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VIA UNITED PARCEL SERVICE

August 24, 2016

Joseph Orlando, Clerk
Appellate Division Clerk's Office
Hughes Justice Complex, 5th Floor
25 Market Street
PO Box 006
Trenton, NJ 08625

Re: *State v. Luis Melendez*
Docket No. A-1301-15T1

Dear Mr. Orlando:

Please be advised that the American Civil Liberties Union of New Jersey seeks to submit a brief and participate in oral argument as *amicus curiae* in the matter referenced above. Accordingly, enclosed for filing please find the original and five copies of the following documents:

1. Notice of Motion for Leave to File a Brief and Participate in Oral Argument as *Amicus Curiae;*
2. Supporting Certification of Rebecca Livengood dated August 24, 2016;
3. Proposed brief;
4. Certification of Service;

Please file these documents and return one copy stamped "Filed" in the enclosed self-addressed, stamped envelope. Please charge the filing fee to this office's account, #142267.

If you have any questions or require any further information, please do not hesitate to contact me directly at (973)854-1733.

Sincerely,

Rebecca Livengood

cc: Laura B. Lasota, Esq.
Devarup Rastogi, Esq.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-1301-15T1

STATE OF NEW JERSEY, Plaintiff-Respondent, v. LUIS MELENDEZ, Defendant-Appellant.	**CRIMINAL ACTION** ON APPEAL FROM A JUDGMENT OF CONVICTION OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY. SAT BELOW: Hon. Joseph V. Isabella, J.S.C. and a Jury. **CERTIFICATION OF SERVICE**

I, Alicia Rogers, hereby certify the following:

1. I caused the proposed *amicus curiae* American Civil Liberties Union of New Jersey's Motion to Appear as *Amicus Curiae*, Certification of Rebecca Livengood in Support of Motion, and proposed Brief to be delivered via United Parcel Service to the following attorneys:

Laura B. Lasota, Esq.
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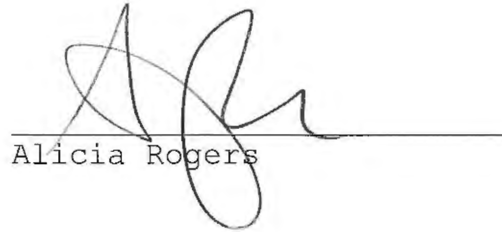
Attorney for Defendant-Petitioner

Devarup Rastogi, Esq.
Assistant Prosecutor
Office of the Hudson County
Prosecutor
595 Newark Avenue
Attorney for Plaintiff-Respondent

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements

are willfully false, I am subject to punishment.

Date: August 24, 2016



Alicia Rogers

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-1301-15T1

STATE OF NEW JERSEY, Plaintiff-Respondent, v. LUIS MELENDEZ, Defendant-Appellant.	**CRIMINAL ACTION** ON APPEAL FROM A JUDGMENT OF CONVICTION OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY. SAT BELOW: Hon. Joseph V. Isabella, J.S.C. and a Jury. **CERTIFICATION OF REBECCA LIVENGOOD**

I, Rebecca Livengood, hereby certify the following:

1. I am an attorney admitted to practice law in the State of New Jersey and am employed as the Skadden Fellow at the American Civil Liberties Union of New Jersey Foundation, the legal arm of the American Civil Liberties Union of New Jersey ("ACLU-NJ").

2. I make this certification in support of the motion of the ACLU-NJ for leave to file a brief and participate in oral argument in the above-captioned matter in an *amicus curiae* capacity. I have personal knowledge of the facts set forth herein.

3. The ACLU-NJ 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 approximately 12,000 members in 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 approximately 500,000 members nationwide.

4. The ACLU and the ACLU-NJ have a long history of defending the rights of criminal defendants both as direct counsel and as *amicus curiae*. *See, e.g.*, *Miranda v. Arizona*, 384 *U.S.* 436 (1966) (ACLU national as *amicus curiae*); *State v. Jones*, 224 *N.J.* 70 (2016) (ACLU-NJ as *amicus curiae* challenging suggestive identification procedure); *State v. Miller*, 216 *N.J.* 40 (2013) (ACLU-NJ as *amicus curiae* addressing denial of defendant's adjournment request); *State v. Tedesco*, 214 *N.J.* 177 (2013) (ACLU-NJ as *amicus curiae* arguing that defendants have a right to waive their appearance at sentencing); *State ex rel. A.W.*, 212 *N.J.* 114 (2012) (ACLU-NJ as *amicus curiae* challenging voluntariness of juvenile's statement); *State v. Marquez*, 202 *N.J.* 485 (2010) (ACLU-NJ as *amicus curiae* addressing standard for determining knowing refusal).

