

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus American Civil Liberties Union of New Jersey is a private non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the Constitution. Founded in 1960, the ACLU-NJ has over 9,000 members in the State of New Jersey. The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and is composed of over 350,000 members nationwide.

ACLU-NJ strongly supports ensuring due process rights for all persons in criminal and quasi-criminal proceedings and has participated in numerous cases involving due process and the need for limitations on the discretionary powers of law enforcement or prosecutors. See, e.g., State v. Carty, 170 N.J. 632 (2002) (State Constitution requires reasonable suspicion of criminal activity prior to police seeking consent to search lawfully stopped motor vehicle); State v. Allah, 170 N.J. 269 (2002) (Sixth Amendment rights violated based on ineffective assistance of counsel where trial counsel failed to assert a meritorious double jeopardy claim); State v. Ravotto, 169 N.J. 227 (2001) (police used unreasonable force in obtaining a blood sample from a DWI suspect where suspect had consented to breathalyzer test); Doe v. Poritz, 142 N.J. 1 (1995) (challenging disclosure

of information pertaining to sex offenders based in part on right to due process); State v. Novembrino, 105 N.J. 95 (1987) (holding that there is no good faith exception to the exclusionary rule under the State Constitution). It has also participated as *amicus curiae* and in other capacities in numerous cases involving rights guaranteed by the federal and state constitutions. Joye, et al. v. Hunterdon Central Regional High School Brd. Of Ed., N.J.S.Ct. Dkt. No. 53,546 (argued February 19, 2003) (challenging random student drug testing); Sojourner, et al. v. New Jersey Dep't of Human Services, 350 N.J.Super 152, cert. granted 174 N.J. 194 (2002) (oral argument held on January 22, 2003); Planned Parenthood, et al. v. Farmer, et al., 165 N.J. 609 (2000); V.C. v. M.J.B., 163 N.J. 200 (2000); Boy Scouts of America v. Dale, 160 N.J. 562 (1999), rev'd, 530 U.S. 640 (2000); South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Elementary Sch., 150 N.J. 575 (1997); State in Interest of J.G., 151 N.J. 565 (1997); Mourning v. Correctional Medical Services, 300 N.J. Super. 213 (App. Div.), certif. denied, 151 N.J. 468 (1997); Rutgers Council of AAUP Chapters v. Rutgers, 298 N.J. Super. 442 (App. Div. 1997), certif. denied, 153 N.J. 48 (1998); C.K. v. New Jersey Dep't of Health & Human Servs., 92 F.3d 171 (3d Cir. 1996); Presbytery of New Jersey v. Florio, 902 F. Supp. 492 (D.N.J. 1995), aff'd, 99 F.3d 101 (3d Cir. 1996), cert. denied, 117 S. Ct.

1334 (1997); Liang v. Immigration and Naturalization Service, 206 F.3d 308 (3d Cir. 2000).

The participation of amicus curiae will assist this Court in the resolution of the issues of public importance raised by this case by providing the legal context in which to analyze the facts of this case. The participation of amicus curiae is particularly appropriate in cases with “broad implication,” Taxpayers Assoc. of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6 (1976), *cert. denied*, 430 U.S. 977 (1977), or in cases of “general public interest.” Casey v. Male, 63 N.J. Super. 255 (Co. Ct. 1960). This is just such a case.

ARGUMENT

The New Jersey Superior Court, Law Division, held that N.J.S.A. 2C:64-6a, “whereby the prosecuting authority which seizes property in its investigation of prosecuting of crimes,...keeps such property, or the cash proceeds of such property, for its own use,” violates the Due Process Clauses of both the New Jersey and United States Constitutions. Amicus ACLU-NJ writes to emphasize the manner in which the court’s decision and reasoning is supported by numerous prior New Jersey court decisions (1) that evidence a heightened sensitivity to conflicts of interest involving prosecutors and other public officials and (2) that seek to limit prosecutorial

and law enforcement discretion in situations where the potential for abuse, arbitrary actions, or lack of uniformity exist.

