SUPREME COURT OF NEW JERSEY
DOCKET NO. 081246

STATE OF NEW JERSEY, Plaintiff-Respondent, **v.** **LUIS MELENDEZ,** Defendant-Petitioner.	Criminal Action **On Appeal from the Superior Court of New Jersey, Appellate Division** App. Div. Docket No. A-1301-15 Sat Below: Hon. Susan L. Reisner, P.J.A.D. Hon. Richard S. Hoffman, J.A.D. Hon. Jessica R. Mayer, J.A.D.

BRIEF AND APPENDIX OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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Preliminary Statement

Through civil asset forfeiture, the State can take a person's property and ransom it back to him at the price of his self-incrimination, plus fees. To recover his rent, his grocery money, or the car he drives to work, he must bring forward information that the State can use against him in a criminal case, including, at minimum, the fact that he owns what the State seized. A more just and efficient system would presumptively stay civil asset forfeiture matters for the pendency of parallel criminal cases. This system is precisely the remedy the present case compels.

Luis Melendez received a summons and complaint initiating a forfeiture action against his $2,928 and found himself in a common position: indigent and uncounseled against the State's well-resourced repeat players, invited to defend by proxy his "guilty property" according to an archaic legal fiction or else lose the property forever. Far from civil asset forfeiture's only coercive feature, this predicament conditioned access to one constitutional right on surrender of another. Melendez's decision to assert his due process right to answer the complaint was also, necessarily, a decision to abandon his right against self-incrimination. It was a choice he should not have had to make in the face of a dilemma the Fifth Amendment cannot abide.

The State counters that civil asset forfeiture's statutory scaffolds necessitate this choice. Under the apparent misimpression that describing the status quo suffices to confirm its constitutionality, the State makes Melendez's case for him. The State contends that the court rules and the criminal code require claimants to file an answer before a court can impose a stay; that stays are never guaranteed; that the State is bound by court rules to issue summonses that induce litigants to file answers; and that providing copies of complaints to claimants' criminal defense attorneys is neither required nor proper. If the State is correct, it has painted a picture of a glaringly unconstitutional scheme.

The Appellate Division rejected Melendez's constitutional claims but determined that that process by which the State extracted his incriminating statements was fundamentally unfair. To remedy this "perfect storm of unfairness," the panel directed the State to issue notices to forfeiture claimants that inform them of their right to seek a stay and advise them to consult an attorney and contact their criminal defense lawyer. The decision also requires the State to serve defense lawyers with courtesy copies of forfeiture complaints. The panel acknowledged that public defenders cannot represent their clients in civil matters and that hiring private counsel in forfeiture cases is typically cost-ineffective.

The panel's remedy marks an improvement. But it is akin to telling a person with a broken-down car that he has the option to fix his catalytic converter, and

that he should speak with one mechanic whose services cost more than the car itself and another who is not permitted to open the hood. Moreover, the right to stay a forfeiture case is a corollary of the right against self-incrimination. Courts should, therefore, extend it automatically to all claimants, subject to waiver, rather than mete it out selectively to those who invoke the proper legal incantation.

The abuse of civil asset forfeiture by police and prosecutors in New Jersey underscores this remedy's practical importance. Many obstacles deter claimants from challenging forfeiture actions—high litigation costs and a low prosecutorial burden of proof among them. Compelled self-incrimination not only offends the Fifth Amendment; it also throws yet another barrier in the way of access to justice and government accountability. This Court can bring down that barrier by reversing the Appellate Division's decision below and establishing a remedy that meaningfully protects the constitutional rights of defendants facing forfeiture.

Statement of Facts/Procedural History

Amicus curiae the American Civil Liberties Union of New Jersey adopts the statement of facts and procedural history recounted in its *amicus* brief filed in the Appellate Division on September 13, 2016.

Argument

I. The State violates the Fifth Amendment when it threatens to forfeit a criminal defendant's property if he does not incriminate himself.

A. The State compelled Melendez to incriminate himself by penalizing silence with forfeiture.

The Fifth Amendment prohibits the government from using coercive tactics to elicit incriminating information from criminal defendants. *U.S. Const*. amend. V. Accordingly, the government may not pressure a defendant to relinquish his privilege against self-incrimination by threatening him with a substantial penalty. "When a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution." *Lefkowitz v. Cunningham,* 431 U.S. 801, 805 (1977). By burdening silence, the State impermissibly compels speech.

In *Garrity v. New Jersey*, the United States Supreme Court held that a defendant who provides incriminating information to avoid losing his job has not voluntarily waived his Fifth Amendment privilege. 385 U.S. 493, 496-98 (1967). The Attorney General of New Jersey was investigating police officers suspected of fixing traffic tickets. The Attorney General informed the officers that they could refuse to answer any incriminating questions, but if they did, they would be "subject to removal from office." *Id.* at 495. Putting the officers to this option

"between self-incrimination or job forfeiture" was the "antithesis of free choice to speak out or to remain silent." *Id.* at 497. The officers' statements "were infected by the coercion inherent in this scheme." *Id.* at 497. As a result, the statements were inadmissible as a matter of law.

Under *Garrity*, a defendant who fails to invoke the privilege against self-incrimination under threat of penalty may exclude any resulting incriminating statements from evidence at trial. In other words, the privilege is self-executing. *See, e.g.*, *State v.* Burkert, 231 N.J. 257, 267 n. 5 (2017); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 426 F.2d 619, 624 n. 2 (2d Circ. 1970); *Wiley v. Mayor of Baltimore*, 48 F.3d 773, 777 n.7 (4th Cir. 1995); *United States v. Veal*, 153 F.3d 1233, 1239 n.4 (11th Cir. 1998).