5. The special interest and the expertise of the ACLU-NJ in this area of the law are substantial. I respectfully submit that the participation of the ACLU-NJ will assist the Court in

the resolution of the significant issues of public importance implicated by this appeal. *R.* 1:13-9.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Dated: August 24, 2016

Rebecca Livengood

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-1301-15T1

STATE OF NEW JERSEY, Plaintiff-Respondent, v. LUIS MELENDEZ, Defendant-Appellant.	**CRIMINAL ACTION** ON APPEAL FROM A JUDGMENT OF CONVICTION OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY. SAT BELOW: Hon. Joseph V. Isabella, J.S.C. and a Jury.

BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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SUMMARY OF ARGUMENT

A critical question presented here - whether a defendant's statements made *pro se* in a civil forfeiture proceeding can be introduced in the case in chief against him in a criminal trial - is an issue of first impression in New Jersey.

Pro se statements made in a forfeiture proceeding are inadmissible in the case in chief in a criminal prosecution. This result is mandated by state and federal jurisprudence concerning the constitutional rights of due process and against self-incrimination, as well as the requirements for waiver of a constitutional right.

Civil forfeiture proceedings implicate the Due Process Clauses of the state and federal constitutions, and so requiring a defendant to choose between asserting his Fifth Amendment right against self-incrimination and his Fourteenth Amendment right to require the State to afford him due process before permanently taking his property imposes an impermissible choice between constitutional rights.

Moreover, even if as a categorical matter a choice between constitutional rights is not always impermissible, statements made in forfeiture proceedings, including the statement here, should nevertheless be excluded under waiver principles. New Jersey has consistently required a showing of knowing and voluntary waiver before a defendant can be found to have

forfeited his right against self-incrimination. A waiver under threat of loss of property cannot be voluntary and was not voluntary here.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus curiae American Civil Liberties Union of New Jersey adopts the facts as recounted in Luis Melendez's appellate brief,[1] and for purposes of clarity recites the following facts relevant to this brief:

On November 8, 2010, members of the Hoboken Police Department's Anti-Vice and Narcotics Unit executed a search warrant for Apartment 6D at 310 Marshall Drive in Hoboken. During the search, police found, *inter alia*, 347 envelopes of heroin, paraphernalia, two-way radios, a handgun, and $2,900 in cash in a bank envelope. Def. Br. 5-8.[2] Mr. Melendez was not in the apartment at the time of the search; police arrested him in a stairwell in the building as the search was taking place, and they seized $28 that was in Mr. Melendez's possession. *Id.* at 6-7.

Mr. Melendez refused to sign a seizure report for the $2928. The next day, he appeared for an arraignment and bail hearing, where the court determined he was eligible for

---

[1] For the convenience of the Court, the Statement of Facts and Procedural History have been combined here.

[2] "Def. Br." refers to Mr. Melendez's June 13, 2016 Appellate Brief.

representation by the Office of the Public Defender, and he was sent to the Hudson County Correctional Center pending trial. *Id.* at 16.

On December 2, 2010, the Hudson County Prosecutor's Office filed a forfeiture action in the Hudson County Superior Court, Law Division, seeking forfeiture of the $2928 pursuant to *N.J.S.A.* 2C:64-1, *et seq.* Mr. Melendez received a notice of the forfeiture action on February 3, 2011.[3] The notice provided, "[i]f you dispute this complaint, you or your attorney must file a written answer or motion and proof of service with the Clerk of Court . . . within thirty-five (35) days from the date you received this summons," along with a filing fee of $135.00.[4] Da 53a.[5] The notice further warned,

> A telephone call will not protect your rights; you must file and serve a written answer or motion . . . . If you do not file and serve a written answer or motion within

[3] The Special Civil Part of the Law Division typically hears cases where the amount in controversy is less than $15,000. *R.* 6:1-2. This action was heard in the Superior Court because the Hudson County Prosecutor's Office joined unrelated defendants, which resulted in the complaint exceeding the amount in controversy requirement for filing in the Law Division. *Amicus* has confirmed that joining unrelated defendants in civil asset forfeiture actions is a regular practice of the Hudson County Prosecutor's Office. That practice violates Rule 4:29-1, and *amicus* is challenging it in a separate action.

[4] In the Special Civil Part, Mr. Melendez would have been subjected to a filing fee of $15 for answering the complaint. *N.J.S.A.* 22A:2-37.1.

[5] "Da" refers to the Defendant-Appellant's appendix.

> thirty-five (35) days, the court may enter a judgment against you for the relief plaintiff demands, plus interest and costs of suit. If judgment is entered against you, the Sheriff may seize your money, wages or property to pay all or part of the judgment.
>
> [*Id.*]

According to the notice, "[i]f you cannot afford an attorney, you may call the Legal Services Office in the county where you live. A list of these offices is provided." *Id.* The office provided for Hudson County was Northeast New Jersey Legal Services, which, as Mr. Melendez notes, "does not represent clients in forfeiture matters." Def. Br. 17; Da 103a.