Amicus ACLU-NJ must initially, however, address an overarching mischaracterization proffered by appellant. Appellant contends that the trial court's decision was "revolutionary" because it "held that a civil plaintiff cannot profit from the action he or she has filed" (App. Brief at 1) and because "[t]here is simply no due process requirement that there be a neutral, impartial civil plaintiff." App. Brief at 16. In so doing, appellant completely mischaracterizes both the nature of a forfeiture action and, more specifically, the role of a prosecutor therein.

In a forfeiture proceeding, as in a criminal trial, the plaintiff is not the prosecutor who brings the case on behalf of the public; it is the public itself. The sole purpose of the prosecutor is to be the public's representative, not to further his individual interests. The current scheme, however, undermines that distinction, allows for the prosecutor's individual interests (which may not be the same as the public's) to come into play, and is perhaps the reason the State itself has expressed confusion over, and conflated, the public's and prosecutors' interests in the forfeiture context.¹

¹ Indeed, the State's confusion is evidenced by the clear conflict between its statements above and its request for "a presumption that the prosecuting authorities, like all public officials and *unlike* ordinary civil plaintiffs,

Further, while there is a neutral decision-maker (i.e., a judge) presiding over a forfeiture hearing, the forfeiture statute grants prosecutors discretion as to whether or not such an action should in fact be instituted. It is that discretionary determination that is infected under the current statute by the inclusion of a potential direct institutional gain to the individual and the office designated to make the decision.

Additionally, the New Jersey Supreme Court and the United States Supreme Court have recognized the quasi-criminal nature of forfeiture proceedings. State v. Seven Thousand Dollars, 136 N.J. 223, 238 (1994) (“The United States Supreme Court has recognized the criminal character of forfeiture proceeding despite its adoption of the civil burden of proof”). And, the New Jersey Supreme Court has firmly held that in quasi-criminal cases, “the need for impartiality extends beyond the judge to the prosecutor.” State v. Storm, 141 N.J. 245, 252 (1995).

perform their functions properly, without bias and in the public interest.” App. Brief at 23 (emphasis added).

I. NEW JERSEY COURTS HAVE CONTINUALLY SOUGHT TO ENSURE THAT CONFLICTS OF INTERESTS DO NOT UNDERMINE THE ABILITY OF PUBLIC OFFICIALS, ESPECIALLY PROSECUTORS, TO SERVE THE INTERESTS OF THE PUBLIC OR TO AVOID THE APPEARANCE OF IMPROPRIETY.

In numerous prior cases, where prosecutors' or municipal attorneys' individual interests intruded upon their ability to impartially carry out actions on behalf of the public, the courts have required those attorneys to be disqualified. See, e.g., State v. Clark, 162 N.J. 201, 206 (2000) (forbidding municipal prosecutors from serving as defense counsel in the same county due to "the high probability that the prosecutor's impartiality will be undermined"); State v. Storm, supra. (placing limitations on the use of private prosecutors because of the danger that a private prosecutor would not act impartially); In re Opinion 452, 87 N.J. 45 (1981) (forbidding an attorney from holding the position of municipal prosecutor where his partner is planning board attorney for the same municipality); In the Matter of Opinion No. 415, 81 N.J. 318 (1979) (forbidding an attorney to be counsel for both a county and for a municipality within that county). These cases, as well as those regarding other public officials, show the Court's heightened sensitivity to conflict of interest matters when public officials are involved. See also Advisory Committee on Professional Ethics, Opinion 690

(“Counsel for governmental entities are held with particular vigor to standards of propriety and the absence of conflict of interests”).

The reason for the heightened sensitivity was plainly stated in Barrett, et al. v. Union Township Committee, 230 N.J. Super 195, 200 (App. Div. 1989): “It is fundamental that the public is entitled to have its representatives perform their duties free from any personal or pecuniary interests that might affect their judgment.” Id., see also Van Itallie v. Franklin Lakes, 28 N.J. 258, 265 (1958). As specifically regards attorneys, the New Jersey Supreme Court has noted: “[A]ttorneys representing public bodies are the legal representatives of the general public and as such have the duty to be and remain above all suspicion even at personal financial sacrifice.” In re Opinion 452, 87 N.J. at 48. Underlying these cases “is a concern that the potential danger of conflict...might undermine public confidence in our system of government and in the independence of integrity of the legal profession.” Id. at 49. As stated by the Advisory Committee on Professional Ethics, prosecutors must protect against “intrusions into public confidence in the independent judgment of the prosecutor, *free from any biases that might be created by the prosecutor’s own personal interests.*” Opinion 690 (emphasis added). See also id. (police officers cannot also act as municipal prosecutors because, “public confidence in the independent

professional judgment of a prosecutor would be undermined by such dual service”).