The Appellate Division cited the Supreme Court's decision in *Salinas v. Texas*, 570 U.S. 178 (2013), to suggest that *Garrity*'s logic excuses a witness from expressly invoking the Fifth Amendment privilege in "limited circumstances." *State v. Melendez*, 454 N.J. Super. 445, 467 (App. Div. 2018). In fact, *Salinas* confirmed that the self-executing privilege applies in diverse contexts, wherever "some form of official compulsion denies [a person] a 'free choice to admit, to deny, or to refuse to answer.'" *Salinas*, 570 U.S. at 185 (quoting *Garner v. United States*, 424 U. S. 648, 656–657 (1976)).

The State denied Melendez the free choice to refuse to answer a civil asset forfeiture complaint. After police officers seized $2900 from his home and another $28 from his person, the Hudson County Prosecutor's Office filed a forfeiture action to deprive him permanently of the money. Notice of the action instructed him to "file a written answer or motion and proof of service with the Clerk of Court . . . within **thirty-five** (35) days," along with a filing fee. Da 53a (emphasis in original).[1] If he did not, the court could "enter a default judgment against [him] for the relief plaintiff demands, plus interests and cost of suit" and the Sheriff could "seize [his] money, wages, or property to pay all or part of the judgment." *Id.* The State offered Melendez two options: exercise his Fifth Amendment privilege and default or answer the complaint and incriminate himself. He chose the latter option under the psychological duress of standing "between the rock and the whirlpool." *Garrity*, 385 U.S. at 496. In manufacturing those hazards and pinning Melendez at their intersection, the State violated the Fifth Amendment.

Disagreeing, the Appellate Division likened Melendez's predicament to the defendant's in *State v. P.Z.*, 152 N.J. 86 (1997). There, a parent sought to suppress incriminating statements he made to a Division of Youth and Family Services (now Division of Child Protection and Permanency) caseworker in connection with

[1] "Da" refers to Defendant's appendix filed in the Appellate Division on June 13, 2016. "St. Pet." refers to the State's Cross-Petition for Certification filed on May 30, 2018.

a child abuse investigation. *Id.* at 92. He alleged that the State coerced his statement by impliedly threatening to terminate his parental rights unless he assumed responsibility for injuring his daughter. *Id.* at 107. This Court noted that, while acknowledging abusive behavior "may aid in the rehabilitative process, termination of custody is not automatic on invocation of the privilege." *Id.* at 108. Admitting wrongdoing might have helped his case, but failing to do so would not necessarily have fatally damaged it.

Here, by contrast, Melendez would have lost his claim to his money by default if he did not file an inherently incriminating answer to the State's forfeiture complaint. The Appellate Division insisted that he had another option: to stay the forfeiture action in lieu of filing an answer. *Melendez*, 454 N.J. Super. at 473. But it also recognized that "the procedure the State followed would have led any reasonable defendant to believe he had no such option." *Id.* at 473-74 The State did not merely fail to inform Melendez that he could seek a stay; it affirmatively indicated that must file an answer or else "automatically lose his property." *Id.* at 474. The theoretical existence of an inaccessible procedural workaround did nothing to slacken the coercive bind Melendez faced.

Moreover, the State disputes that the stay process provides even a hypothetical path between self-incrimination and default. It reads the forfeiture statute to require that a claimant file an answer before requesting a stay. St. Pet. at

4-7. Though *Amicus* agrees with the Appellate Division's assessment that the State's "construction would force a criminal defendant to make a potentially incriminating statement in order to obtain a stay, thereby defeating an obvious purpose of the stay provision," *Melendez,* 454 N.J. Super. at 463 n.10., the State's view is illuminating. If the Hudson County Prosecutor's Office does not understand the stay process to provide an alternative to self-incrimination, why should we expect an uncounseled claimant to appreciate—much less effectuate—this function? The State's position also suggests that it would vigorously oppose any motion to stay forfeiture proceedings that a claimant filed before answering, making the stay alternative even more remote.

B. The State compelled Melendez to incriminate himself by pitting his constitutional rights against one another.

Melendez's silence in response to the State's civil asset forfeiture complaint would have cost him not only his property, but also his opportunity to exercise a constitutional right. *Simmons v. United States* expressly prohibits this type of bargain. 390 U.S. 377, 394 (1968). The United States Supreme Court in *Simmons* held that the prosecution could not use a defendant's testimony in a Fourth Amendment suppression hearing in its case in chief against the defendant during the subsequent criminal trial. *Id.* Requiring the defendant to sacrifice his Fifth Amendment right against self-incrimination in order to assert a Fourth Amendment

claim "impose[d] a condition of a kind to which this Court has always been peculiarly sensitive." *Id.* at 393. "Testimony 'voluntarily' given in the exercise of a constitutional right . . . is 'compelled' in the sense that if the defendant foregoes that testimony he loses the right." *Avant v. Clifford*, 67 N.J. 496, 541 (1975). Compelling testimony in this way is "intolerable." *Simmons*, 390 U.S.at 394.

In *McGautha v. California*, decided three years after *Simmons*, the Court elaborated on the test it applies when constitutional rights collide. 402 U.S. 183 (1971). *McGautha* considered whether resolving a capital defendant's guilt and punishment in a single verdict "unduly encourage[d] waiver of [his] privilege to remain silent on the issue of guilt." *Id.* at 185. The Court held that, "[a]lthough a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *Id.* at 213.

McGautha's holding does not translate neatly to the facts of the present case. The defendant in *McGautha* found himself at a strategic crossroads. Surrendering his privilege against self-incrimination and assuming responsibility for his offenses allowed him to demonstrate remorse and call for the jury's mercy. But it also exposed the jury to information that supported his culpability. The Court observed that the criminal process is replete with these sorts of "difficult judgments." *Id.* (quoting *McMann v. Richardson*, 397 U.S. 759, 769 (1970)). Here, by contrast,

Melendez made incriminating statements not because he ran "nice calculations of the effect of his testimony," *id.* at 214, but because it was the only way he could earn access to the courtroom for the simple chance to recover his seized money.