On February 22, 2011, a thirteen-count indictment was filed charging Mr. Melendez with, *inter alia*, maintaining or operating a controlled dangerous substance (CDS) production facility in violation of *N.J.S.A.* 2C:35-4 and several counts of possession of controlled dangerous substance (CDS) with intent to distribute.

On March 22, 2011, Mr. Melendez submitted a letter to the Hudson Vicinage Civil Division in response to the forfeiture complaint. He asked for an extension of time to file an answer, and he wrote that he was "in the process of retrieving documentation pertinent to prove that the U.S. currency seized. . . was in no way associated with any criminal activities as alleged by the prosecution." Def. Br. 18. He also asked for

appointment of counsel. The court did not appoint counsel to represent Mr. Melendez in the forfeiture action, and on April 25, 2011, he submitted a *pro se* response, objecting to forfeiture on the grounds that (1) he had not been found guilty of any associated crime, and (2) the money that was seized was not the product of illegal activity, but was the balance of his inmate account when he left the custody of the Bureau of Prisons. He attached a copy of the federal check through which that balance had been remitted to him. This statement thus tied Mr. Melendez to the location where the money - and the drugs - were seized.

On July 9, 2012, the State moved to admit Mr. Melendez's *pro se* forfeiture answer in the State's case in chief in the criminal prosecution. On April 23, 2013, the Honorable Joseph V. Isabella, J.S.C., granted that motion. Mr. Melendez, through counsel, moved for reconsideration, and after oral argument on the motion, on November 14, 2013, Judge Isabella denied the motion for reconsideration. This Court denied an interlocutory motion for leave to appeal on January 8, 2014, and after trial on ten counts of the indictment, on October 9, 2014, the jury returned a guilty verdict. Mr. Melendez now appeals, *inter alia*, the denial of his motion for reconsideration of the decision to admit the written statement in the forfeiture action.

ARGUMENT

I. BECAUSE THEY INVOLVE THE GOVERNMENT TAKING OF PROPERTY, CIVIL FORFEITURE ACTIONS IMPLICATE THE CONSTITUTIONAL RIGHT TO DUE PROCESS.

Mr. Melendez faced a choice between asserting his Fifth Amendment right against self-incrimination and asserting his Fourteenth Amendment right to due process when the State sought to seize his property. The trial court erred in failing to recognize that the civil action involved a constitutional right.

The trial court wrote:

> Yes, the defendant had to make a decision in regard to choosing whether to claim the money seized from his house; however, this decision did not compromise a constitutional right. Although this decision may be difficult, the caselaw suggests that it's not the difficulty of the decision that will be analyzed; but rather the constitutional right which may be compromised by such a decision.
>
> [Tr. Ct. Op. at 7.]

The trial court again observed that "the majority of the caselaw suggests that a defendant's statement will be admissible unless he were to face a constitutional dilemma. Here, the defendant was not facing the dilemma of being *compelled* to claim ownership of his money or waive his 5th Amendment rights." *Id.* at 8.

The trial court misstated the constitutional dilemma Mr. Melendez faced because it failed to recognize that civil forfeiture actions implicate the Fourteenth Amendment right to

due process when the State seizes an individual's property. The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." This right plainly applies where the State seeks to seize an individual's property through civil forfeiture, as the United States Supreme Court has repeatedly held in the analogous Fifth Amendment context. *See, e.g., United States v. $8,850 in United States Currency*, 461 *U.S.* 555 (1983) (finding that an eighteen-month delay in instituting forfeiture proceedings did not violate defendant's due process rights, but acknowledging that civil forfeitures implicate the Due Process Clause); *United States v. James Daniel Good Real Prop.*, 510 *U.S.* 43 (1993) (absent exigent circumstances, the Due Process Clause of the Fifth Amendment requires a pre-deprivation hearing in forfeitures of real property).

Because government-initiated civil forfeitures implicate the Due Process clauses in a way that other civil actions do not, the case on which the State relies, *United States v. McClellan*, 868 *F.*2d 210 (7th Cir. 1989), is inapposite. In *McClellan*, the court admitted statements from the defendant's bankruptcy proceedings against him at a later criminal trial. As the State concedes, "McClellan was not forced to choose between constitutional rights, he merely had to choose between a

constitutional right and some other benefit." State Interloc. Br. at 16.[6] *United States v. Payment Processing Ctr.*, on which the trial court relied, is similarly irrelevant to the analysis here. *See* No. 06-0724, 2006 *U.S. Dist. LEXIS* 56600 (E.D. Pa. Aug. 14, 2006), at *20 ("Requiring defendants in a civil suit to choose between proceeding without the benefit of their own immunized testimony and invoking their Fifth Amendment privilege does not compromise a constitutional right."). In this case, where Mr. Melendez faced a State-initiated forfeiture proceeding, he did have to choose between constitutional rights – the right to due process and the right against self-incrimination.

