adjudications. Indeed, notwithstanding the State's conjecture to the contrary, there is no reason to think that the Court felt any concern about the availability of intra-agency review at *any* agency. There is no mention of such an issue in the text of the opinion. But even if it did feel some such generalized concern, the Court would hardly have chosen a case in which no such review was available to give effect to its concern.

2. Redefining the Issue. The State's brief repeatedly veers away from the well-defined issue that the *Marshall* Court addressed: whether the distribution of civil penalties created a "risk and appearance of bias by encouraging the assistant regional administrator to make unduly numerous and large assessments of penalties." *Id.* at 241. The State insists that *Marshall* turned on the fact that, "in the administrative law system, it is the agency, including the administrative law judge, which enforces the law, finds violations and assesses appropriate penalties. . . ." Pb21.

Apparently, the State wants to recast the issue, from the *Marshall* Court's consistent focus on the potential bias of prosecutors, not of ALJs, to some amorphous set of issues that the State never quite defines and that the Court never addressed. If the question the State hopes to raise somehow concerns the neutrality and independence of ALJs, then its contention can be dismissed out of hand. As demonstrated above, the Supreme Court was fully satisfied with the ALJ as a "neutral and detached judge." *Marshall*, 446 U.S. at 247 n.9. And the independence of ALJs from the agencies that employ them is well established and carefully guarded. *See generally, Nash*, *supra*. There is simply no good reason to distinguish between a neutral and detached judge who presides in a Law Division courtroom and a "neutral and detached judge" who presides, as ALJ, over administrative proceedings. The focus here should remain on the risk and appearance of bias among those who prosecute civil forfeiture cases. This is exactly the kind of issue that *Marshall* addressed, and it is the issue that needs to be addressed in the case at hand.

3. The Substantial Evidence Test. Federal courts review administrative agency adjudications according to a "substantial evidence" test. *See* APA, § 10(e)(2)(E), 5 U.S.C. § 706(2)(E). The State's brief disparages this standard of review and suggests that its alleged inadequacy may have affected the outcome in *Marshall*. *See* Pb29-30. In fact, the *Marshall* Court never said a word about the substantial evidence test and, indeed, referred to judicial review of agency decisions only in passing. *See Marshall*, 446 U.S. at 241 (noting that the employer "did not seek judicial review of the decision of the [ALJ]"). Notwithstanding the fact that nothing in the Court's opinion supports its argument, the State implies that the Supreme Court must be so uncomfortable with the deferential substantial evidence standard that it needs to compensate for the deference by applying more stringent due process criteria to administrative adjudications than it would in cases that get less deferential judicial review. Whatever the State might mean by this argument, there is simply nothing in *Marshall*, or in any other case, that supports the State's argument.

C. Even If They Acted As "Civil Plaintiffs" and Brought Actions "Identical to a Civil Suit for Replevin or Damages," New Jersey Prosecutors' Institutional Interests Would Require Constitutional Scrutiny.

The State argues that "[t]he prosecutor in a civil forfeiture action is a civil plaintiff. . . ." Pb1,15. The civil forfeiture actions that New Jersey prosecutors file, the State goes on to claim, are "identical to any civil suit for replevin or for damages. . . ." *Id.* at 2. From these two doubtful propositions, the State infers a third doubtful proposition, namely, that there is "simply no due process requirement that there be a neutral, impartial civil plaintiff, as opposed to the constitutional guarantee of an impartial adjudicator." *Id.* at 27.

There are several problems with the State's reasoning. First of all, in a literal sense, prosecutors are not plaintiffs in forfeiture actions at all. They are attorneys representing the State; the State itself is the plaintiff. Second, the civil character of the forfeiture actions that they prosecute does not distinguish New Jersey prosecutors from the ESA's administrative prosecutors; the actions that the latter initiate are also of a civil nature. *See Marshall*, 446 U.S. at 244 ("Congress . . . authorized the Secretary [of Labor] to assess a *civil* penalty. . . .") (emphasis added). Third, the State's position is entirely belied by the *Marshall* opinion. If prosecutors are just like any other civil plaintiff, the Court would never have articulated the *Marshall* standards. Instead, contrary to the State's position, the Court held that there are "limits on the partisanship of administrative prosecutors." *Id.* at 249.

No one would think of limiting the partisanship of private plaintiffs. They are not acting for the government, and as private parties, they cannot violate anyone's right to due process. *See Flagg Bros. v. Brooks*, 436 U.S. 149, 156 (1978) (noting that "most rights secured by the Constitution are protected only against infringement by governments," including the right to procedural due process). But by representing units of government, federal administrative prosecutors or state prosecutors subject their conduct to the due process clauses of the Fifth and Fourteenth amendments, respectively. Both kinds of prosecutor are state actors, or as the *Marshall* Court put it, "Prosecutors are . . . public officials; they . . . must serve the public interest." *Id*. at 249; *see also Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all. . . .").

The State may wish to characterize public prosecutors as mere civil plaintiffs, but they are not. They are public officers whose conduct must be in conformity with the Constitution.

D. *Marshall* Never Even Hints at a Legally Significant Distinction Between Administrative Prosecutors and State Prosecutors.

The *Marshall* Court repeatedly refers to administrative prosecutors and other prosecutors – state or federal – in the same breath without any suggestion that it sees a constitutionally meaningful distinction between them. "Prosecutors," the Court says without distinguishing between administrative and other prosecutors, "need not be entirely neutral and detached." *Id.* at 248 (internal quotation marks omitted). Immediately after its suggestion that the Due Process Clause puts "limits on the partisanship of administrative prosecutors," the Court states broadly that "[p]rosecutors [of all kinds] are also public officials; they too must serve the public interest." *Id.* at 249. And the Court supports the generalization by citing a case that concerned the conduct of a United States Attorney in a criminal case. *See id.* (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). Again without distinguishing between kinds of prosecutor, the Court warns against the injection of "irrelevant or impermissible factors into the prosecutorial decision. . . ." *Id.*

The Court likens the ESA's assistant regional administrators to state prosecutors in order to justify the less stringent criteria it uses instead of the "strict requirements" of *Tumey*. The Court did not choose the more lenient standards for assistant regional administrators because their title was "administrative prosecutor" – it is not – but because their duties are like those of a prosecutor. *Marshall*, 446 U.S. at 243 ("We conclude . . . that the strict requirements of *Tumey* and *Ward* are not applicable to the determinations of the assistant regional administrator, whose functions resemble those of a prosecutor more closely than those of a judge."); *see also id.* at 248 ("The rigid requirements of *Tumey* and *Ward* . . . are not applicable to those acting in a prosecutorial or plaintiff-like capacity."). In effect, the Court is saying that administrative prosecutors do not perform such peculiar functions that their existence calls for a new, legally significant category distinct from the two extant categories, judges and prosecutors. Rather, the Court says, they so resemble other prosecutors that there is no good reason to distinguish between administrative prosecutors and state prosecutors.

The distinction, where the Court draws one, is always "[t]he distinction between judicial and nonjudicial officers." *Id.* at 249 (citing *Tumey*, 273 U.S. at 535). The Court goes on to say that "rewards" might be in order for persons who "initiate and carry on [criminal] prosecutions." *Id.* (quoting *Tumey*, 273 U.S. at 535). The State makes much of the quotation and suggests that the *Marshall* Court meant "unambiguously" to distinguish the ESA's administrative prosecutors from state prosecutors, like those whose pecuniary interest is at stake in the matter at hand. Pb19. Quite to the contrary, the context makes it abundantly clear that the Court counts both administrative and state prosecutors as non-judicial officers.[5] As such, neither group is subject to "[t]he rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions, [and] not applicable to those acting in a prosecutorial or plaintiff-like capacity." *Marshall*, 446 U.S. at 248. Indeed, both administrative and state prosecutors are subject to the standards set forth in *Marshall*.

In short, there is no legally significant distinction between the administrative prosecutors in *Marshall* and New Jersey prosecutors in civil forfeiture cases. The due process criteria applied to administrative prosecutors in *Marshall* apply equally to state prosecutors, both those who prosecute criminal cases and those who bring civil forfeiture actions. *Marshall*

[5] The State's confusion may stem from the concession, dating back to *Tumey*, that persons involved in prosecutions might receive rewards. It is not clear just what rewards the *Tumey* Court had in mind or who might receive them; its dictum specifically mentions only rewards to informers and payments to detectives. *Tumey*, 273 U.S. at 535. The point, as *Marshall* makes clear, was to distinguish judicial officers, who could have no personal interests in litigation, and non-judicial officers, who might have some limited interests. It was only later when the Court decided *Marshall* that it began to clarify the limits that due process imposes on non-judicial officers' permissible interests.

also makes it clear that a civil forfeiture claimant enjoys a due process right to a disinterested prosecutor, and it is thus *Marshall* that presents controlling authority for deciding the case at hand. The State's dismissal of *Marshall*'s relevance cannot be taken seriously.[6]

III. THE ARGUMENTS OF AMICUS CURIAE COUNTY PROSECUTORS' ASSOCIATION OF NEW JERSEY DO NOT SAVE THE CONSTUTITIONALITY OF NEW JERSEY'S CIVIL FORFEITURE STATUTE.