What's more, the Court in *McGautha* emphasized that its decision reflected a reluctance to exceed the limits of its authority, bounded by the bare requirements of the federal Constitution, and did not comport with "the best of all worlds" or even the "individual predilections" of the justices. *Id.* at 220-21. It is therefore worth recalling that this Court has "actively embraced the opportunity to move beyond the guidelines of federal directives in pursuit of an unyielding commitment to assure the proper admissibility of confessions." *State v. Hartley*, 103 N.J. 252, 301 (1986). Our state privilege against self-incrimination, derived from the common law and codified by statute, offers greater protection than the federal right in a variety of circumstances. *State v. Reed*, 133 N.J. 237, 251-52 (1993). In particular, this Court has taken care to build up the "cluster" of "ancillary" rights that "collectively give substance to the right of a person not to incriminate himself or herself." *Id.* at 251.

Even if the Court did not recognize protections above the federal floor, and even if *McGautha* controlled the outcome in this case, the State's actions would violate the Fifth Amendment under the test *McGautha* articulated. The Court in *McGautha* held that "[t]he threshold question is whether compelling the election

[between two constitutional rights] impairs to an appreciable extent any of the policies behind the rights involved." *Id.* The State forced Melendez to choose between his Fifth Amendment right against self-incrimination and his due process right to challenge the forfeiture of his money. Its process impaired the policies behind both.

First, the State offends the policies behind the privilege against self-incrimination when it forces a criminal defendant to abandon his property in order to exercise silence. One of those policies is "a fair state-individual balance" at criminal trials, which requires the State to shoulder the full burden of proving guilt. *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964) (quoting 8 John Henry Wigmore, Evidence 317 (McNaughton rev., 1961)) (internal quotation marks omitted). Where a claimant cannot challenge a forfeiture except by incriminating himself, the risk arises that the State will sidestep its investigative responsibilities and use the forfeiture case, with its lower standard of proof, to gain evidence for use in a criminal trial. *Id.*

Another related policy underlying the privilege against self-incrimination concerns accountability and alleviating the "fear that self-incriminating statements will be elicited by . . . abuses." *Id.* If prosecutors are empowered to use incriminating statements from forfeiture cases against criminal defendants, they will have incentive to bring more forfeiture actions and encourage police to make

more seizures. And because claimants will have good reason to fear that the State will use their statements against them, they will be less likely to contest forfeitures. The same forces that drive forfeitures up will drive challenges down; there will be greater need but diminished occasion to test the legitimacy of forfeitures and police practices around seizures. The fact that police and prosecutors profit from forfeited funds compounds their incentives to abuse the forfeiture process. *See N.J.S.A.* 2C:64-6.

These invited abuses also offend the central policy that animates the due process right: preventing unfair and erroneous deprivations. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). A process that incentivizes police and prosecutors to bring the highest possible volume of forfeiture actions and forces claimants to default in order to avoid incriminating themselves will frequently yield improper deprivations. This process is anathema to the truth-seeking function of adversarial litigation.

C. The State compelled Melendez to incriminate himself by serving him with a forfeiture complaint without administering *Miranda* rights.

The State violated the Fifth Amendment in failing to read Melendez his *Miranda* rights before inviting him to incriminate himself. In *Miranda v. Arizona*, the Supreme Court recognized that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no

statement obtained from the defendant can truly be the product of his free choice." 384 U.S. 436, 458 (1964). Accordingly, the constitutional right against compelled self-incrimination requires law enforcement authorities to advise defendants of their right to remain silent and to the presence of an attorney before conducting custodial interrogations. *See, e.g.*, *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). Thereafter, a "defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." *Miranda*, 384 U.S. at 444. But "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Id.* at 475. Critically, custodial interrogations take many shapes, notwithstanding popular culture's fixation with its most narratively dramatic form—in-person questioning at the moment of arrest.

Melendez was "in custody" for *Miranda* purposes. A person is in custody if he has been "deprived of his freedom of action in any significant way." *Id.* Thus, "custody exists if the action of the interrogating officers and the surrounding circumstances, fairly construed, would reasonably lead a detainee to believe he could not leave freely." *State v. Coburn*, 221 N.J. Super. 586, 596 (App. Div. 1987). Incarceration is the prototypical custodial setting. *See State v. Davis*, No. A-

5105-10, 2012 N.J. Super. Unpub. LEXIS 358, at *5-6 (App. Div. Feb. 21, 2012).[2] Melendez was detained while awaiting trial at the Hudson County Correctional Center, his liberty plainly and significantly restricted.

The State also "interrogated" him. "The term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). The State confronted Melendez with a complaint—signed by the Hudson County Prosecutor and supported by a certification from a sergeant employed in that office—alleging that the money seized from him was the proceeds of "receiving stolen property and violations of the controlled dangerous substance laws." Da 50a; 49a; 44a. A summons accompanying the complaint directed him to answer the allegations within thirty-five days. Prompting this answer was "an invitation to discuss the events giving rise to defendant's arrest." *Davis*, No. A-5105-10, 2012 N.J. Super. Unpub. at *6. Indeed, "[b]ecause of the way the forfeiture statute is structured, a defendant's answer must necessarily assert ownership of, or some interest in, the seized property." *Melendez*, 454 N.J. Super. at 473. Here, the mere

[2] Pursuant to R. 1:36-3, this opinion is included in an appendix. Counsel is aware of no case that stands for the contrary proposition.

fact of ownership was incriminating. The State's practice was reasonably likely to elicit an incriminating response, and it did.