II. A DEFENDANT CANNOT BE FORCED TO SACRIFICE HIS RIGHT AGAINST SELF-INCRIMINATION IN ORDER TO INVOKE HIS RIGHT TO DUE PROCESS.

The State cannot force a defendant to forfeit one constitutional right in order to preserve another when the integrity of police practices is at stake. In *Simmons v. United States*, the United States Supreme Court held that a defendant's testimony in a pre-trial suppression hearing under the Fourth Amendment could not be used in the case in chief against him in the subsequent criminal trial. 390 *U.S.* 377, 394 (1968). The Court reasoned that requiring a defendant to sacrifice his Fifth

[6] "State Interloc. Br." refers to the State's December 13, 2013 brief opposing interlocutory review.

Amendment right against self-incrimination in order to assert a Fourth Amendment right "impose[d] a condition of a kind to which this Court has always been peculiarly sensitive." *Id.* at 393. The Court explained:

> A defendant is "compelled" to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forgo a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit. However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created . . . In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.
>
> [*Id.* at 393-94.]

Thus, *Simmons* "emphasized that its holding applied only where a defendant must choose between constitutionally protected rights, and not when he merely must choose between a constitutional right and some other benefit." *McClellan*, 868 *F.*2d at 215. In *McGautha v. California*, 402 *U.S.* 183 (1971), the United States Supreme Court clarified *Simmons*. It explained that *Simmons* rested not on "a 'tension' between constitutional rights and the policies behind them," *id.* at 212, but on the problem for police accountability if defendants were forced to forgo enforcing

their Fourth Amendment rights in order to protect their Fifth Amendment rights. Such a scenario would undermine the ability of the Fourth Amendment and the exclusionary rule to preserve the integrity of police practices. *See McGautha*, 402 *U.S.* at 211 (Permitting a prosecutor to force a defendant to choose between testifying at a suppression hearing and invoking his right against self-incrimination at trial would "create[] an unacceptable risk of deterring the prosecution of marginal Fourth Amendment claims, thus weakening the efficacy of the exclusionary rule as a sanction for unlawful police behavior."). *McGautha* thus explained that "the Constitution does not . . . always forbid requiring [a criminal defendant] to choose" between asserting constitutional rights that are in tension with one another; instead, "[t]he threshold question is whether compelling the election [between rights] impairs to an appreciable extent any of the policies behind the rights involved." *McGautha*, 402 *U.S.* at 213.

Under the reasoning of *Simmons*, as explained in *McGautha*, Mr. Melendez's statement should not have been admitted in the criminal trial. Compelling election between the constitutional rights at stake in this case would impair the policies behind each right involved. With respect to the due process right in the civil case, one primary policy for requiring due process before the State permanently deprives an individual of his

property is the risk of erroneous deprivation. *See, e.g.*, *Mathews v. Eldridge*, 424 *U.S.* 319, 335 (1976). Here, the only way the State could properly seize Mr. Melendez's money is if that money was "utilized in furtherance of an unlawful activity" or was the "proceeds of illegal activities." *N.J.S.A.* 2C:64-1(a)(1) and (a)(3). Mr. Melendez's ability to assert that the money was not the product of illegal activity, but was the proceeds of a check issued by the federal government, was essential to preventing an erroneous deprivation. With respect to the right against self-incrimination, a State-initiated suit that elicits testimony on pain of losing one's property is at the heart of what the Fifth Amendment's Self-Incrimination Clause seeks to prevent. As the United States Supreme Court explained in *Doe v. United States*:

> It is consistent with the history of and the policies underlying the Self-Incrimination Clause to hold that the privilege may be asserted only to resist compelled explicit or implicit disclosures of incriminating information. Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him.
>
> [487 *U.S.* 201, 212 (1988).]

As in *Simmons*, forcing Mr. Melendez to choose between the Fifth Amendment right and the Fourteenth Amendment right would

undermine the policy the Fourteenth Amendment protects of limiting State seizures to those that are permitted by law.

In addition to the general interests underlying due process and self-incrimination, *McGautha* specifically notes the concern of maintaining police accountability, which is particularly significant here. Were this Court to allow the admission of statements made in civil forfeiture proceedings in criminal trials, it would create a perverse incentive for police officers to seize private property and bring more forfeiture actions (even when they otherwise might not), to place more defendants in the untenable situation of having to choose between forfeiting property or invoking the right to silence. Indeed, in New Jersey, that concern is exacerbated by the fact that prosecutors and police departments themselves benefit from the proceeds of successful civil forfeiture actions. *See N.J.S.A.* 2C:64-6. In order to preserve the aims of the constitutional rights at stake, the Court should not require Mr. Melendez to choose between them.