Not surprisingly, the County Prosecutors' Association of New Jersey (CPANJ)—comprised of prosecutors who most directly benefit from the statutory section at issue here—has filed an *amicus curiae* brief arguing that Section 2C:64-6a is constitutional. CPANJ's brief attempts to buttress the State's arguments by citing inapposite cases, mischaracterizing Thomas's argument, and boldly defending the profit incentive under New Jersey's civil forfeiture law as a matter of policy, even if the policy violates the due process clauses of the U.S. and New Jersey constitutions. CPANJ's errors, along with subsidiary arguments by the State, will be addressed in this section of the brief.

[6] As noted, the State devotes most of its brief to the unfounded argument that *Marshall* does not apply to the instant matter. The State's discussion of other cases that it claims supports its position will be discussed along with the cases cited by *amicus* CPANJ in Section II, *infra*.

A. The *Amicus* Party Who Filed A Brief In Support of the State, While Conceding that *Marshall* Is Applicable to the Instant Matter, Nevertheless Misapplies It.

Typical of the wildly overblown statements that run throughout its brief, CPANJ opens by stating that the instant case is about "weakening criminal law enforcement." Ab1. This comment is absurd and insulting. As pointed out previously, this case will do nothing to weaken the ability of the State to engage in forfeiture actions. All Thomas seeks to do is to end the direct, unconstitutional profit incentive of New Jersey's civil forfeiture system conducted pursuant to Section 2C:64-6a.

In direct contrast to the State, which devoted a substantial portion of its brief to arguing that the *Marshall* decision was completely inapplicable to the instant matter, CPANJ essentially admits that *Marshall* in fact does apply to New Jersey prosecutors. Ab5-6.[7] That its own *amicus* cannot support the State's contention that the *Marshall* decision is inapposite further demonstrates the insubstantial nature of the State's *Marshall* argument.

Although CPANJ concedes that *Marshall* applies to the instant case, it fundamentally misreads the decision and the standards established by *Marshall* for determining prosecutorial

[7] "*Marshall* stated that due process does impose limits on the partisanship of administrative prosecutors. . . . Undoubtedly, this too is so and the CPANJ has no reason to believe it would not also be true of public prosecutors." Ab5-6.

bias. It is difficult to discern exactly what CPANJ argues with regard to the *Marshall* case. At first, the *amicus* argues that Marshall did not announce a "constitutional due process standard." Ab6-7. To the extent that Marshall did not establish a bright-line rule as to what statutory schemes violate due process, CPANJ's claim is true. But what *Marshall* emphatically did set forth were factors that courts must consider when looking at statutes that inject possible bias into prosecutorial decisionmaking. And that is exactly what the trial court below did: it examined the factors set forth in *Marshall* and found that Section 2C:64-6a violated them.

Instead of addressing the principles established by the Court in *Marshall*, CPANJ argues that Thomas's claim is one of procedural due process, and attempts to focus this Court on the question of whether New Jersey civil forfeiture law provides adequate "procedural safeguards" to property owners. Ab8. Again, on a general level, CPANJ is correct that procedural due process guarantees that government provide a constitutionally adequate process when depriving an individual of life, liberty, or property. And in this case, the State has provided a process in which officials with a direct, substantial, and unlimited interest in the outcome of a forfeiture proceeding make the decision to proceed and prosecute the case. Under applicable law, that process is not constitutionally sufficient. *See*

Section V, *infra*. Moreover, the process is not saved simply by having access, at least in theory, to a neutral adjudicator.

CPANJ claims the trial court's judgment "rests upon nothing more that a finding that the prosecutor/enforcer institutionally benefits from forfeiture proceedings and in this sense is 'biased.'" Ab7. Because that is supposedly all upon which the trial court's decision is based, CPANJ argues, it violates the Supreme Court's decision in *Concrete Pipe & Prods. Of Calif., Inc v. Construction Laborers Pension Trust for So. Calif.*, 508 U.S. 602 (1993). Ab7-8. (The State in its brief makes a similar argument. Pb33-35.) These contentions are false, as demonstrated in this section.

Concrete Pipe was a decision about bias by decisionmakers. 508 U.S. at 615 n.10. As the trial court recognized, the Court in *Concrete Pipe* did not address permissible limitations on the trustees' prosecutorial bias. Op. at 10(Pa12). In fact, the issue of prosecutorial bias was not raised at all. *See* 60 U.S.L.W. 3507 (Jan. 21, 1992) (listing questions presented in petition for certiorari). And the Court specifically noted that it was *not* deciding whether the statute created unconstitutional *prosecutorial* bias under *Marshall*, because that issue was not raised. *Concrete Pipe*, 508 U.S. at 619 n.12.

Concrete Pipe does not address the standards to evaluate prosecutorial bias. *Marshall* does. *Marshall* lists a series of factors to be considered and the trial court carefully applied each of those factors to New Jersey's civil forfeiture scheme. CPANJ and the State argue that any due process problems with prosecutorial bias are cured by the availability of a neutral decisionmaker. *Marshall* directly contradicts this claim. It was undisputed that the *Marshall* plaintiff had recourse to a neutral decisionmaker. The *Marshall* factors for evaluating prosecutorial bias explain how courts should analyze the facts *when there is a neutral decisionmaker*. Under the State's and CPANJ's analysis, the *Marshall* Court should have said: "There's a neutral decisionmaker. Case closed." It did not do so. The trial court below properly followed *Marshall*.

This Court should not surprised that CPANJ, like the State, hopes that this Court will ignore all of the relevant due process factors beyond the question of a neutral adjudicator, for each one of those *Marshall* factors is devastating to defending the constitutionality of Section 2C:64-6a. CPANJ's diversionary tactics should be disregarded in favor of a careful examination of all the relevant factors set forth by the Supreme Court in determining the constitutionality of laws such as Section 2C:64-6a.

In the face of the unconstitutional incentive system under Section 2C:64-6a, CPANJ's only response is to claim that the financial interest of prosecutors is too "remote" to be constitutionally significant because the prosecutor has no adjudicatory power in forfeiture cases and that the ability of a civil forfeiture claimant to take her claim before a Law Division judge is the only "safeguard" that the due process inquiry must examine. Ab9-10. But as set forth previously, the reason for imposing "limits on the partisanship" of prosecutors, *Marshall,* 446 U.S. at 249, is not that their decisions are irrevocable or irremediable. They are not. Employers aggrieved by administrative prosecutors' decisions in *Marshall*, for instance, could go before a disinterested ALJ for "a de novo review of all factual and legal issues." *Id.* at 245. Yet the *Marshall* Court's decision did not rest on that "safeguard," but on the "remote and insubstantial" character of the biasing influence. *Id.* at 243-44 (small amount of fines did not go directly to prosecutors and they were reimbursed only for costs of prosecution).

The *Marshall* Court clearly states the reason for its focus on the prosecutorial decision itself: "the decision to enforce – or not to enforce – may itself result in significant burdens on a defendant . . . even if he is ultimately vindicated in an adjudication." *Id.* at 249. Similarly, in the matter at hand, the availability of judicial review does nothing to relieve the harm that limits on prosecutorial partisanship are meant to avert.[8]

In sum, *Marshall* and *Concrete Pipe* make it clear that the availability of a neutral, detached adjudicator is at most simply one of the factors that courts are to examine in determining whether unconstitutional prosecutorial bias exists. But other factors must be considered as well. Courts are to engage in a fact-specific analysis to determine whether there is a "realistic possibility" that a statutory incentive scheme may violate due process. Having access—at least in theory—to a

[8] Incredibly, both the State and CPANJ claim throughout their briefs that property owners enjoy enormous advantages in civil forfeiture proceedings. In fact, property owners face significant legal and practical burdens in seeking the return of their property. In civil forfeiture proceedings, the government need only show by preponderance of the evidence, not proof beyond a reasonable doubt, a relationship between the seized property and illegal conduct. In contrast the burden is on the property owner in civil forfeiture to answer the complaint, engage the services of a lawyer, and pursue civil litigation to even have a chance of obtaining the return of seized property. Moreover, if a property owner is indigent and cannot afford a lawyer, she is not entitled to court-appointed counsel to challenge the forfeiture because, again, the action is strictly a civil proceeding. Thus, given the burdens associated with challenging a forfeiture action, the seizure of property for forfeiture is often tantamount to a forfeiture judgment either by court decree or mere default. As one scholar notes: "Civil forfeiture procedure is a prosecutor's dream and a defense attorney's nightmare: the government has all the advantages." Matthew P. Harrington, *Rethinking In Rem: The Supreme Court's New (and Misguided) Approach to Civil Forfeiture*, 12 Yale L. & Pol'y Rev. 281, 303 (1994); *see also,* Leonard L. Levy, *License to Steal, The Forfeiture of Property* (1996) (book offering critical examination of civil forfeiture laws); Rep. Henry Hyde, *Forfeiting Our Property Rights: Is Your Property Safe From Seizure?* (1995) (same).

neutral adjudicator is not enough to save a system that suffers from flaws that violate the Constitution. And, admittedly, merely pointing out that prosecutors might be able to benefit, however *de minimus* or indirect it may be, from a statutory scheme would probably not be enough to overturn an incentive program. But where prosecutors work under a direct, substantial, unlimited biasing influence, such as the system in place under Section 2C:64-6a, the due process clauses of the U.S. and New Jersey constitutions are violated.