Therefore, “[a] public official is disqualified from exercising the authority of his office in any matter in which he has a personal or financial interest that conflicts with his public duty.” Barrett, 230 N.J.Super. at 200. The need for this rule is to ensure that there is no “conflicting interest that may interfere with the impartial performance of his duties as a member of the public body.” Wyzkowski v. Rizas, 132 N.J. 509, 523 (1993), citing Scotch Plains-Fanwood Bd. of Ed. V. Syversten, 251 N.J.Super. 566, 568 (App. Div. 1991).

“A conflicting interest arises when the public official has an interest not shared in common with the other members of the public.” Care for Tenafly, Inc. v. Tenafly Zoning Board of Adjustment, 307 N.J.Super. 362, 370 (App. Div. 1998), citing Griggs v. Borough of Princeton, 33 N.J. 207, 220-21 (1960). See also Griggs, 33 N.J. at 216 (assessing whether “dual interest” exists). Indeed, in conflict of interest cases, the question is “whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty,” Wyzkowski v. Rizas, 132 N.J. at 523, or create a situation that is “incompatible with the spirit of impartiality....” Care for Tenafly, Inc. v.

Tenaflly Zoning Board of Adjustment, 307 N.J.Super. at 374. In making that assessment, “[t]he potential of psychological influences cannot be ignored.” Griggs, 33 N.J. at 220; see also Barrett v. Union Tp. Comm., 230 N.J.Super. at 204.

In State v. Storm, supra, the Court discussed at length the role of a prosecutor and the manner in which conflicting interests can result in a prosecutor’s impartiality and, thus, a violation of due process. In that case, the New Jersey Supreme Court placed limitations on the use of private prosecutors in municipal courts. Their concern regarding the use of private prosecutors arose from the existence of “dual responsibilities,” i.e. to the attorney’s individual client as well as to the public. The Court wrote: “Conflicting interests, moreover, can undermine a prosecutor’s impartiality. The loss of impartiality can affect the prosecutor’s assessment of probable cause to proceed...” as well as numerous other prosecutorial decisions. Id. at 253. The potential for partiality, due to conflicting interests, in the assessment of whether to proceed with an action is the exact concern raised in the present case.

To establish that such conflicting interests exist, it is not necessary to show actual proof of dishonesty or that the public servants in question have

succumbed to the temptation,² “but rather whether there is a potential for conflict.” Care for Tenaflly, Inc. v. Tenaflly 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.

Indeed, even the *appearance* of impropriety in such circumstances will require an attorney to be disqualified from handling a case. In the Matter of Opinion 415, 81 N.J. at 322. See also In re Opinion 452, 87 N.J. at 48 (“counsel for the public must conduct themselves and their practice so as to [a]void the appearance of impropriety”); Advisory Committee on Professional Ethics, Opinion 690 (“While there may be no *prima facie* conflict of interest [for a police officer to serve as a municipal prosecutor], the specter of an appearance of impropriety so permeates this situation as to preclude the dual service”). As stated by the New Jersey Supreme Court:

² Public officials, including at least one New Jersey prosecutor, have succumbed to that temptation in the past. See “Disgraced judge and prosecutor answer still more questions,” by Michael Drewniak, *Star-Ledger*, September 9, 1996, at page 21 (describing improper use of civil forfeitures by then-Somerset County Prosecutor Nicholas Bissell, Jr.). See also “U.S. marshal is charged with forfeiture sales,” by John P. Martin, *Star-Ledger*, June 12, 2002, at page 17 (describing arrest of the chief of the U.S. marshal’s asset forfeiture unit for selling government-seized cars and land to friends at a discount and then sharing in the resale profits).