Other courts have applied the reasoning from *Simmons* to situations in which a defendant is forced to acknowledge ownership of an item subject to forfeiture and thus compromise his Fifth Amendment right at a subsequent trial. The Court of Appeals for the Sixth Circuit, in *United States v. U.S. Currency*, 626 *F.*2d 11 (6th Cir. 1980), reasoned, "[c]learly,

appellees should not be compelled to choose between the exercise of their Fifth Amendment privilege and the substantial sums of money which are the subject of this forfeiture proceeding." *U.S. Currency*, 626 *F.*2d at 15. Noting that "the government should not be compelled to abandon the forfeiture action," *id.*, the Court of Appeals for the Sixth Circuit remanded the case to the district court to fashion a remedy that respected both interests, such as providing immunity to the appellees or staying the forfeiture action until the criminal case had concluded.

The Court of Appeals for the Ninth Circuit, in *dicta* in *United States v. Cretacci*, 62 *F.*3d 307 (9th Cir. 1995), similarly cited *Simmons* for the proposition that "[a] defendant's claim of ownership at a pre-trial suppression hearing of property that he contends was unlawfully seized may not be used to prove the defendant's guilt," and observed, "[f]or the same reason, a defendant's claim of ownership of property that was subject to forfeiture may not be used for that purpose." *Cretacci*, 62 *F.*3d at 311.

The State cites no case in which a court has declined to extend *Simmons* to the circumstances present here.

The State relies heavily on *Brown v. Berghuis*, 638 *F. Supp.* 795 (E.D. Mi. 2009), in which the Eastern District of Michigan reached the unremarkable conclusion that a state court's refusal

to apply *Simmons* in the context of forfeiture actions was not "contrary to or an unreasonable application of" clearly established federal law. *Id.* at 816. This decision is irrelevant – it considered the challenge through a federal *habeas corpus* lens, rather than on direct appeal through a state court, and so it asked whether the state court's failure to apply *Simmons* was an "unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States," the federal *habeas corpus* standard. *See* 28 *U.S.C.* § 2254(d)(1). The *Berghuis* court thus considered not whether *Simmons should* be extended to apply to statements made in forfeiture proceedings – the question presented here – but instead whether *Simmons already had* clearly been applied to forfeiture proceedings by the United States Supreme Court. While the principle and reasoning of *Simmons* mandates that statements made in forfeiture actions be inadmissible in subsequent criminal proceedings, the United States Supreme Court has not specifically addressed this question.

The State also seeks to rely on cases in which a defendant, on his own initiative, submits a statement in support of a motion. These have no bearing on the instant case. In *United States v. Clawson*, 831 *F.*2d 909 (9th Cir. 1987), the Court of Appeals for the Ninth Circuit refused to extend *Simmons* to an affidavit defendant made in support of defendant's own motion

for return of things seized. *Id.* at 912. The court held that this affidavit was a voluntary statement of the defendant, made in support of his own motion. The Court of Appeals for the Seventh Circuit similarly declined to extend *Simmons* to a statement made in support of a filing the court construed as a motion for things seized in *United States v. Taylor*, 975 *F.*2d 402 (7th Cir. 1992). The State's reliance on *Taylor* and *Clawson*, involving voluntarily-initiated motions by defendants, is misplaced because Mr. Melendez did not choose to file a motion; he was forced to respond to a civil suit brought by the State.

III. MR. MELENDEZ DID NOT KNOWINGLY AND VOLUNTARILY WAIVE THE PRIVILEGE AGAINST SELF-INCRIMINATION BY FAILING TO INVOKE THE FIFTH AMENDMENT WHEN PROVIDING A *PRO SE* ANSWER TO THE CIVIL FORFEITURE COMPLAINT.

The Fifth Amendment provides that defendants may not be compelled to make self-incriminating statements in criminal cases, *Doe*, 487 U.S. at 212, including statements made outside of trials that incriminate them in future trials. *See, e.g., Minnesota v. Murphy*, 465 *U.S.* 420, 426 (1984). Mr. Melendez's statement here - that the seized money was not the product of illegal activity - was self-incriminatory in the already-pending criminal action, because it connected him with the evidence police had seized in his mother's house. Indeed, it was the only evidence introduced at trial that so connected him. Though Mr.

Melendez had the right to voluntarily waive his Fifth Amendment right and make incriminatory statements, he did not do so here.

A. Under New Jersey Law, A Waiver Of A Constitutional Right Must Be Knowing And Voluntary, And Silence Does Not Constitute Waiver.