B. The Cases Cited By Both The State And CPANJ Fail To Support Their Arguments.

This is an issue of first impression in this state, or any other, so there is obviously no case, apart from the trial court decision, directly on point either for or against the precise due process claim. But as noted above and recognized by the trial court, the Supreme Court's decision in *Marshall* is clearly the primary case for determining whether incentive schemes for officials who perform prosecutorial functions violate due process. As further noted before, both the State and CPANJ are desperate to avoid the holding in *Marshall*. In addition to avoiding *Marshall*, both the State and CPANJ take a scatter-shot approach to case law, drawing on several inapposite cases and grafting language from them to bolster their arguments. The cases are often cited in support of bold, sweeping statements, but the State and CPANJ provide little explanation of the cases themselves or their specific factual circumstances. Below, Thomas explains how the major cases cited by the State and CPANJ do not support their unfounded constitutional arguments.

Despite the lack of case law concerning the instant issue, the State and CPANJ claim that Section 2C:64-6a is just like other financial incentives that have been recognized by courts as legitimate for decades. Moreover, both parties misleadingly suggest that the Supreme Court has somehow already affirmed the constitutionality of Section 2C:64-6a. First, they try to use the Supreme Court's decision in *Tumey v. Ohio,* 273 U.S. 510 (1927), to support their position that the incentive system under Section 2C:64-6a is constitutional. Pb27-28; A28. In the leading case concerning judicial bias claims, the Court in *Tumey* struck down a mayor's pecuniary interest in the outcome of the proceedings. CPANJ claims that the Court left in place financial incentives to other law enforcement officials in Ohio. A28. The unsurprising reason for this is that those incentives were not challenged in *Tumey*. "[C]ases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). The Court did not confront directly what incentives given to police and prosecutors violate due process until several decades later in *Marshall*.

The State and CPANJ use the same tactic they did with regard to *Tumey* in their discussion of the Supreme Court's decisions in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989); *U.S. v. James Daniel Good Real Property*, 510 U.S. 43 (1993); and *U.S. v. Matthews*, 173 U.S. 381 (1899). Indeed, CPANJ goes so far to claim that the Supreme Court's decisions in *James Daniel Good* and *Caplin & Drysdale* foreclose Thomas from challenging the constitutionality of Section 2C:64-6a. A20,45-46. This outlandish claim has no basis.

All of the cases above raise completely separate issues from the due process claim in this case. *Caplin & Drysdale* addressed a Sixth Amendment right to counsel challenge to a forfeiture of money that a defendant wished to use to pay his attorney; *James Daniel Good* concerned whether a notice and hearing must be provided to real property owners before the government seized land; and the over 100 year-old *Matthews* decision was not even a constitutional case but instead concerned whether it is against public policy for a marshal and a deputy to collect reward money that was available to other parties when they apprehended a wanted fugitive.

None of these cases addressed the issue presented in this case: whether direct, substantial and unlimited financial benefits to law enforcement violate due process. The State and CPANJ try to use these cases as somehow implying that forfeiture statutes would be able to withstand due process scrutiny. Cases should not be read as deciding by implication issues that were not presented. *See Waters v. Churchill*, *supra*; *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not considered as having been so decided as to constitute precedents"). And even if a statute can survive a challenge under one constitutional provision, it may fail when challenged on another. *Compare, e.g.*, *White v. Massachusetts Council of Constr. Employees*, 460 U.S. 204 (1983) (holding that preference in city-funded construction contracts for city residents passed muster under the Commerce Clause) *with United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 221 (1984) (holding the following year that such preferences may violate the Privileges and Immunities Clause). Thus, the *Caplin & Drysdale* holding that a federal forfeiture statute withstood a Sixth Amendment challenge does not imply that the same federal statute would withstand a prosecutorial bias challenge. *James Daniel Good*'s mere mention that the federal forfeiture statute permits federal forfeiture proceeds to go to law enforcement efforts certainly cannot be read as upholding the federal forfeiture statute under due process analysis.

When not relying on 100-year old opinions from the Supreme Court, CPANJ seeks to buttress its erroneous claims by invoking a federal district court case from the 1960s, *Bennett v. Cottingham*, 290 F. Supp. 759 (N.D. Ala. 1968). In an opinion containing scant details about the law being challenged, the district court did not find a constitutional violation when the sheriff's office received a portion of fines collected from motorists for motor vehicle infractions.[9] (It is uncertain from the *Bennett* opinion whether the fines merely covered administrative costs or could be used for other purposes.) In reviewing the constitutionality of the fees, the court declared that the Supreme Court's decision in *Tumey* addressed judicial officers, not law enforcement officials. As a result, the district court stated that it "decline[s] to extend *Tumey* to include the sheriff and his deputies." *Id.* at 763. This result should not be surprising. The case was decided twelve years before the Supreme Court in *Marshall* did in fact extend *Tumey* to law enforcement officials and set forth the standards for determining the due process limitations on incentive schemes for

[9] In its brief, CPANJ claims that the U.S. Supreme Court decided the *Bennett* case. Ab28-29. That is not the most accurate way of stating it. *Bennett* was decided by a federal district court, which issued a written opinion, and the Supreme Court summarily affirmed, without any explanation or opinion of its own. *See* 393 U.S. 317 (1969).

law enforcement officials. In the wake of *Marshall*, *Bennett* simply has no modern applicability.[10]

CPANJ also cites two opinions from the Fifth Circuit, *Brown v. Edwards*, 721 F.2d 1442 (5th Cir. 1984), and *Broussard v. Parish of Orleans*, 318 F.3d 644 (5th Cir. 2003), to bolster its argument that Section 2C:64-6a is just like other financial incentives to law enforcement officials that have been upheld. But even a cursory review of these cases reveals that they are distinguishable from the statutory system at issue here. Because both involved such nominal, *de minimus* financial amounts, they simply did not give rise to substantial financial incentives under the *Marshall* test. The fee at issue in *Brown* was $10 per charge. The fees at issue in *Broussard* ranged in amount from $5 to $15. Indeed, the fees were so small that the court in *Broussard* referred to arrestees' interest in avoiding them as "*de minimis*." *Id*. at 656. In contrast to the very minimal fees at issue in those cases, the amount of property and currency available to law enforcement officials under Section

[10] In trying desperately to find some case support for its arguments, CPANJ also invokes two paragraphs from a Maine state case, *State v. Briggs*, 388 A.2d 508 (Me. 1978), which upheld in an extremely cursory fashion the ability of a state agency to retain some fine money from the enforcement of gaming laws. The case nowhere addresses the due process limits on prosecutorial as opposed to judicial officials. And the case, like *Bennett*, was decided *before* the Supreme Court addressed the limits on prosecutorial officials in *Marshall*. Accordingly, *Briggs*, like *Bennett*, should not be given any weight by this Court.

2C:64-6a is very substantial in both its amount (over 31 million in a mere three year period) and the myriad, direct benefits it provides to law enforcement officials in New Jersey. *See* Section V, Parts A and B below. Tellingly, neither the court in *Brown* or Broussard mentioned or cited *Marshall*.[11]

Finally, the *de minimus* amounts of the rewards in *Broussard* could do no more than defray expenses that officials incurred in processing the bond or supervising the arrestee upon release. *Broussard*, 318 F.3d at 648 (the purpose of the fees was to let parish officials discharge their "responsibility for covering the expenses that they incur while carrying out administrative tasks."); *see also id.* at 660 ("[W]e can imagine that bail fees help offset the costs of paperwork and subsequent time required of sheriffs or clerks to keep track of those arrestees who are out on bail."). This is an important distinction. As Thomas sets forth in Section V, Part C, below, the Court in *Marshall* recognized that law enforcement officials could, consistent with

[11] The *Brown* case does not apply to this case for the additional reason that it was decided under a specific line of Fourth Amendment cases. *Brown* specifically addressed standards of "probable cause" in making arrests, an issue that is not relevant to determining the constitutionality of the incentive scheme under Section 2C:64-6a. The court in *Brown* explicitly relied on cases that made bias or wrongful motive on the part of arresting officers irrelevant to the question of probable cause; that ruled out § 1983 actions predicated on officers' bias in making arrests; and that more broadly set forth the principles of law that determine whether an arrest is lawful. *See id.* at 1452-53. Again, a Fourth Amendment holding cannot be taken as a decision about due process.

the Constitution, be reimbursed for administrative and enforcement costs. And Section 2C:64-6a would in all likelihood pass constitutional muster if the forfeiture revenue was used *only* to offset the costs of enforcing the forfeiture law. But as the section below further notes, New Jersey police and prosecutors may profit without limitation under the current system. The property and currency collected and distributed to law enforcement under Section 2C:64-6a is in no way tied to covering enforcement expenses. Accordingly, the Fifth Circuit cases and the systems they address are inapposite to the system at issue.[12]

C. CPANJ's Eighth Amendment and Policy Arguments Against Thomas's Due Process Claim Are Not Persuasive.

According to CPANJ, the Eighth Amendment cures one of the problems that inheres in New Jersey's forfeiture distribution scheme, namely, the problem of "prosecutorial selectivity," which *amicus* defines as a tendency "to discriminatorily target forfeitable properties based only upon its [sic] value." A41.