“To maintain public confidence in the bar it is necessary that the appearance of, as well as actual, wrongdoing be avoided.” In re Opinion 452, 87 N.J. at 48, citing In re Cipriano, 68 N.J. 398, 403 (1975). This is necessary “to the end that the image of disinterested justice is not impoverished or tainted...[and] for the sake of public confidence in the probity of the administration of justice.” State v. Rizzo, 69 N.J. 28, 30 (1975). For prosecutors and other representatives of the public, “the appearance of impropriety assumes an added dimension. Positions of public trust call for even more circumspect conduct.” In the Matter of Opinion No. 415, 81 N.J. at 324.

In the present case, both the appearance of impropriety as well as an actual conflict of interests exist. Under N.J.S.A. 2C:64-6a, prosecutors, in exercising their discretion whether or not to bring a forfeiture action, have a particular incentive that is not shared by the public generally and that is clearly “incompatible with the spirit of impartiality.” Namely, prosecutors receive a direct benefit from each successful forfeiture action they decided to pursue. The benefit accrues, as was determined in the findings of fact by Judge Bowen, via the ability to use the forfeiture funds (pursuant to the prosecutor’s own discretion) for such items as office furniture, a golf outing, telecommunications and computer equipment, automobiles, fitness

equipment, food for seminars and meetings, and expenses for law enforcement conferences. Slip op. at 4. The more forfeiture proceedings they bring and successfully prosecute, the more such benefits that prosecutors are enabled to receive. Clearly, these benefits go well beyond interests that prosecutors hold “in common with members of the public.”

As such, the prosecutor’s impartiality in exercising judgment as to whether he or she should initiate a forfeiture action is clearly compromised. The actual benefits obtained from initiating numerous forfeiture proceedings, as well as the psychological sway that the benefits have on the prosecutors’ decision-making, simply cannot be ignored, (see Griggs, 33 N.J. at 220 (in assessing whether a conflict of interests exists, “[t]he potential of psychological influences cannot be ignored”)), and can clearly result in a prosecutor initiating more forfeiture actions that he would otherwise bring if the potential for personal benefits did not exist. It is therefore reasonable to determine that the benefits have “the capacity to tempt [a prosecutor] ‘to depart from his sworn public duty’” to act solely on behalf of the public rather than for himself. See Care of Tenaflly, 307 N.J.Super. at 373, citing, Van Itallie, 28 N.J. at 268. Indeed, this process is “incompatible with ‘the spirit of impartiality with which...quasi-judicial

proceedings must be governed.” Id., citing Szoke v. Zoning Board of Adjustment, 260 N.J.Super. 341, 345 (App.Div. 1992).

Further, the statute clearly creates an appearance of impropriety. As noted supra at p. 10, n.2, forfeiture proceedings have in fact been abused before by at least one notable prosecutor in New Jersey. The idea that prosecutors remain able to personally or institutionally benefit from forfeitures yet still are entitled to make determinations that result in such an action going forward is repugnant to the need for “the image of disinterested justice...not [to be] impoverished or tainted.” State v. Rizzo, 69 N.J. at 30.

As it is necessary to ensure that prosecutors “not only...maintain [their] conduct free of impropriety, but also...avoid scrupulously even the appearance of impropriety,” the scheme that permits them to personally or institutionally gain from their decision to pursue forfeiture actions was properly held by the lower court to violate due process.

II. THE NEW JERSEY COURTS HAVE CONTINUALLY SOUGHT TO LIMIT THE DISCRETIONARY ACTIONS OF PROSECUTORS AND LAW ENFORCEMENT WHEN THE POTENTIAL FOR ABUSE OR LACK OF UNIFORMITY EXISTS.

As noted, under N.J.S.A. 2C:64-1 et seq., prosecutors have discretion to determine whether or not to initiate forfeiture proceedings and, based upon that statutory scheme, prosecutors also have discretion to use the funds obtained from such proceedings for their own benefit. As explained above,

this creates the potential for abuse and the appearance of impropriety. In numerous prior cases where the potential for abuse, arbitrariness, lack of uniformity, or appearance of impropriety existed, the New Jersey Supreme Court has found it necessary to strike down or stringently limit the prosecutorial or law enforcement discretion at issue.