As the New Jersey Supreme Court has made clear, "[f]undamental rights explicitly rooted in the Constitution require a waiver by defendant that is 'knowing and voluntary.'" *State v. Buonadonna*, 122 *N.J.* 22, 35 (1991) (quoting *Johnson v. Zerbst*, 304 *U.S.* 458 (1938)). For example, in finding waiver of the right to counsel in the criminal context, the New Jersey Supreme Court has held that to ensure that a waiver is knowing and voluntary, the court must conduct an on-the-record colloquy in which the person waiving the right to counsel is "made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *State v. Crisafi*, 128 *N.J.* 499, 510 (1992) (quotation marks omitted). In New Jersey, mere silence does not constitute waiver. *See, e.g.*, *S.D.G. v. Inventory Control Co.*, 178 *N.J. Super.* 411, 417 (App. Div. 1981).

The need to ensure knowing and voluntary waiver is particularly acute in the context of the Fifth Amendment right against self-incrimination. In order to preserve that right in

the face of law enforcement efforts to obtain information, courts require law enforcement before custodial interrogation to provide the warnings outlined in *Miranda v. Arizona*, 384 *U.S.* 436 (1966). These warnings are a response to the "compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda*, 384 *U.S.* at 467. When a defendant makes a statement after *Miranda* warnings have been given and later seeks to exclude that statement in a criminal trial, courts look to see whether the waiver was made "voluntarily, knowingly, and intelligently." *Moran v. Burbine*, 475 *U.S.* 412, 421 (1986) (quotation marks omitted). Again in the *Miranda* context, silence is insufficient to show waiver of the Fifth Amendment right: "A valid waiver will not be presumed simply from the silence of the accused after warnings are given . . . ." *Miranda*, 384 *U.S.* at 475.

The State's contention in its response that Mr. Melendez waived the Fifth Amendment right against self-incrimination by failing to invoke the Fifth Amendment when answering the forfeiture complaint is thus plainly incorrect – that silence does not constitute waiver.

Mr. Melendez argues that the State should have issued *Miranda* warnings along with the notice of the forfeiture action, because he contends that under the circumstances, the suit

constituted a custodial interrogation. *Amicus* supports that assertion. But even if the Court finds that *Miranda* warnings were not required, Mr. Melendez nevertheless did not waive his rights here. Whether in the context of *Miranda* warnings or not, silence is insufficient to constitute a knowing and voluntary waiver of a constitutional right.

B. Where The Penalty For Asserting The Fifth Amendment Right Against Self-Incrimination Is Loss Of A Significant Possessory Interest, The Waiver Of The Right Cannot Be Voluntary.

The notice here did not inform Mr. Melendez that he had any alternative to waiving his Fifth Amendment right. It warned,

> If you do not file and serve a written answer or motion within thirty-five (35) days, the court may enter a judgment against you for the relief plaintiff demands, plus interest and costs of suit. If judgment is entered against you, the Sheriff may seize your money, wages or property to pay all or part of the judgment.
>
> [Da 53a].

Mr. Melendez was thus explicitly told that he could not remain silent without suffering the penalty of a default judgment and the possible loss of his property.

Though *Miranda* warnings would have allowed Mr. Melendez to understand the implications of asserting his possessory interest, even had *Miranda* warnings been issued, Mr. Melendez would still have been faced with the choice between asserting

his Fifth Amendment right against self-incrimination and asserting his possessory interest in the money.

The United States Supreme Court has held under analogous circumstances that such a waiver of a Fifth Amendment right could not be voluntary. In *Garrity v. New Jersey*, 385 *U.S.* 493 (1967), the Attorney General of New Jersey was investigating alleged fixing of traffic tickets by police officers in several New Jersey towns. Before questioning, each officer was informed that "(1) anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office." *Garrity*, 385 *U.S.* at 495. The United States Supreme Court held that the choice "between self-incrimination or job forfeiture" was "the antithesis of free choice to speak out or remain silent," and the resulting "statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions." *Id.* at 496-98. As in *Garrity*, even if Mr. Melendez had received *Miranda* warnings, he would nevertheless have been faced with the constitutionally impermissible choice between remaining silent and keeping his property. *See also, e.g., Spevack v. Klein*, 385 *U.S.* 511 (1967) (lawyer could not be

required to give incriminatory statements or remain silent on penalty of disbarment).

Any waiver under those circumstances could not be voluntary.

C. The Waiver Was Not Made Voluntary Because The Theoretical Options Of Asserting A Vague Denial Or Seeking A Continuance, Where Mr. Melendez Was Not Represented, Were Not Practically Available To Him.

The trial court found below, and the State now suggests, that Mr. Melendez did not face the choice between asserting his property rights and asserting his Fifth Amendment right because "defendants, in this unique position, may apply for a stay in the forfeiture action until the criminal proceedings are concluded. Appellant, instead, chose to substantively answer the complaint." State Resp. at 6. *See also* Tr. Ct. Op. at 4. ("Here, the defendant had the choice of admitting, denying, or simply refusing to answer the civil complaint."). The absence of appointed counsel in forfeiture cases makes these hypothetical options meaningless in practice.