[12] Both the State (at 16) and CPANJ cite *Commonwealth v. Gullota*, 716 A.2d 663 (Pa. Super. Ct. 1998), a Pennsylvania appellate court decision, but that case likewise provides no support for their position. The statute under challenge in *Gullotta* provided that the penalties paid to the prosecuting attorney will only be used to "defray the operating expenses of investigating and prosecuting insurance fraud." *Id.* at 665. As noted, proceeds from civil forfeiture could constitutionally be used to defray the expenses of investigating and prosecuting forfeiture actions. But that is not New Jersey's system. Thus, *Gullotta*, like the similar programs in *Brown* and *Broussard*, is completely inapposite to the instant matter.

The Eighth Amendment's Excessive Fines Clause blocks any such tendency, CPANJ argues, because it imposes a "proportionality limitation" on the amounts of all forfeitures. Ab41-42. In truth, however, the availability of potential Eighth Amendment defenses in some forfeiture actions does nothing to diminish the force of Thomas's due process claim. Thus, the Eighth Amendment is simply irrelevant.

The potential availability of an Eighth Amendment defense does not cure the Fourteenth Amendment due process violation, any more than do other defenses that some claimants might assert. *Marshall* stands for the principle that law enforcement officials cannot have direct, substantial and unlimited biasing influences under a statutory scheme. In part, the *Marshall* Court reaches that conclusion because the actions brought by government against individuals impose "significant burdens." *Marshall*, 446 U.S. at 249. Furthermore, the Court notes, prosecutors are "public officials; they too must serve the public interest." *Id.* Where prosecutors are systematically biased, that fact violates due process, even if defendants (or forfeiture claimants) have opportunities to vindicate themselves later in neutral adjudication. *See id.* So, it matters not that forfeiture claimants might sometimes be able to stave off particularly egregious forfeiture actions with Eighth Amendment defenses, or on some other grounds. The violation of due process does not hinge on the complete unavailability of ultimate vindication. It depends only on the fact of strong systematic incentives toward prosecutorial bias. That's why the *Marshall* Court focused its due process analysis there on the incentives offered to the prosecutors and ignored the role of the neutral adjudicator. Similarly, *Tumey* and *Ward* establish that the mere fact of judicial bias violates due process, even if some of the defendants who appear before biased judges are able to avoid wrongful conviction.[13]

[13] Even if it did have some bearing on the issues at hand, the Eighth Amendment is a blunt instrument that cannot limit prosecutorial discretion to nearly the degree that *amicus* suggests. CPANJ states that the Excessive Fines Clause "requires that the amount forfeited be proportional to the gravity of the criminal conduct." Ab41. Not exactly. In a case that CPANJ itself cites, *see id.*, the Supreme Court "hold[s] that a punitive forfeiture violates the Excessive Fines Clause if it is *grossly* disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (italics added). The Court emphasizes that "in deriving a constitutional excessiveness standard," it rejected a requirement of "strict proportionality" in favor of "the standard of gross disproportionality." *Id.* at 336. The Court will allow forfeitures that seem somewhat out of proportion, it says, but not those that are *grossly* disproportional. The Court thereby takes into account the fact "that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." *Id.* at 336. The Court thereby gives the actors in the "inherently imprecise" process of calibrating forfeitures to the gravity of an offense room for the exercise of judgment, room for discretion. In short, *Bajakajian* leaves intact the discretion that prosecutors exercise in deciding what forfeitures to seek, discretion that, in the New Jersey civil forfeiture scheme, is systematically distorted by incentives toward bias. The Eighth Amendment may establish some outer limits, but it reaches only the most egregious cases. In any event, the Eighth Amendment is simply

Following its Eighth Amendment claim, in the last few pages of its brief, CPANJ sets forth what amounts to a passionate policy argument for the soundness of Section 2C:64-6a. Ab43-48. CPANJ claims that it fails to see the significance of the evidence produced in the trial court and the conclusions drawn by the judge. Ab43-44. What the *amicus* essentially objects to are the factors that the *Marshall* case makes clear are relevant for determining whether a law enforcement incentive system violates due process. CPANJ might think it should not matter that prosecutors can profit without limitation under Section 2C:64-6a or that they collected a very significant amount of property and currency in a mere three year period. They were, CPANJ claims, just zealously enforcing the civil forfeiture law. But Supreme Court precedent makes it clear that these factors do matter and must be considered by courts. Prosecutorial officials can be zealous in their enforcement efforts but not under an incentive scheme that violates the due process rights of citizens.

CPANJ also notes that Thomas has produced no evidence of wrongdoing on the part of law enforcement officials in her case or in others, as if that fact should somehow affect the due process question. But the standard for determining whether an impermissible conflict of interest exists is if there is a

---

irrelevant to the instant issue.

possible temptation to engage in unfair decisionmaking. *Marhsall*, 446 U.S. at 250(examining risk that prosecutors' judgment "will be distorted by the prospect of institutional gain"); *Ward*, 409 U.S. at 60 (incentives need only pose "*possible* temptation to the average man") (emphasis added); *Tumey*, 273 U.S. at 532; *see also* Brief of *Amicus Curiae* American Civil Liberties Union of New Jersey, 9-13 (discussing New Jersey cases prohibiting statutory schemes that give the potential for or the appearance of bias or impropriety).

Finally, CPANJ argues that it is extremely unlikely that New Jersey law enforcement officials would risk filing unjustified, perhaps even illegal forfeiture actions simply to benefit from forfeiture funds. Ab45-48. This argument fundamentally misreads the crux of the due process claim in this case. The instant case does not rest on the potential for illegal forfeiture prosecutions due to Section 2C:64-6a or the actions of a few wayward law enforcement officials. As Section V below demonstrates, the problem is with the law itself and the unconstitutional profit incentives that it gives to law enforcement officials.

Of course, regardless of whether Section 2C:64-6a is good or bad from a policy perspective, the question in this case is whether it violates the U.S. and New Jersey constitutions. CPANJ's extended policy defense of the law must be disregarded.

IV. OTHER CASES BEYOND THE SUPREME COURT'S DECISION IN *MARSHALL* SUPPORT THE DUE PROCESS CLAIM IN THIS CASE.

In contrast to the inapposite cases cited by the State, other cases concerning law enforcement bias not only strike down laws that provide undue incentives to law enforcement officials, but they also reinforce the Court's *Marshall* decision. Moreover, as further set forth below, New Jersey state court decisions also support a finding that Section 2C:64-6a is unconstitutional.

CPANJ claims that the Supreme Court of Louisiana's decision in *Wilson v. City of New Orleans*, 479 So.2d 891 (La. 1985), dealt solely with procedural safeguards for an enforcement program. Not so. Indeed, the parking ticket program at issue in *Wilson* is quite similar to the operation of Section 2C:64-6a. The City of New Orleans hired a private firm to administer its parking ticket and car booting program. Although the company derived no direct profit from booting, it received contingency payments from the entire parking ticket program. The Louisiana Supreme Court found that this system created an impermissible bias because it gave the persons deciding whether to boot a car "a financial stake which would give a possible temptation to the average person as a decisionmaker to make him partisan towards maintaining a high level of revenue . . . ." *Id.* at 901. The Court further held that the company administering the parking program also stood to benefit from the ticketing because it needed to assess whether a person should be deprived of his or her automobile.[14]

CPANJ glosses over the import of *Wilson* by claiming that the case concerned whether the people whose cars were booted had adequate notice and access to a "timely adjudicator." Ab33. But just as with property claimants in New Jersey forfeitures, a person whose car was seized in New Orleans had an opportunity, after seizure, to contest the seizure before a court. 479 So.2d at 898-99. Nonetheless, the court treated the original seizure as impermissibly biased. 479 So.2d at 901-02.[15] The financial incentive systems in *Wilson* and *Hubbell* parallel the prosecutorial incentives under Section 2C:64-6a in the instant case. And, importantly, those courts treated the decision to take action against the individual—seizure of property or assessment of taxes and fines—as raising due process concerns

---

[14] Likewise, in *Hubbell, Inc. v. City of Bridgeport*, 1996 Conn. Super. LEXIS 281 (Conn. Super. Ct. 1996), the city of Bridgeport hired a private company to conduct tax audits. The company received a flat fee for each audit and an additional 25 percent of taxes collected during the audits. The Connecticut trial court held that the tax assessment function is "bound by elementary notions of due process." *Id.* at *15. It found that the direct contingency fees violated due process.

[15] Similarly, the Connecticut court in *Hubbell, Inc. v. City of Bridgeport*, 1996 Conn. Super. Lexis 281 (Conn. Super. 1996) treated the reassessment of taxes as quasi-adjudicative, even though de novo judicial review was available, and expressed grave concerns about the constitutionality of such a program. 1996 Conn. Super. Lexis 281, at *15 n. 8.

even if the person had the opportunity to later challenge the actions in court before a neutral adjudicator.