The Appellate Division found no *Miranda* violation because it saw "no evidence that the prosecutor served defendant with the forfeiture complaint as a means of circumventing his right against self-incrimination," nor any "evidence that the failure [to serve defendant's criminal defense attorney a copy of the complaint] was intentional." *Id.* at 466. But the custodial interrogation analysis is wholly unconcerned with individual intent. It eschews "the unworkable standard of delving into a police officer's state of mind." *State v. O'Neill*, 193 N.J. 148, 153 (2007). Instead, "it focuses on whether a suspect knowingly, voluntarily, and intelligently waived his rights . . . ." *Id.* "Whatever may be the subjective intent of the interrogators," the test considers "the total situation which envelopes the questioning by considering such factors as the length of the interrogation, the place and time of the interrogation, the nature of the questions, the conduct of the police and all other relevant circumstances." *Coburn*, 221 N.J. at 596 (quoting *People v. Stewart*, 43 Cal. Rptr. 201, 206 (1963), aff'd *Miranda v. Arizona*, 384 U.S. 436 (1966)) (internal quotation marks omitted).

In fact, the Appellate Division employed this objective test—but only after misapplying a subjective one to dismiss Melendez's *Miranda* argument. When the panel considered the objective circumstances enveloping Melendez's questioning,

it correctly observed that "the procedure the State followed would have led any reasonable defendant to believe" he had no option but to respond to the State's complaint or lose his forfeiture case by default. *Melendez*, 454 N.J. Super. at 474. In other words, the State's "procedure" made Melendez reasonably likely to incriminate himself. Because the State neglected its obligation to issue Melendez *Miranda* warnings, his incriminating statements were inadmissible.

II. The State violates the Sixth Amendment when it personally confronts a criminal defendant with a civil asset forfeiture complaint, despite knowing that the defendant is represented by counsel.

The Sixth Amendment affords the accused, once formally charged, "the right to rely on counsel as a 'medium' between him and the State." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). Once that right attaches, "the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by [it]." *Id.* at 171. While "the language of article 1, paragraph 10 of the New Jersey Constitution is virtually identical with that of the Sixth Amendment," this Court has held "that the State Constitution affords greater protection of the right to counsel than is provided under the federal constitution." *State v. Sanchez*, 129 N.J. 261, 274 (1992).

The federal guarantee "is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present

in a confrontation between the accused and a state agent." *Moulton*, 474 U.S. at 176. Under Article 1, paragraph 10, this Court has supplied a more targeted safeguard: prosecutors or their representatives may not initiate conversations with indicted defendants without the consent of defense counsel. *Sanchez*, 129 N.J. at 277. A defendant's uncounseled, post-indictment statement is inadmissible, even if he waived his *Miranda* rights. *Id.* at 279; *cf. Patterson v. Illinois*, 487 U.S. 285, 294 (1988) (finding *Miranda* warnings sufficient to ensure the accused's post-indictment waiver of counsel is "knowing and intelligent").

As it did when conducting its *Miranda* analysis, the Appellate Division misread an intentionality requirement into these standards. It found "no evidence that what occurred here was an intentional attempt to circumvent defendant's right to counsel." *Melendez*, 454 N.J. Super. at 471. The panel may have derived this test from cases involving confidential informants. There, courts must determine whether an informant's actions—which elicit incriminating information in the absence of the accused's attorney—are attributable the State and thus sufficient to ground a constitutional violation. *See State v. Leopardi*, 305 N.J. Super. 70, 80 (App. Div. 1997). Whether the State "orchestrated the circumstances, colluded with [the informant], or engaged in chicanery" is, therefore, relevant. *State v. Lenin*, 406 N.J. Super. 361, 377 (App. Div. 2009).

But when the State acts for itself, without an intermediary, there is no need to divine its purpose. When it contacts a defendant, it does so deliberately. The Court in *Sanchez* did not ask whether the State intended to circumvent the defendant's constitutional rights when it questioned him without his attorney's consent. The violation inheres in the act.

If the constitutional test incorporates any state of mind consideration, it asks whether the State acted "knowingly," not intentionally. *See Moulton*, 474 U.S. at 176 ("[K]nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity."). Here, the State contacted Melendez via forfeiture complaint after indicting him[3] and while he was represented by defense counsel. The State knew that it was confronting Melendez directly and personally. The State knew Melendez was represented. After all, "the same prosecutor's office was both prosecuting defendant in the criminal action and moving to seize his property through forfeiture." *Melendez*, 454 N.J. Super. at 474. The State shirked its affirmative obligation to guard Melendez's right to counsel.

[3] The State served Melendez with the complaint twelve days before indicting him, but his thirty-five day window to answer the complaint spanned the date of his indictment. *See Melendez*, 454 N.J. Super at 461. In effect, the complaint was an ongoing communication during that thirty-five day period. After indicting him and before his answer was due, the State made no attempt to inform Melendez's attorney that it had served Melendez with a forfeiture complaint. Melendez responded to the complaint more than a month after he was indicted.

III. The Court can remedy the unconstitutional process the State employs when it seeks to forfeit a criminal defendant's property by directing trial courts to presumptively stay forfeiture actions for the pendency of parallel criminal cases.

The Appellate Division recognized that staying a forfeiture case until the associated criminal matter has resolved allows a defendant to preserve both his right against self-incrimination and his right to seek his property's return. *See Melendez*, 454 N.J. Super. at 473. But the panel stopped short of bringing the stay process within reach for the thousands of overwhelmingly uncounseled civil asset forfeiture claimants every year who navigate the intricate interplay of civil and criminal litigation.