Mr. Melendez was incarcerated when the State initiated the forfeiture action, and as demonstrated by his eligibility for representation by the Office of the Public Defender in his criminal case, he was unable to hire private counsel to represent him in the civil suit.

As the notice itself acknowledges, counsel would have aided Mr. Melendez in defending against the forfeiture action, but the counsel the notice suggested - Northeast New Jersey Legal Services - could not have represented Mr. Melendez, both because he was incarcerated, *see* 45 *C.F.R.* 1637; Omnibus Consolidated Rescissions and Appropriation Act, 1997, Pub. L. No. 104-208, § 504(a)(15), and because as a categorical matter, it does not handle forfeiture cases. Da 103a.

Without counsel, the notice provided no information that would have conveyed to Mr. Melendez that he was free to "admit, deny, or refuse to answer" the civil complaint. The notice said the opposite - it told Mr. Melendez that if he did not answer, the court could enter a judgment against him.

For this reason, *United States v. Kordel*, 397 *U.S.* 1 (1970), on which the trial court relied, is distinct from the case at bar. In *Kordel*, the United States Government had sued a corporation civilly to seize several of the corporation's products. As part of that suit, the Government served interrogatories on the corporation. Believing a criminal action would follow, the corporation sought to stay the civil matter pending the outcome of the criminal case, and that request was denied. The corporation, through counsel, then answered the interrogatories. The Government later initiated a criminal action against the corporation and used information from the

interrogatories against the corporation in the criminal trial. Officers of the corporation later sought to have the conviction reversed on the ground that the Government had violated their Fifth Amendment rights against self-incrimination through the civil discovery requests. The United States Supreme Court held that the Government had acted permissibly. The court observed that "the Government may not use evidence against a defendant in a criminal case which has been coerced from him under penalty of either giving the evidence or suffering a forfeiture of property," but it noted that the defendants had never asserted their Fifth Amendment rights during the civil proceeding even though, crucially, they were represented by counsel: "We do not deal here . . . with a case where the defendant is without counsel or reasonably fears . . . other unfair injury." *Kordel*, 397 *U.S.* at 11-12. Mr. Melendez, unlike the defendants in *Kordel*, was uncounseled and was not informed by the court-provided notice that he could invoke his Fifth Amendment right in the civil proceeding. The exact scenario *Kordel* acknowledged as impermissible happened to Mr. Melendez, and nothing in that case sanctions the State's conduct here.

Similarly, *State v. Kobrin Securities, Inc.*, 111 *N.J.* 307 (1988), on which the State relies in its response to Mr. Melendez's appellate brief, is inapposite. *Kobrin Securities* involved counseled defendants facing both criminal charges and a

civil suit by the State. *Kobrin Securities* invoked the Fifth Amendment in the civil suit and then sought to stay the proceedings. *See id.* at 310. The New Jersey Supreme Court in *Kobrin Securities* held that defendants had a right to invoke the Fifth Amendment in the civil suit, but that "[i]t is not their right to bar the State from proceeding to obtain civil relief from securities fraud either in the form of damages or an injunction." *Id.* The Supreme Court thus reversed the trial court's exercise of discretion in staying the civil proceedings. *Kobrin Securities* is not illuminating here, where Mr. Melendez lacked counsel and could not make an informed decision about whether to waive his Fifth Amendment right, and it is not controlling in the civil forfeiture context, where, unlike in the securities context, the statute expressly authorizes the court to stay proceedings. *See N.J.S.A.* 2C:64-3(f)

Because Mr. Melendez was uncounseled, the contrast the State drew in its interlocutory brief between New Jersey's forfeiture statute and the Oregon statute analyzed in *United States v. Scrivner*, 167 *F.*3d 525 (9th Cir. 1999) (opinion withdrawn) (*Scrivner II*)[7] is likewise unavailing. The State

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[7] In *Scrivner II*, the Ninth Circuit applied *Simmons* to find statements made in a civil forfeiture proceeding inadmissible in a subsequent criminal trial. *Id.* at 533. The trial court here refused to rely on *Scrivner II* on the ground that it had been withdrawn by the Ninth Circuit. *Scrivner II* is not binding, and

argued that that "the New Jersey forfeiture statute, unlike the Oregon statute in Scrivner [*sic*], does not mandate the defendant claim the property in order to challenge the forfeiture of the property." State Interloc. Br. at 11-12. This distinction is nowhere made known to a *pro se* litigant; instead, in New Jersey, he receives a notice saying that he must respond or face default judgment.

A *pro se* litigant reading that notice would reasonably believe that his only choice was to answer the complaint or forfeit his property.