CPANJ claims in its brief that Thomas can point to no cases that struck down an institutional benefit as opposed to personal benefits for officials under a legislatively authorized incentive scheme. Ab3. This is simply not the case. As a preliminary matter it is important to point out that Section 2C:64-6a, as explained in Section V below, provides joint institutional and personal benefits to law enforcement officials. Accordingly, the very premise of the claim is false. Moreover, it is crystal clear from *Marshall* and numerous other cases that institutional as well as personal benefits provided to officials under an unconstitutional incentive scheme also violate the due process clause. *See*, *e.g.*, *Marshall*, 446 U.S. at 250 (test for due process violation is whether prosecutor's "judgment will be distorted by the prospect of *institutional gain* as a result of zealous enforcement efforts.")(emphasis added); *Ward*, 409 U.S. at 59-62. Finally, such cases as *Wilson* described above, and *Young* and *Eubanks* discussed *infra*, struck down institutional benefits flowing to officials.

In pressing their argument that courts do not strike down arrangements that let prosecutors derive institutional as opposed to personal benefits, both CPANJ and the State rely on *Commonwealth v. Ellis*, 708 N.E.2d 644 (Mass. 1999). Pb27.

Ellis involved, *inter alia,* an as-applied challenge to a statute permitting the insurance industry to fund to a limited degree state prosecutions for insurance fraud. Specifically, the institutional benefits at issue in this case were a disk drive, some computer tapes, an expert's bill, and an extension cord. The *Ellis* court found that while these benefits were "problematic," they were too "minimal" to offend due process. *Ellis*, 708 N.E.2d at 653. If it does anything, *Ellis* reinforces the principle that institutional benefits can in fact violate due process, but in keeping with the factors set forth in *Marshall*, *de minimus* institutional benefits may not be enough to compromise due process. In fact, all one need do to see the difference between *Ellis* and the case at hand is to compare a few computer tapes and the extension cord at issue in *Ellis* to the variety and substantiality of the nearly $32 million in benefits at issue in this particular case.

Indeed, the California Supreme Court's decision in *People v. Eubanks*, 927 P.2d 310 (Cal. 1996), is a case that not only demonstrates that substantial institutional benefits to prosecutorial officials may violate due process, but also the importance of *Marshall* in examining these statutory schemes. The case concerns a California statute that disqualifies prosecutors from pursuing criminal defendants if a "conflict

. . . would render" a fair trial "unlikely." *Id.* at 316-17 (quoting Cal. Penal Code § 1424). In relation to the statute, the California Supreme Court held that "[n]o reason is apparent why a public prosecutor's impartiality could not be impaired by institutional interests, as by personal ones. . . . For example, a scheme that provides monetary rewards to a prosecutorial office might carry the potential impermissibility to skew a prosecutor's exercise of the charging and plea bargain functions." *Id.* at 319-20. Even though the *Eubanks* court is specifically interpreting a California statute, it invokes both Federal Circuit and Supreme Court cases—in particular, *Marshall*—to support its conclusion that prosecutors cannot be unduly influenced by institutional gain without running afoul of the due process clause. *Id.* at 320.[16] The *Ellis* court distinguishes *Eubanks* because *Eubanks* addressed substantial institutional benefits, while *Ellis* involves minimal ones. Of course, the instant case involves quite substantial benefits.

Both the State and CPANJ address the Supreme Court's decision in *Young v. United States ex rel. Vuitton*, 481 U.S. 787

[16] Along with *Ellis*, the State cites to *New Jersey v. Imperiale*, 773 F. Supp. 747 (D.N.J. 1991), a case declaring that private prosecutors are not *per se* unconstitutional. Pb27. Instead, *Imperiale* instructed, bias claims against prosecutors must be examined in a fact-specific manner. Here, Thomas sets forth in a fact-specific, detailed manner how Section 2C:64-6a violates due process. As a result, *Imperiale* is of no avail to the State.

(1987). The State argues that *Young* does not apply to the instant case while CPANJ argues, inexplicably, that the case actually supports its position. Both the State and CPANJ are wrong in their interpretation of *Young*, as explained below.

In *Young*, a judge appointed the lawyers for the Vuitton company as special prosecutors in a contempt action against certain other companies for violating a court order against trademark infringement. If the companies were found guilty of contempt, the Vuitton company stood to recover liquidated damages in the underlying action. The Court, citing *Marshall* and other due process cases, held that, despite the supervision of the prosecution by the judge, the financial incentives for prosecution were too direct. *Id.* at 805. Even prosecutors are charged with a public duty, the court explained, and the financial incentive created an improper conflict of interest. *Id.* at 805-07.

The State argues that the *Young* case does not apply here because *Young* involved a criminal contempt proceeding and this is a civil forfeiture case. Pb32-33. It also points out that the criminal prosecution ethical rules supposedly do not apply to civil cases. Neither of these distinctions is significant. First, the constitutional principle announced in *Young* is the same whether it is a contempt proceeding or another matter involving the government, such as civil forfeiture. It is improper to have a biased prosecutor in a contempt case, and it is similarly improper to have one in a civil forfeiture proceeding.

More importantly, civil forfeiture cases are brought by the county prosecutor, a public officer, on behalf of the State of New Jersey. His duty to serve the public in an unbiased manner does not dissolve when he litigates in civil court. Regardless of whether criminal prosecutorial ethics rules apply to a civil case brought by the government, the Constitution most certainly does. Finally, the proceeding in *Marshall* was also a civil case brought by the Department of Labor with only civil sanctions at issue. *See Marshall*, 446 U.S. at 244 ("Congress . . . authorized the Secretary [of Labor] to assess a *civil* penalty. . . .") (emphasis added). Nevertheless, the Court analyzed the statutory scheme under the U.S. Constitution, just as this Court must do with Section 2C:64-6a.

Incredibly, CPANJ claims that *Young* supports its position. It does not. First, the *amicus* claims that *Young* implies that only inherent conflicts of interests—where a lawyer represents two different clients—constitutes improper bias. Ab34-35. Second, CPANJ suggests that *Young* criticizes only bias directed toward a particular case or client and that would disturb the "uniformity" of legal proceedings. Ab36. Finally, it suggests that any financial incentives are congruent with the public interest and thus the bias makes no difference.[17] Ab36-38. *Young* stands for none of these propositions.

One of the holdings of *Young* is that inherent conflicts of interests, where a prosecutor has a contractual duty to two different parties, require automatic reversal. CPANJ interprets this holding to mean that *only* such conflicts of interest violate due process. In fact, *Young* explains that "ordinarily," courts must speculate about the interests that are likely to influence the prosecutor and balance those against the prosecutor's role. 481 U.S. at 808. In other words, the Court recognized that most prosecutorial bias cases would not involve the exceptional circumstances addressed in *Young* but could still violate due process guarantees. CPANJ is simply wrong when it argues that the *Young* facts are the only type that can violate due process.

Next, CPANJ claims that due process problems arise only where financial interests influence decisions "with regard to a specific defendant's case to cause an aberrant exercise of discretion" and where an impermissible factor influences "some

---

[17] The *amicus* brief constantly describes Young as a case involving personal financial gain. *See*, *e.g.*, Ab36. But the facts of *Young* indicate only that the lawyer's client, not the lawyer, would have benefited by the successful prosecution. *Young* is thus more like an institutional bias case than a personal one. And in any event, as explained *infra*, the civil forfeiture funds in New Jersey give rise to both personal and institutional financial incentives.

forfeiture cases but not others." Ab35-36. Apparently, the *amicus* believes systemic institutional or personal bias is perfectly fine. Certainly *Young* says nothing of the kind. And *Marshall* and other cases clearly contradict the notion that a person must allege bias in particular proceedings. The Court in *Marshall*, for instance, stated clearly that the company "alleged no unfairness in the proceedings before [the ALJ]." 446 U.S. at 241.[18]

CPANJ also claims that there is no conflict of interest because the prosecutor represents only one party—"the government." Ab36. In fact, the prosecutor represents the public, not the government. The public's interest in safety from crime is not necessarily the same as prosecutors' interest in office renovations, the purchase of automobiles, or trips to law enforcement conventions. Moreover, CPANJ's argument that the prosecutor represents the government might have some persuasive power if forfeiture proceeds went to the general fund

[18] Moreover, as *amicus curiae* American Civil Liberties Union of New Jersey points out in its brief, discussed *infra*: "to establish that such conflicting [prosecutorial] interests exist, it is not necessary to show actual proof of dishonesty or that the public servants in question have succumbed to the temptation, 'but rather whether there is a potential for conflict.' *Care for Tenafly, Inc. v. Tenafly Zoning Board of Adjustment*, 307 N.J.Super. at 369, *quoting Griggs v. Borough of Princeton*, 33 N.J. at 219. As summarized by the New Jersey Supreme Court: '[I]t is the existence of such interests which is decisive, not whether they were actually influential.' *Griggs*, 33 N.J. at 219." ACLU-NJ Brief at 9-10.

of the State. They do not. Rather, the funds go directly to the police and prosecutors' offices.