In State v. Lagares, 127 N.J. 20, 26 (1992), the New Jersey Supreme Court wrote: “[T]his Court has generally required that decision-making be carried out in a fashion that limits potential arbitrariness. In addition, we have required that the judiciary retain the power to review prosecutorial discretion to avoid abuses of discretion. We continue that approach today.” Id. In that case, the Court addressed the repeat-offender-sentencing provision of the Comprehensive Drug Reform Act, which provided prosecutors sole discretion to select which defendants would be subject to increased sentences. In order to remedy “the risk of the prosecutor’s arbitrary application of the sentencing provision...”, the Court found it necessary to limit the prosecutor’s discretion. Id. at 33. The Court therefore required the promulgation of guidelines and subjected prosecutorial decision-making to judicial review. Id.

Likewise, in State v. Leonardis, 73 N.J. 360 (1977), the New Jersey Supreme Court limited the power of prosecutors to grant or deny admission

into the Pretrial Intervention Program. The Court noted that this decision, like the decision in the current case to proceed with a forfeiture proceeding, “is functionally a quasi-judicial decision.” Id. at 376. As such, the Court determined that judicial review of the prosecutor’s decisions was required in order to “safeguard individuals from abusive governmental action.” Id.

In State v. Vasquez, 129 N.J. 189 (1992), the issue before the Court involved the prosecutor’s ability to waive or not waive a parole disqualifier. As in the cases above, the Court saw the need to limit the prosecutor’s decision-making abilities in order to make sure the system is not “undermined by unreviewable prosecutorial discretion.” Id. at 196. The Court held: “Judicial oversight is mandated to protect against arbitrary and capricious prosecutorial decisions.” Id. See also State in the Interest of R.C., 351 N.J.Super. 248 (2002) (requiring judicial review of prosecutors’ decisions under N.J.S.A. 2A:4A-26f to avoid “the serious separations of powers issues that would be raised if the 2000 amendment of the Juvenile Code were construed to give a county prosecutor unreviewable authority to decide whether to waive serious charges against a juvenile over sixteen to adult court”).

State v. Brimmage, 153 N.J. 1 (1998), reiterated the need for principles of due process not to be undermined by broad prosecutorial

discretion. In holding that each county prosecutor should not be permitted to adopt independent standard plea offers, the Court quoted its prior statements from State v. Warren, 115 N.J. 433, 449 (1989): “Individual prosecutors with distinctive perceptions of the gravity of particular offenses and offenders, and responsive to a very different constituency from that of the judiciary, would add undue variability, inevitable inconsistency, and greater disparity to the sentencing process.” 153 N.J. at 12.

In Flagg v. Essex County Prosecutor, 171 N.J. 561, 570 (2002), the Court dealt directly with the issue of forfeitures, specifically, forfeitures of public employment. While the Court determined that the abuse of discretion rather than a heightened standard of review should be applied to waiver decisions by the prosecutor, it reiterated the need for limits on prosecutorial discretion. The Court noted that prosecutors’ decisions based “upon a consideration of...inappropriate factors” would amount to a clear abuse of discretion and must not be permitted. Id. at 571.

As explained in Point I, under the current forfeiture scheme at issue, the benefits to the prosecutor resulting from the decision to initiate a forfeiture proceeding are clearly “inappropriate factors” for consideration, as they create dual interests – those of the public generally versus the prosecutor’s self-interests. Therein lies one crucial distinction between the

cases cited above and the current situation. While all involve the need to protect against the potential for abuse or impropriety, in the above-cited cases judicial review or the creation of strict guidelines could resolve the due process concerns. This was so because the Court was dealing with situations where it simply needed to ensure that prosecutor's "personal zeal" in carrying out his responsibilities in a particular case did not result in an abuse in application. The current case, however, deals not solely with the mere use of discretion in application or the mere potential of "personal zeal" but, rather, with the "structural" potential for partiality to intrude upon the decision-making process and an improper economic incentive to prosecute forfeiture proceedings. As explained by the Appellate Division in State v. Storm, 278 N.J.Super. 287, 292, aff'd State v. Storm, supra: "[P]artiality refers not to 'personal' zeal but to 'structural' problems where personal interests (including non-pecuniary interests) generate a structural conflict of interests." Id. Because the potential benefits and the psychological sway attending them are inherent in the current forfeiture system, there is simply no way for a judge to determine to what degree the potential personal benefits impacted in a particular case or, even more generally, results in prosecutors erring overall on the side of bringing more forfeitures than they otherwise might have brought.