D. In The Absence Of A Valid Waiver, Mr. Melendez's Statement Is Inadmissible Against Him.

Because any waiver here was not knowing and voluntary, Mr. Melendez's statement of ownership was inadmissible against him in the State's case-in-chief in the criminal trial. *See State v. Hartley*, 103 *N.J.* 252, 278 (1986) ("[A]ny statement [obtained after failure to honor invocation of right to remain silent] is unconstitutionally compelled, and hence inadmissible, as having been obtained in violation of the fifth amendment and of the state common-law right against self-incrimination.").

IV. THE PROSECUTOR CAN AMELIORATE THE UNCONSTITUTIONAL DILEMMA POSED HERE BY SEEKING A STAY OF THE CIVIL FORFEITURE PROCEEDINGS ANY TIME A CRIMINAL CASE IS FILED.

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amicus does not rely on it here, but its reasoning may nevertheless be persuasive.

As the Court of Appeals for the Sixth Circuit recognized in *U.S. Currency*, 626 *F.*2d at 17, a defendant's right against self-incrimination and the State's right to initiate both civil forfeiture actions and criminal prosecutions can be reconciled in a number of ways. The most straightforward way, and one option the court proposed in *U.S. Currency*, would be for the Prosecutor's Office to request a stay of a forfeiture action any time it initiates such an action and a criminal case is pending or is filed. *See U.S. Currency*, 626 *F.*2d at 17.

New Jersey's forfeiture statute specifically allows for a stay under these circumstances: "Upon application of the State or claimant, if he be a defendant in a criminal proceeding arising out of the seizure, the Superior or county district court may stay proceedings in the forfeiture action until the criminal proceedings have been concluded by an entry of final judgment." *N.J.S.A.* 2C:64-3(f). Thus, the legislature has provided a remedy for "[t]he conflict of interest resulting from the interrelationship of criminal and civil actions against the same defendant" that Justice O'Hern alluded to in *State v. Kobrin Securities*. 111 *N.J.* at 312. Where a criminal case is filed while a civil forfeiture action regarding property at issue in the criminal trial is pending, or where a forfeiture action for such property is initiated after the commencement of

a criminal case, the prosecutor should seek a stay of the civil proceedings until the criminal case has ended.[8]

V. EVEN IF THE USE OF THE STATEMENT IN THIS MANNER IS ACCEPTABLE UNDER THE UNITED STATES CONSTITUTION, THE COURT MAY NEVERTHELESS FIND IT UNACCEPTABLE UNDER THE NEW JERSEY CONSTITUTION.

The admissibility of Mr. Melendez's statement in his criminal trial implicates both the New Jersey and United States Constitutions. The United States Constitution creates a "floor" for constitutional protection, *see State v. Gilmore*, 103 *N.J.* 508, 523-24 (1986), above which the New Jersey Constitution may, and has often been found to, provide additional rights. *See, e.g.*, *State v. Alston*, 88 *N.J.* 211, 228-29 (1981) (broader standing under New Jersey Constitution than federal Constitution to challenge validity of searches); *State v. Novembrino*, 105 *N.J.* 95, 157-58 (1987) (rejecting good-faith exception to the exclusionary rule); *State v. Johnson*, 68 *N.J.* 349, 353-54 (1975) (requiring showing that consent to search was knowingly given).

Because the jurisprudence concerning the intersection of the Fifth Amendment right against self-incrimination and other

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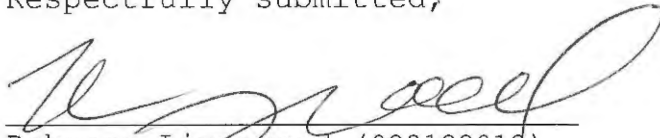
[8] Another option would be to appoint counsel to represent defendants in forfeiture actions, but this approach might require a funding allocation from the legislature. *See Pasqua v. Council*, 186 *N.J.* 127, 153 (2006). Moreover, counsel in such cases would likely still seek a stay of civil proceedings pending the outcome of the criminal trial because of the tension between the defendant's possessory and Fifth Amendment interests.

constitutional rights in the civil forfeiture context is more fully developed at the federal level, *amicus* has referred principally to federal cases here. This Court may of course determine that the rights of defendants in civil asset forfeitures are also protected by the New Jersey Constitution.

CONCLUSION

Where a defendant in a criminal action is the subject of a civil forfeiture action in which he proceeds *pro se,* he cannot be made to choose between his Fifth Amendment right against self-incrimination in his criminal trial and his due process right in his civil proceedings. Such a choice is unacceptable under *Simmons* and its progeny. Moreover, a waiver of the Fifth Amendment right against self-incrimination can never be voluntary when invoking that right will result in the loss of substantial property. For this reason, Mr. Melendez did not waive his right against self-incrimination here. His statement in the civil proceeding should have been excluded in his criminal trial.

Respectfully submitted,



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