CPANJ claims that financial incentives are good and simply promote "government" interests. That is not, however, what the Court said in *Marshall*. The prosecutors in *Marshall* also represented "the government," but the Supreme Court nevertheless analyzed the statute to see if the benefits provided to the prosecutors gave rise to a due process claim. Section 2C:64-6a gives law enforcement officials a direct, substantial and unlimited incentive to engage in civil forfeiture as often as possible and to collect as much money and property as they can. It thus violates due process guarantees.

Finally, the American Civil Liberties Union of New Jersey ("ACLU-NJ") has filed an *amicus curiae* brief in support of Thomas. In it, ACLU-NJ sets forth an additional line of New Jersey state court opinions that evidence a heightened sensitivity to conflicts of interest involving prosecutors and other public officials and that seek to limit prosecutorial and law enforcement discretion in situations where the potential for abuse and other problems exist. These cases provide yet more case support for Thomas's claim that Section 2C:64-6a violates the due process clauses of the U.S. and New Jersey constitutions.

Of course, the primary case that controls the instant matter is the Supreme Court's decision in *Marshall*. Section 2C:64-6a is in direct contravention of the *Marshall* decision. However, other cases support the finding of a due process violation.

V. N.J.S.A. 2C:64-6a VIOLATES THE STANDARDS ESTABLISHED BY THE SUPREME COURT IN *MARSHALL V. JERRICO* FOR DETERMINING WHETHER INCENTIVES TO LAW ENFORCEMENT OFFICIALS VIOLATE DUE PROCESS GUARANTEES.

As set forth above, the State and *amicus* NJCPA devote most of their briefs to arguing that either the Supreme Court's decision in *Marshall* is entirely inapplicable to the instant case or is distinguishable. And, as documented above, their efforts fail—*Marshall* is directly applicable and controlling in the instant matter. It should perhaps not be surprising that neither the State nor NJCPA wish to discuss the specifics of the *Marshall* decision—indeed, neither brief addresses the relevant factors considered by the Court—for the *Marshall* opinion, as the trial court below recognized, is devastating to the State's (and NJCPA's) arguments. As set forth in detail below, N.J.S.A. 2C:64-6a violates each of the factors the Court considered in *Marshall* in determining the constitutionality of systems that reward law enforcement officials for prosecutions.

The *Marshall* Court closely examined the financial arrangements of the ESA before finding that there was no "realistic possibility that the assistant regional administrator's judgment will be distorted by the prospect of institutional gain as a result of zealous law enforcement efforts." 446 U.S. at 250. The Court in *Marshall*, as in subsequent cases, relied heavily on the "remote" connection between the decision and the possible financial gain. *Id*. at 251. First, the regional offices did not benefit directly from the use of civil penalties. *Id.* at 245. Second, the quantity of fines was quite small. *Id.* at 250. And last, because they could only be reimbursed for the costs of an enforcement action, the regional offices were not rewarded financially for bringing more actions. *Id.* at 251-52.

In contrast, when analyzing New Jersey's civil forfeiture distribution procedure, each of these factors cuts precisely the other way. Indeed, New Jersey's system fits almost to a tee the unconstitutional systems described in *Marshall*. As set forth in more detail below, New Jersey law enforcement agencies and prosecutors benefit directly from the operation of civil forfeiture laws. Second, unlike the meager amount of funds at issue in *Marshall,* revenue generated from civil forfeiture in New Jersey is very substantial. Last, civil forfeiture proceeds are not confined to reimbursement for the expenses associated with prosecuting a civil forfeiture action. Rather, New Jersey law enforcement agencies and prosecutor offices can profit directly from zealous enforcement of civil forfeiture laws.

A. New Jersey Police and Prosecutors Derive Direct Institutional Benefits From Civil Forfeiture.

As the trial court found, civil forfeiture in New Jersey funds an astonishingly broad array of activities that directly benefit law enforcement agencies and prosecutor offices in violation of the due process clause. Op. at 4. The County Forfeiture Program Reports, reproduced in part at Ca7—324, give a breakdown by county of the different categories of forfeitures.[19] Under New Jersey law, police and other law enforcement agents have broad discretion to seize property for forfeiture, and virtually any type of property that is related to any type of allegedly unlawful activity (except for minor offenses) may be seized and eventually forfeited. Even a cursory look at the County Forfeiture Reports reveals the wide variety of items that law enforcement officials have seized for eventual forfeiture. Law enforcement officials have seized and forfeited for use or sale at auction such items as:

[19] The first page (Nos. 1 and 2) of each report lists the amount of currency both seized and forfeited. Section (3) of the report lists other property besides currency seized while Section(5) lists the other property forfeited by law enforcement departments and agencies within the county. Sections (9), (10) and (11) list the distribution of the forfeited property and funds to local law enforcement agencies and prosecutors' offices respectively. The reports included in the appendices typically contain only the sections relevant to the constitutional issue before this Court rather than the full report.

- Binoculars (Ca 254)
- Mountain bicycles (Ca 254-Ca 255, Ca 258)
- Electronic organizers (Ca 259)
- Gold and silver jewelry (Ca 254-Ca 255, Ca 257-Ca 259)
- A Nintendo game (Ca 256)
- Stereo equipment (Ca 254-Ca 257)
- A tract of land (Ca 90)
- A VCR (Ca 254)
- Computer equipment (Ca 260-Ca 262)
- Bank accounts (Ca 298)
- A television (Ca 182)
- Massage tables (Ca 183)
- Automobiles, including
    - 1992 Lexus SC 400 valued at $16,700 (Ca 271)
    - 1988 Cadillac Eldorado valued at $5,200 (Ca 271)
    - 1991 Nissan Maxima valued at $5,800 (Ca 299)
    - 1990 Peter Bilt valued at $16,000 (Ca 293)
    - 1994 Nissan Pathfinder valued at $12,075 (Ca 293)
    - 1968 Chevrolet Corvette valued at $20,000 (Ca 294)
    - 1989 BMW valued at $10,925 (Ca 297)
    - 1993 Jeep Cherokee, valued at $9,900 (Ca 297)

Once forfeited property or revenue is generated, the county prosecutor pursuant to Section 2C:64-6a is charged with dividing forfeited property, proceeds, and currency among the various law enforcement agencies, including the prosecutor’s own office. *See* Pa 139—Pa 147. For instance, in one fiscal quarter in Atlantic County, the Egg Harbor Police Department received computer equipment valued at over $3,000 while the Atlantic City Police Department received a 1985 Porsche 944. Ca 25. The distributions to local law enforcement agencies can be quite significant. In just a single quarter of 2000, the prosecutor of Passaic County distributed over $183,000 to the county sheriff’s department and $52,000 to the Paterson police department. Ca 226. Those departments then use those funds for law enforcement purposes within their own department. Local police departments and other enforcement agencies know that when they seize property for forfeiture, they are entitled to a share of the property, thereby giving them a direct financial stake in the outcome of forfeiture efforts.

Although police departments gain substantial benefits from civil forfeiture, it is county prosecutor offices that primarily benefit. Indeed, as discussed *infra*, most prosecutor offices in New Jersey fund a very substantial portion of their discretionary activities through forfeited property and currency. And the profit incentive for prosecutors is even more direct than for police. Prosecutors know that if they bring a successful forfeiture action against property or currency, they and their offices will be able to take advantage of the forfeited property or revenue.

The County Forfeiture Program Reports reveal the wide variety of activities and functions prosecutors fund through civil forfeiture under the broad rubric of "law enforcement purposes." These provide direct, tangible benefits both institutionally and personally to those in the prosecutors' offices. Civil forfeiture funds such items, among many others, as:

- Purchase of 25 personal computers, 7 printers, and 1 computer hub (Ca 262)
- Upgrade of an office lobby (Ca 286)

- Rent for auxiliary offices (Ca 124)
- Payment for consulting services (Ca 303)
- Payment for a golf outing (Ca 251)
- The purchase of food for breakfasts and other meetings (Ca 304-Ca 305); (Ca 314-Ca 315, Ca 316);(Ca 156, Ca 161, Ca 163)
- Purchase of automobiles[20]
- Purchase of office equipment and furniture[21]
- Purchase of office supplies (Ca 277)
- Purchase of fitness and training equipment (Ca 207)
- Purchase of air conditioners (Ca 288)
- Purchase of a new copier (Ca 303)
- Purchase of a television and VCR (Ca 281)
- Purchase of uniforms for summer basketball league (Ca 282)
- Purchase of a refrigerator (Ca 228)
- Purchase of airline tickets (Ca 303, Ca 306)
- Production costs of an office newsletter (Ca 287)
- Replacement of worn-out carpets with new ones, $10,889.89 (Ca 284)
- Lease of additional office space, $25,509.99 (Ca 280)

While forfeited funds cannot be used to pay the annual salaries of individuals in prosecutor offices or police departments, they can be used to pay overtime salaries. For instance, forfeiture funded overtime for Major Crimes Detectives in Atlantic City (Ca 263) and for the narcotics task force in Burlington County (Ca 302). Forfeiture revenue has also paid for over $125,000 for overtime reimbursement for law enforcement

[20] *See, e.g.*, $26,736 for automobiles (Ca 277); (Ca 289) (purchase of 8 used cars for $144,492 in addition to the purchase of one car for a confidential investigation in the amount of $25,087); (Ca 292) ($89,632.26 toward vehicle purchases); (Ca 308) ($38,996 for the purchase of two 1998 Crown Victoria unmarked police cars).