State v. Carty, 170 N.J. at 632, represents an analogous case in which the Court was required to abolish a procedure for which judicial review would not suffice to remove the danger of an unconstitutional process. In State v. Carty, the Court dealt not with limitations on prosecutorial discretion but, rather, on law enforcement officers' decisions to request consent from drivers to search their vehicles during traffic stops. The Court wrote: "[O]nce a motorist is pulled over, the officer's decision to ask for consent to search is a purely discretionary one.... '[A] police procedure is less threatening to Fourth Amendment values when the discretionary authority of the police (and thus the risk of arbitrary action) is kept at an absolute minimum.'" Id. at 641. The Court explained that it is unlikely that a motorist would feel empowered to deny consent in such a situation and, thus, the Court no longer had confidence that consent to search under this structural framework "truly can be voluntary or otherwise reasonable...." Id. at 645. The Court also noted that police would be able to use their discretionary authority to "turn[] a routine traffic stop into a fishing expedition for criminal activity unrelated to the stop." Id. at 647. Further, because of the potential for abuse inherent in such discretion and the actual "widespread abuse of our existing law," (id. at 646), there was a lack of confidence in the system. Id. at 645. The Court therefore ultimately held

that police officers could no longer employ consent searches during motor vehicle stops “unless there is reasonable and articulable suspicion to believe that an errant motorist or passenger has engaged in, or is about to engage in, criminal activity.” Id. at 647.

As in Carty, the structural system at issue undermines public confidence in the forfeiture system, and the potential for abuse or that impermissible factors will come into play in the decision-making process is great. Note also State v. Maryland, 167 N.J. 471, 484 (2001) (“Although a field inquiry may be conducted in the absence of grounds for suspicion..., that does not mean that the police may rely on impermissible criteria to question individuals”). Likewise, as with requests for consent searches, many individuals are simply not in a position in the practical sense to adequately oppose the official’s discretionary decision to institute the forfeiture action. As forfeiture is a civil proceeding, there is no attorney assigned to assist an indigent defendant and the burden of proof on the government is extremely lower than that of a criminal proceeding, with none of the protections afforded therein. Further, if an individual does not know to, or is unable to, file an answer within 35 days, the property is automatically forfeited with no court hearing having taken place. N.J.S.A. 2C: 64-3e. Finally, as in Carty, there has in fact been previous abuse of the

existing laws (see supra at p. 10, n.2), and, given that there is no way to measure the psychological impact presented by the potential benefits to a prosecutor for a decision to institute forfeiture proceedings, the possibility of “widespread abuse of [the] existing law,” even if not consciously engaged in, is ever-present.

Finally, it should be noted that, unlike the cases described above wherein the potential for arbitrariness and impropriety necessitated limiting the discretion of the public officials, in the present case it may be possible to maintain (without limit) the discretion of law enforcement and prosecutors. However, to do so, it is necessary to remove the direct institutional benefits that they receive from their discretionary decision-making³. As that is not currently the case, the Law Division’s decision finding the existing scheme to be unconstitutional must be upheld.

³ While this court need not affirmatively determine an alternative to the current scheme that would pass constitutional muster, *amicus* submits that, were the funds from forfeiture dispersed by a general public body, such as the State legislature, rather than by the prosecutor or Attorney General, the potential for the abuse and appearance of impropriety discussed above would be alleviated.

CONCLUSION

For the reasons set forth above, the Law Division's decision finding the current forfeiture scheme unconstitutional should be affirmed.

Dated: March 19, 2003

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