The Appellate Division directed the State to serve forfeiture claimants with notice of their option to request a stay. *Id* at 476. The practical value of this information is dubious. For a claimant without counsel, how to exercise the stay option will be far from obvious. What's more, the State notes that courts maintain discretion to deny stay motions. St. Pet. at 7. For all the reasons detailed in the sections above, denying a stay motion will offend the Constitution. At best, then, the Appellate Division's remedy requires claimants and courts to expend resources on a superficial pageant of motion practice. At worst, it plants constitutional snares in their path. A more accessible and efficient remedy would provide for automatic stays.

In addition, a claimant should not have to beg the privilege of preserving his constitutional rights. Our civil and criminal procedures protect an individual's rights in the default. The individual may affirmatively forego certain protections, but he should not have to seek permission to assert them. Thus, a forfeiture claimant should not have to file a motion to prompt a court to honor his Fifth Amendment rights. Some claimants will not wish to wait for their criminal cases to conclude before attempting to recover their seized property. A claimant who expressly, knowingly, and voluntarily waives his right against self-incrimination should have the opportunity to override a presumptive stay. But if this Court recognizes the right to stay a forfeiture case as a right of constitutional significance—a corollary of the right against self-incrimination—it must extend the right automatically, subject to appropriate waiver.

IV. Civil asset forfeiture's widespread abuse contributes to the coercive atmosphere in which prosecutors confront claimants and reinforces the need for a robust remedy.

Civil asset forfeiture lays traps for claimants at every turn. It is a fount of abuse. Against this background, the Court's duty to fortify Fifth and Sixth Amendment guardrails and to devise a meaningful remedy is particularly pressing.

Civil asset forfeiture's basic constitutionality is the subject of doubt. Justice Thomas recently questioned whether its roots in English customs law are "capable of sustaining, as a constitutional matter, the contours of modern practice." *Leonard*

v. *Texas*, 137 S. Ct. 847 (2017) (Thomas, J., statement respecting the denial of certiorari). He explained that "[t]his system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses." *Id.* More troubling still, these abuses disproportionately burden low-income communities and "other groups least able to defend their interests in forfeiture proceedings." *Id.*

New Jersey is no exception. In fact, New Jersey's forfeiture laws are among the worst in the country, earning a grade of D- from the Institute for Justice. *See* Institute for Justice, *Policing for Profit, The Abuse of Civil Asset Forfeiture, New Jersey*.[4] During a five-month period in 2016, law enforcement seized $5.5 million in cash, 234 cars, and a home from New Jersey residents. *See* ACLU of New Jersey, *Private Property, Police Profit: Explaining and Reforming Civil Asset Forfeiture in New Jersey*, 2 (2018).[5] Under New Jersey law, prosecutors send forfeiture proceeds directly back to the agencies responsible for seizing the forfeited assets. *N.J.S.A.* 2C:64-6. In over 97 percent of cases, the forfeiture process amounts to an uninterrupted siphon from claimants' pockets to police department coffers. Claimants filed answers—taking the first step toward challenging the forfeiture of their property—in just fifty of the 1,860 forfeiture

[4] https://ij.org/pfp-state-pages/pfp-new-jersey/ (last visited Jan. 29, 2019)
[5] https://www.aclu-nj.org/files/2215/4453/4434/2018_ACLU_Civil_Asset_Forfeiture.pdf

cases initiated by county prosecutors during the five-month period. ACLU of New Jersey, *Private Property, Police Profit*, *supra*, at 3.

The system is designed to yield this shocking statistic. Most seizures take place in low-income communities. Of the ten cities with the highest frequency of seizures in New Jersey, eight are among the poorest in the state, falling within the bottom quartile in median income rankings. ACLU of New Jersey, *Civil Asset Forfeiture, Number of Seizures by Municipality*.[6] Court filing fees alone can be prohibitive. And because a plurality of seizures are between $100-500, the cumulative costs of litigation frequently exceed the value of seized property. *See* Erin Petenko & Disha Raychaudhuri, *Police took $5.5 million from residents in 5 months — and few have the means to challenge it, ACLU report says*, NJ.com (Dec. 11, 2018).[7] By seizing property in relatively small amounts, police ensure that they never have to justify their actions to a court. By seizing these small amounts at a high frequency, they raise significant revenue off the backs of poor New Jerseyans.

Civil asset forfeiture also takes an outsized toll on communities of color. *See* ACLU of New Jersey, *Civil Asset Forfeiture: A 5-Month Snapshot in New*

[6] https://www.aclu-nj.org/theissues/criminaljustice/civil-asset-forfeiture/number-seizures (last visited Jan. 29, 2019)
[7] https://www.nj.com/news/2018/12/police-took-55-million-from-residents-in-5-months-and-few-have-the-means-to-challenge-it-aclu-report-says.html

Jersey.[8] Racial profiling in these communities, compounded by heavier policing, skews at the outset the composition of the population swept up by civil asset forfeiture. *See* Michael Sallah et al., *Stop and Seize*, The Washington Post (Sept. 6, 2014).[9] For example, in Jersey City—the municipality with the highest rate of seizures—Black people were 9.6 times more likely to be arrested than were white people for low-level offenses in 2013. *See* ACLU of New Jersey, *Selective Policing: Racially Disparate Enforcement of Low-Level Offenses in New Jersey* 20 (Dec. 2015).[10]

In addition, nearly half of all Black and Latino households are unbanked or underbanked, compared with one in five white households. Rebecca Vallas, et. al, *Forfeiting the American Dream: How Civil Asset Forfeiture Exacerbates Hardship for Low-Income Communities and Communities of Color*, Center for American Progress (Apr. 1, 2016).[11] Because people without access to bank accounts must carry large sums of cash—such as a month's rent payment or wages from a full pay period—they are uniquely vulnerable to cash seizures. For the same reason, forfeiture can spell financial devastation.