[21] *See, e.g.* (Ca 278) ($13,354.84 for office workstations); *see also* (Ca 290) (over $9,000 for the purchase of office chairs and desks); (Ca 291) ($29,539.11 toward "Buildings, Structures, and Equipment"); (Ca 301) (equipment in the amount of $170,867.12 for the Burlington County Prosecutor's Office).

personnel in Salem County (Ca 310-Ca 311).[22] In addition to overtime pay for regular employees, forfeited funds can be used to pay the salaries of "temporary employees hired for a specific function." Pa 143. For example, an internship program was funded in Union County through civil forfeiture. Ca 238.

One of the most common uses to which forfeiture funds are put is the reimbursement for expenses incurred at conventions. Examples include:

- $14,100 payment for 30 attendees at a county prosecutors' association function in Atlantic City (Ca 300)
- $12,902.60 for expenses at the county prosecutors' association convention (Ca 253)
- $12,300 for attendance at Annual Prosecutors' Conference (Ca 283)
- $15,025 at 2000 Annual Prosecutors' Conference (Ca 290)
- $26,350 for employee travel, meetings and seminars (Ca 291)
- $24,038.72 in expenses at Chief's Retreat at Seaview Mariott Resort (Ca 307)
- $4,956.35 payment for a prosecutor office executive retreat (Ca 285).

As set forth above, due process forbids undue institutional and personal incentives toward prosecution. Some of the benefits, such as office renovation and new equipment are more institutional benefits to law enforcement while items such as overtime are clearly personal. Others are probably best described as a combination of institutional and personal benefits. Civil forfeiture provides to law enforcement officials an off-budget, entirely discretionary method of making

[22] For more overtime work, *see* Ca37, Ca68; Ca138; Ca176.

their jobs better and their work lives more comfortable. Forfeiture allows their offices to have tangible, highly valued benefits that otherwise may not be available if officials had to rely only on budgeted amounts of money. People care about working in comfortable offices and having access to better equipment and furnishings. People care about the ability to go to professional conventions and meetings, and to hire temporary employees, and people certainly care about the ability to obtain overtime pay. These are some of the many conditions besides one's salary that form part of an employee's compensation package and quality of working life. And through 2C:64-6a, these benefits are funded through civil forfeiture.[23]

Thomas assumes that police and prosecutors adhere to the mandate of the SOPs that forfeited property and funds serve "law enforcement purposes," however broadly defined that term may be. Moreover, Thomas is not implying that individual police or prosecutors are in some way acting with illegal intent in

[23] When confronted with the myriad opportunities for gain presented by Section 2C:64-6a, the State points, as it did in the trial court, to the "Standard Operating Procedures" (SOPs) that have been implemented over the years. Pb37. The State claims that the SOPs—which provide some degree of guidance on the use of forfeited property—lay to rest any concern that police and prosecutors may have incentives to gain from the operation of the state's forfeiture laws. But the SOPs do not solve the unconstitutional incentive structure at issue. Indeed, if anything, they demonstrate compellingly the fact that under the law, law enforcement personnel *must* gain the benefits that flow from civil forfeiture.

pursuing and enjoying the fruits of civil forfeiture. One cannot blame individuals for taking advantage of an incentive system that clearly authorizes obtaining property and currency for the benefit of one's department or office. It is rather the perverse incentive structure itself, which permits law enforcement to profit without limitation from the operation of the law and provides substantial benefits to law enforcement personnel, which runs afoul of due process protections.

The items discussed in this section of the brief and contained in the appendix are only some of the many direct, tangible benefits afforded to law enforcement agencies from the application of civil forfeiture laws. Under *Tumey* and *Marshall*, only those benefits that are so "remote, trifling and insignificant that [they] may fairly be supposed to be incapable of affecting the judgment" of an average person may pass constitutional scrutiny. *Tumey*, 273 U.S. at 531; *Marshall*, 446 U.S. at 243-44. In contrast, the benefits here are direct, substantial in their amounts (as set forth in the following section) and significant in affecting the quality of life of the people engaged in law enforcement functions. There is no question that these benefits create a "realistic possibility" and indeed a high probability that police and prosecutors' "judgment will be distorted by the prospect of institutional gain as a result of zealous law enforcement efforts." *Marshall*, 446 U.S. at 250.[24]

B. Police and Prosecutors Derive Substantial "Institutional Gain" from Civil Forfeiture.

In *Marshall*, the amounts that the federal agency received from the civil penalties it assessed were small, "substantially less than 1%" of the agency's budget. *Id.* at 250. Indeed, the amounts were not only small but *consistently so*, substantially less than 1% in *each* of the three years for which data had been presented to the district court. *Id.* at 245. The Court therefore concluded that the agency was "in no sense financially dependent on the maintenance of a high level of penalties." *Id.* at 251.

In contrast, the proceeds from civil forfeiture in New Jersey are very substantial. As set forth below and documented in Ca1—6, the amounts are large in absolute terms; they make up

[24] In addition to county prosecutors, the state attorney general's office also benefits directly from civil forfeiture. As set forth in the following section, a majority of the civil forfeitures in New Jersey are commenced by county prosecutors, with the forfeited property and proceeds being divided between the prosecutors' offices and local law enforcement agencies. However, the state attorney general can also directly initiate forfeiture actions and the attorney general and state law enforcement agencies can benefit from the forfeitures as well. The Attorney General's office collected close to $7 million in a mere three year period. Ca6. And as the bi-annual reports document, those forfeiture revenues produced a wide variety of direct benefits to state law enforcement officials. Ca325—Ca 359.

a significant percentage of prosecutors' budgets; and they constitute an even more substantial percentage of the budgets that prosecutors have available for discretionary expenditures.

The sheer overall size of the forfeitures generated by State and county forfeiture programs gives police and prosecutors a substantial financial incentive to depart from the evenhanded neutrality that must characterize due process. Over the course of the three years examined, from 1998 through 2000, State and county forfeiture programs secured total forfeitures of *$31.6 million* in cash and other property, proceeds that could be spent at prosecutors' discretion. Ca1. The State program accounted for some $6.8 million of the three-year total, and county forfeiture programs supplied the remaining $24.8 million. *Id.*

In virtually all of New Jersey's individual counties, the county forfeiture programs give county prosecutors the power to control the expenditure of very substantial sums. In the period from 1998 through 2000, county forfeiture programs brought in an average of more than $393,000 per county per year. Ca2. Ten of New Jersey's 21 counties secured forfeiture of property with a total value in excess of $1 million over the three-year period while only two counties' three-year totals fell short of $100,000. *Id.* Moreover, the overall amount of forfeitures increased each year from 1998 to 2000. *Id.* These amounts are anything but "remote, trifling and insignificant." *Tumey*, 273 U.S. at 531.

The parties in the trial court stipulated to the accuracy of the numbers gathered through discovery in this case. The totals for state and county forfeiture programs are not in dispute, but the parties disagree as to what is the best methodology to use to analyze those numbers. Not surprisingly, the State hopes to minimize the significance of civil forfeiture proceeds. Toward that end, the State has insisted that distributions by county prosecutors to other law enforcement bodies should not be included in the overall percentages of county prosecutors' budgets. This approach is misguided.

While New Jersey law permits law enforcement departments to share in civil forfeiture property and proceeds, it is the county prosecutor under Section 2C:64-6a that determines whether and how much the law enforcement department will receive. *See also* Pa144—Pa146. Accordingly, distributions to other law enforcement bodies are themselves discretionary expenditures under the control of prosecutors and should therefore be included as a part of the budget of the county prosecutors' offices. In any event, as the below demonstrates, and as the trial court held, whether you use the methodology advocated by Thomas or that urged by the State, the percentages are still significant and exceed the consistently small numbers at issue in *Marshall*.

Moreover, the State only wishes this Court to analyze forfeiture revenue as compared to the overall budgets for county prosecutors, which include the normal salaries of the entire staff, and resists any attempt to compare forfeiture revenue to the discretionary (i.e. non-salary and non-wage) spending of prosecutors. Thomas believes this Court should look at both comparisons, but the more appropriate number for due process analysis is a comparison of forfeiture revenues to the discretionary budgets of the prosecutors' offices. The reason for this is that most salaries and wages are set by legislative bodies, *see, e.g.*, N.J.S.A. §§ 2A:158-10; 2A:158-15.3; 40:73-6, and, moreover, forfeiture revenue cannot be used to pay normal salaries. On the other hand, prosecutors may use forfeiture to augment to an unlimited degree their discretionary budgets.