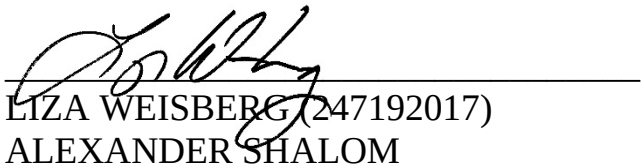
[8] https://www.aclu-nj.org/theissues/criminaljustice/civil-asset-forfeiture (last visited January 29, 2019)
[9] https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/?utm_term=.7ee2db91ab6a
[10] https://www.aclu-nj.org/files/7214/5070/6701/2015_12_21_aclunj_select_enf.pdf
[11] https://www.americanprogress.org/issues/criminal-justice/reports/2016/04/01/134495/forfeiting-the-american-dream/

Coercion is endemic to civil asset forfeiture. Compelled self-incrimination is one of among many mutually reinforcing abuses that entrench the State's power and impunity. Automatically staying forfeiture cases is a modest but critical step toward making the system fairer and more just.

Conclusion

In view of New Jersey's forfeiture crisis, the Court has a moral as well as constitutional imperative to reverse the Appellate Division's decision and establish an effective remedy.

Respectfully submitted,



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Counsel for *Amicus Curiae*

Dated: January 31, 2019

State v. Davis

Superior Court of New Jersey, Appellate Division

November 15, 2011, Argued; February 6, 2012, Decided

DOCKET NO. A-0106-07T4

Reporter
2012 N.J. Super. Unpub. LEXIS 241 *; 2012 WL 360200

STATE OF NEW JERSEY, Plaintiff-Respondent, v. CHARLES DAVIS, Defendant-Appellant.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Certification denied by *State v. Davis, 216 N.J. 363, 80 A.3d 745, 2013 N.J. LEXIS 1209 (Nov. 4, 2013)*

Post-conviction relief denied at *State v. Davis, 2018 N.J. Super. Unpub. LEXIS 126 (App.Div., Jan. 19, 2018)*

Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 06-07-01042.

Counsel: John Douard, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Cecelia Urban, Assistant Deputy Public Defender, of counsel and on the brief).

Joie D. Piderit, Assistant Prosecutor, argued the cause for respondent (Bruce J. Kaplan, Middlesex County Prosecutor, attorney; Ms. Piderit, of counsel and on the brief).

Appellant filed a pro se supplemental brief.

Judges: Before Judges Carchman, Baxter and Nugent.

Opinion

PER CURIAM

Following a jury trial, defendant Charles Davis was convicted of second-degree robbery, *N.J.S.A. 2C:15-1*; two counts of third-degree theft from the person, *N.J.S.A. 2C:20-2(b)(2)(d)*[1]; third-degree receiving a stolen automobile, *N.J.S.A. 2C:20-7*; second-degree eluding, *N.J.S.A. 2C:29-2(b)*; and fourth-degree hindering investigation, *N.J.S.A. 2C:29-3(b)(4)*. The judge sentenced defendant to an aggregate extended term of twenty-six years' imprisonment with a fourteen-year period of parole ineligibility.

Prior to the commencement **[*2]** of the trial, the judge denied defendant's motions to suppress evidence as well as his motion to sever the various robbery and theft offenses. In addition, since another individual, Bilam Muslim, had previously entered a plea of guilty to the eluding offense, defendant asserted that defendant could not be found guilty of the same offense. The judge rejected that argument.

Defendant appeals from his judgment of conviction. We affirm.

These are the facts adduced at trial. On March 21, 2006, at approximately 1:45 p.m., Evelyn Schwartz was shopping at the Macy's department store in Menlo Park in Edison. Schwartz left Macy's and walked to her car, which was parked about 100 yards from the entrance. She unlocked and opened the driver's side door and placed her handbag on the front passenger's seat. Before she could close the door, defendant ran to the car, reached across Schwartz, and grabbed the handbag. Schwartz's hand became entangled in the strap of the bag, and she was pulled from the car, lacerating her wrists.

A **[*3]** Macy's employee, Thomas Thomas, drove into the parking lot and parked nearby just as Schwartz's purse was taken. He observed a young, black male in his 20's, approximately 5'11" with a thin build, pull Schwartz out of the car and drag her as she struggled. Thomas exited his car and stood next to his vehicle. Defendant walked past, entered a Honda Accord, and drove away. Thomas wrote down the license plate number, then assisted Schwartz.

The police responded, gathering matching descriptions of

[1] These counts were amended before trial from the original indicted offense of second-degree robbery.

defendant from Schwartz and Thomas. The police investigated the license plate number and learned that the plate had been stolen.

Two days later, Evelyn Kentos was shopping at Shop-Rite in Edison. She exited the Shop-Rite and walked to her car, unlocked the driver's side door and walked around her minivan to open the passenger-side sliding door. Her purse was in the child's seat section of her shopping cart as she was unloading her groceries. Defendant drove his car in front of Kentos' car, blocking her exit. He ran from the car, grabbed Kentos' purse, ran to his vehicle and drove away.

The police were contacted, and upon arrival asked Kentos for a quick description of the suspect. She described the **[*4]** suspect as a "[b]lack male, approximately six foot, wearing a green sweat shirt, gold sweat shirt, green sweat pants and wool knit, like a knit cap." Kentos also told the police that the purse and its contents were worth approximately $260.

On April 11, 2006, at 4:15 p.m., a security officer at the Menlo Park Mall told a patrolling police officer that he had seen a person who matched the composite picture police had produced in the Schwartz robbery driving a red Honda Accord with an identified license plate number outside the Macy's parking lot. The police responded, but the Honda was gone when they arrived. The police ran a vehicle check and learned that the car had been reported as stolen from Piscataway the previous day.

Later that day, at approximately 5:45 p.m., Janet Tadduni was at the Shop-Rite in Edison. Tadduni exited the store and began unloading her groceries when she observed a red car with a spoiler. She then saw defendant exit the car and walk into the Shop-Rite. As she unloaded her groceries, she placed her purse in the child's seat section of her shopping cart. Defendant exited the Shop-Rite, dashed towards Tadduni, grabbed her purse, and ran away. Defendant entered the **[*5]** red car, but before he could drive away, Tadduni reached the vehicle and observed defendant. She banged on the window and roof and yelled at defendant to return her purse. Defendant grinned and drove away. Tadduni calculated the replacement cost of her purse and its contents at $1085.

Two days later, Edison Police Officer Alan Varady was on patrol on his motorcycle when he saw a red Honda Accord driving towards him. Varady read the license plate and identified the Honda as the stolen car seen two days earlier at the Menlo Park Mall. He also noted that defendant was driving the car. As he attempted to approach the car, defendant suddenly drove away towards an adjoining parking lot. Varady turned on his lights and siren and followed.

Finding no exit from the parking lot, defendant turned the car around and exited onto Route 1. As defendant pulled onto Route 1, he approached a red light and, as he attempted to squeeze between cars, side-swiped a car and continued on Route 1. Varady pursued defendant for approximately two miles at 50 m.p.h., when defendant increased his speed to 70 m.p.h. At Avenel Avenue, with at least three police officers in pursuit, including Detective Rigby, defendant **[*6]** encountered a red light, hopped onto the grass median, and struck a car.

As defendant continued north on Route 1, Rigby pulled next to the driver's side and could see defendant driving with a heavier black male in the passenger seat, later identified as Muslim. Defendant swerved into Rigby, forcing him to back off. After an overpass, a red light had caused a traffic backup, and defendant diverted into a Wal-Mart shopping center. Defendant drove into a field behind the store, through a fence, but became stuck attempting to cross some railroad tracks. Defendant and Muslim got out of the car and ran in opposite directions. Linden police, K-9 units and a state police helicopter joined the chase. Muslim was immediately apprehended, but defendant was discovered forty minutes later, hiding inside an abandoned refrigerator. Rigby estimated that he had pursued the Honda for 15 or 20 miles, reaching a high speed of 80 to 90 m.p.h.

Defendant was arrested, charged, tried and convicted of the previously mentioned offenses. This appeal followed.

On appeal, defendant raises the following issues:

POINT I

THE TRIAL COURT'S REFUSAL TO SEVER THE COUNTS OF THE INDICTMENT DENIED DEFENDANT HIS STATE AND FEDERAL **[*7]** CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL. *U.S. CONST. AMENDS. V, VI* AND *XIV*; *N.J. CONST. (1947), ART. I, ¶¶ 1*, *9* AND *10*. (NOT RAISED BELOW)

POINT II

THE EVIDENCE THAT MR. MUSLIM HAD BEEN CONVICTED OF THE ELUDING CHARGE IN THIS CASE PRECLUDED THE STATE FROM PROVING BEYOND A REASONABLE DOUBT THAT MR. DAVIS WAS GUILTY OF THE ELUDING CHARGE.

POINT III

THE EXCESSIVE 20-YEAR AGGREGATE SENTENCE, 14 YEARS WITHOUT PAROLE,

WAS ACHIEVED BY IMPOSING INAPPROPRIATE CONSECUTIVE SENTENCES AND THE INDIVIDUAL SENTENCES FOR EACH OFFENSE WERE CALCULATED WITHOUT REFERENCE TO APPLICABLE MITIGATING FACTORS.

In a pro se brief, defendant raised these additional issues:

POINT I:

THE DEFENDANT WAS DENIED HIS RIGHT TO THE *MIRANDA* SAFEGUARDS AFFORDED UNDER THE *STATE'S CONSTITUTION (1947) ARTICLE I par, 10*. BECAUSE THE DEFENDANT WAS INTERROGATED THREE SEPARATE TIMES ON THE SAME SUBJECT, WHEREBY FAILING TO "SCRUPULOUSLY HONOR" THE DEFENDANT'S RIGHT TO REMAIN SILENT AND CUT OFF COMMUNICATIONS WITH THE INTERROGATORS. CONTRARY TO *MIRANDA, 384 U.S. 86 S. Ct. (1966)* (sic) AND ITS PROGENY.

POINT II:

WITHHOLDING OF RELEVANT AND PROBATIVE OUT OF COURT NON-IDENTIFICATION EVIDENCE VIOLATED DEFENDANT'S *SIXTH* AND **[*8]** *FOURTEENTH AMENDMENT* RIGHTS AND DEPRIVED THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL.

(A) WESTFIELD POLICE DEPARTMENT'S WITHHOLDING OF IDENTIFICATION EVIDENCE IN CONNECTION TO THE INCIDENTS DATED APRIL 10, 2006; (B) THE WILLFUL WITHHOLDING OF IDENTIFICATION EVIDENCE IN CONNECTION TO COUNT ONE OF THE INDICTMENT; (C) THE WILLFUL WITHHOLDING OF IDENTIFICATION EVIDENCE IN CONNECTION TO COUNT THREE OF THE INDICTMENT.

POINT III:

THE DENIAL OF THE DEFENDANT'S MOTION TO DISMISS WAS FUNDAMENTALLY UNFAIR.