1. Forfeiture as a Part of the Overall Budget. First, using the methodology advocated by Thomas (and not deducting distributions to other law enforcement agencies), the amount of forfeiture revenue constitutes a significant percentage of prosecutors' total budgets. From 1998 through 2000, county forfeitures added some 4.4% to the overall budgets appropriated for county prosecutors' offices by their respective county boards. Ca3. One county's percentage reached as high as 14.5%

for a single year. *Id.* Of 63 individual-county one-year percentages, 18 exceeded 5.0% of overall budgets. *Id.*

Even if the percentages are calculated by the State's method of subtracting distributions to other law enforcement agencies, the overall budget percentages for all the counties are more than twice as high as the levels in *Marshall.* In some years, *again using the State's methods*, some counties' forfeiture proceeds exceeded the *Marshall* level by a factor of five, six, or seven. *See* Pa276—Pa 278; *see also* Op. at 10.

2. Forfeiture Revenue and Discretionary Spending. When forfeitures are compared to county prosecutors' budgets for expenses other than salaries and wages, the resulting percentages are dramatic. Over the three-year period, county forfeitures added on average over *60%* to county prosecutors "other expense" budgets, with one county's percentage for one year reaching a staggering 269.8%. Ca4. In other words, the availability of forfeiture revenue increased prosecutors' ability to fund discretionary expenditures by close to two-thirds. Moreover, 17 of New Jersey's 21 counties realized at least a 50% increase in monies available for "other expenses" in at least one of the three years. *Id.*

As explained above, Thomas believes all forfeiture proceeds should be included, including those distributed to other law enforcement agencies. However, even excluding those amounts, *using the State's suggested methodology*, forfeitures still make up nearly one-third of prosecutors' discretionary budgets each year from 1998 to 2000—totaling 29.24% of discretionary spending for the three years combined. Ca5. Nineteen out of 21 county prosecutors acquired more than 10% of their discretionary budgets from forfeiture proceeds over the total three year period. *Id.* Nine counties acquired more than 50% of their discretionary budgets from forfeitures in at least one year, including Passaic County, which hit a high of 97.55% of its discretionary spending from forfeitures in 1999. *Id.* Cumberland County, which prosecuted the case against Thomas, received 64% of its discretionary spending across all three years from forfeiture proceeds. *Id.* Again, these percentages all use *the State's* (improperly) reduced estimations of forfeiture proceeds. However the numbers are assessed, they show that county prosecutors rely, to a shocking degree, upon forfeiture proceeds to support their discretionary spending.

Whether this Court uses Thomas's methodology or the State's, forfeitures make up a substantial amount of prosecutors' overall budgets and a truly alarming percentage of the amount available to prosecutors for discretionary spending. Indeed, to a very large degree, county prosecutors' freedom to undertake discretionary expenditures depends on their ability to gather the necessary funds through civil forfeiture. New

Jersey's scheme meets the substantiality prong of the *Marshall* test by presenting an impermissible incentive for bias and raising a real risk that prosecutors' "judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts." *Marshall*, 446 U.S. at 250.

C. New Jersey Police and Prosecutors May Profit Without Limit From The State's Civil Forfeiture Laws.

As set forth previously, the Supreme Court in *Marshall* carefully examined the Department of Labor program's structure and its potential for abuse. In addition to the consistently small amounts of money involved, another aspect of the program in *Marshall* that made the risk of bias "exceedingly improbable," 446 U.S. at 252, was the fact that officials could not profit directly from the enforcement structure. Here, in contrast, Section 2C:64-6a offers opportunities and incentives for institutional gain that firmly establish a violation of due process. As set forth below, New Jersey law enforcement officials are entitled to civil forfeiture revenues and those officials profit in direct proportion to the amount of civil forfeitures. This ability to profit from law enforcement activities violates the due process clauses of the U.S. and New Jersey constitutions.

When examining the Department of Labor program for possible bias in *Marshall*, the Court emphasized the fact that the regional administrators who made the prosecutorial decisions could "have no assurance that the penalties they assess[ed] [would] be returned to their offices at all." *Id.* at 251. It was the national office that "decide[d] how to allocate civil penalties . . . ." *Id.* Here, in contrast, there is a guarantee that prosecutors will receive forfeiture profits. Under Section 2C:64-6a, prosecutors are *entitled* to the forfeited money and property. The Attorney General and county prosecutors who make the decisions to prosecute forfeiture actions also administer and use the funds that they receive from each forfeiture judgment they are able to win either through verdict or by default. These prosecutors know that, if they successfully prosecute a forfeiture action (or win by default), they will reap the opportunity to spend the funds at their discretion, and to their own institutional advantage, for broadly-defined "law enforcement" purposes.

In addition to being entitled to forfeiture revenue, New Jersey law enforcement officials profit directly from the operation of the State's forfeiture laws and from their own prosecutorial decisions. In *Marshall*, the federal agency sometimes allocated penalty monies it received to the offices that made enforcement decisions, but it did so only in proportion to the expenses of investigating and prosecuting the offenses that led to the penalties. *Id.* at 251. The distribution of funds to regional offices was not proportional to the amount of funds collected. The statute that authorized the penalties limited their amounts to "reimbursement of the costs" of enforcement. *See id.* at 245 (citing Fair Labor Standards Act, § 9a, 29 U.S.C. § 9a). Limited to reimbursement of their own costs, the administrative prosecutors in *Marshall* had no opportunity to make a profit on penalties that resulted from their prosecutorial decisions. They therefore had no undue incentive to initiate enforcement actions or seek penalties.

Pursuant to Section 2C:64-6a, however, the more an office obtains through civil forfeiture, the larger the budget of the agency. Unlike the program at issue in *Marshall*, there is no requirement that the forfeiture funds be used only for reimbursement of expenses associated with the prosecution of the forfeiture action. Section 2C:64-6a unquestionably permits law enforcement officials to profit directly from the operation of the civil forfeiture laws. As the trial court rightly noted:

> [T]here is no statutory or regulatory limit on the dollar amount or percentage total of forfeited funds in any fiscal period, except of course, that it cannot be used to defray certain expenses such as salaries or wages. A monumentally large asset seizure and forfeiture or series of them could force a percentage skyward. Op. at 8.

Moreover, the "off-budget" nature of forfeiture funds gives the Attorney General and county prosecutors a source of revenue over which they exercise unique control. The State legislature and county boards allocate funds for prosecutors' use only after planned expenditures survive the rigors of the legislative budgeting process. In contrast, the forfeiture revenues are profits that the Attorney General and county prosecutors can expend largely as they see fit (again, under the broad parameters of "law enforcement"), unconstrained by the discipline of the usual budgeting process.

For this reason, monies derived from civil forfeitures can have special allure to the officials who would control their expenditure. Indeed, prosecutors have every incentive, and every opportunity, to use civil asset forfeiture as a source of profits to meet their institutional needs and satisfy their institutional ambitions. If prosecutors' institutional needs should grow, they can turn to civil forfeiture to close the gap. Moreover, there is no upper limit as to how much property may be forfeited and then rechanneled back to law enforcement. As the trial court held: "In theory and in practice, there is no limitation upon the motivation for enlargement to which a county prosecutor is subject in deciding upon seizure of property." Op. at 11. Again, the more an office obtains through forfeiture, the more property and money that is available for discretionary spending.

The prospect of reaping institutional profit from the operation of a prosecutorial incentive scheme was perhaps the most important factor examined by the Court in *Marshall*. The types of property forfeited by law enforcement and the exact dollar amounts change from year to year but the fact that Section 2C:64-6a permits law enforcement officials to profit from civil forfeiture with no requirement that the revenues be in any way tied to reimbursement for expenses is a permanent feature of the law. Unless the trial court decision is upheld, police and prosecutors will be able to engage in civil forfeiture for the direct benefit of their agencies or offices without limitation. As noted previously, police and prosecutors are public officials and are charged with a public duty: fair and impartial enforcement of the law. And as the Court recognized in *Marshall* and *Young*, direct, proportional profit incentives for officials charged with a public duty lead to improper conflicts of interest and are unconstitutional.

Some prosecutors' offices in New Jersey use a portion of the funds collected pursuant to civil forfeiture to pay for the expenses associated with the pursuit of civil forfeiture actions. *See*, *e.g.*, Ca214. If Section 2C:64-6a permitted officials to use forfeiture revenues only to cover the costs and expenses of forfeiture prosecutions, it might satisfy a prong of the *Marshall* requirements. Of course, 2C:64-6a does no such thing. Police and prosecutors can and do profit in direct proportion to the amount of forfeitures they pursue. By declining to limit the use of civilly forfeited property and currency to reimbursing law enforcement for expenses incurred in investigating and prosecuting civil forfeiture actions and instead permitting New Jersey police and prosecutors to profit from civil forfeiture, Section 2C:64-6a violates due process guarantees.

CONCLUSION

For the foregoing reasons, Counterclaimant—Appellee Carol Thomas respectfully requests that the decision of the trial court be affirmed.

Respectfully submitted,

____

Joseph M. Chiarello
JACOB & CHIARELLO
600 West Main Street
P.O. Box 429
Millville, NJ 08332
Tel: (856) 825-0700
Fax: (856) 825-2441
Local Counsel for Appellee

William H. Mellor
Scott G. Bullock
Dana Berliner
INSTITUTE FOR JUSTICE
1717 Pennsylvania Ave., NW, Suite 200
Washington, DC 20006
Tel: (202) 955-1300
Fax: (202) 955-1329
Attorneys for Appellee

Dated: August 6, 2003