Defendant first asserts that the judge erred in refusing to sever the various counts of the indictment. He claims that including all of the counts before the same jury would be unduly prejudicial. In denying the motion to sever, Judge Mulvihill stated:

[C]ounts one, two and three will be subject to *[N.J.R.E.] 404(b)* relevant material issue which is genuinely disputed as to identity, similar in kind. They are similar. The robbery and theft from person on March 21 to 23, April 11th, are all similar in kind. Close in time within days. March 21 to 23 and then to April 11 you're talking a span of three weeks and the evidence would have to be clear and convincing and the probative value not outweighed **[*9]** by prejudice to the defendant. The issue of identity is primary here.

All of these incidents happened in Edison. They all involved allegedly a black male in his 20's, 160 pounds, 5'11. Same kind of modus operandi for the robbery and theft from persons. Also there was a motor vehicle involved in those which goes to the receiving and goes into the eluding and, of course, the hindering has to do with false name which is part and parcel of the arrest. I don't find that the probative value of the other crimes evidence *[N.J.R.E.] 404(b)* would be outweighed by apparent prejudice. All of these offenses are within a period of time within 23 days, all in the same town, common plan, common scheme and identity and therefore the motion is denied.

We review a judge's decision whether to sever the counts of an indictment under the abuse of discretion standard. *State v. Chenique-Puey, 145 N.J. 334, 341, 678 A.2d 694 (1996)*.

Rule 3:7-6 provides that multiple offenses may be charged in the same indictment if the offenses are of the same or similar character, are based on the same act or transaction or constitute parts of a common scheme or plan. However, *Rule 3:15-2(b)* permits the judge to grant severance if it appears **[*10]** defendant is prejudiced by a joinder of offenses. "Central to the inquiry is 'whether, assuming the charges were tried separately, evidence of the offenses sought to be severed would be admissible under [*N.J.R.E. 404(b)*] in the trial of the remaining charges.'" *Chenique-Puey, supra, 145 N.J. at 341* (quoting *State v. Pitts, 116 N.J. 580, 601-02, 562 A.2d 1320 (1989)*).

"If the evidence would be admissible at both trials, then the trial court may consolidate the charges because 'a defendant will not suffer any more prejudice in a joint trial than he would in separate trials.'" *Ibid.* (quoting *State v. Coruzzi, 189 N.J. Super. 273, 299, 460 A.2d 120 (App. Div.), certif. denied, 94 N.J. 531, 468 A.2d 185 (1983))*.

Preliminarily, the evidence must be relevant to an issue that is genuinely in dispute, and it must be necessary to prove the disputed issue. *State v. Darby, 174 N.J. 509, 518, 809 A.2d 138 (2002)*; *State v. Oliver, 133 N.J. 141, 151, 627 A.2d 144*

(1993).

N.J.R.E. 404(b) provides that:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, **[*11]** plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

The Supreme Court has articulated a four-part test to determine if evidence of other crimes is admissible at trial:

> 1. The evidence of the other crime must be admissible as relevant to a material issue;
> 2. It must be similar in kind and reasonably close in time to the offense charged;
> 3. The evidence of the other crime must be clear and convincing; and
>
> 4. The probative value of the evidence must not be outweighed by its apparent prejudice.
>
> [*State v. Rose, 206 N.J. 141, 159-60, 19 A.3d 985 (2011)* (quoting *State v. Cofield, 127 N.J. 328, 338, 605 A.2d 230 (1992)*).]

This test, derived from *Cofield*, protects against the significant danger that a jury may convict defendant for one crime based on evidence of other crimes because he is seen generally as a bad person. *Rose, supra, 206 N.J. at 159* (citing *Cofield, supra, 127 N.J. at 336*).

Here, the trial judge, while relying on *Rule 404(b)*, conducted a careful *Cofield* analysis.

The first prong of the analysis requires relevance and materiality, *i.e.* "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." *Rose, supra, 206 N.J. at 160* **[*12]** (quoting *N.J.R.E. 401*). This standard is a generous one. *Ibid.* "When an individual's state of mind is at issue, a greater breadth of evidence is allowed" because "mental state is not conducive to demonstration through direct evidence." *State v. Williams, 190 N.J. 114, 124-25, 919 A.2d 90 (2007)*.

We need not address the second prong as that only applies to cases with fact patterns similar to *Cofield*, a case involving constructive drug possession where the issue of constructive possession was hotly contested. *See Rose, supra, 206 N.J. at 160*; *Williams, supra, 190 N.J. at 131*.

The third prong requires proof of other crimes by clear and convincing evidence, while the fourth prong requires that the probative value of the proffered evidence outweighs its apparent prejudice. The Court has recognized this prong as the most difficult to overcome. *State v. Gillispie, 208 N.J. 59, 89, 26 A.3d 397 (2011)*. This prong is "more exacting than *[N.J.R.E.] 403*, which provides that relevant evidence is admissible unless its probative value is *substantially* outweighed by the risk of undue prejudice." *Rose, supra, 206 N.J. at 161*. The analysis requires a careful balancing of the competing interests. *State v. Barden, 195 N.J. 375, 392, 949 A.2d 820 (2008)*. **[*13]** If other, less prejudicial, evidence can establish the same issue, the balance tips in favor of exclusion. *Rose, supra, 206 N.J. at 161*; *Barden, supra, 195 N.J. at 392*.

Here the *Cofield* factors were satisfied. The evidence of "other crimes" is relevant to the issue of identity, as all three of the purse thefts victims were only able to identify defendant by physical description. Second, all three purse thefts were similar. In all three offenses, defendant used a stolen car to escape. All three offenses occurred along Route 1 within a few miles of each other. In two of the offenses, the victim was an elderly woman, and in the third, the victim was with her elderly mother. Third, the trial court correctly noted that the evidence was clear and convincing. Finally, the trial judge was well within his discretion in determining that the probative value of the evidence of other crimes was greater than its prejudice. Affording the trial judge the "ample discretion" due in joinder decisions, *Pitts, supra, 116 N.J. at 601*, there was no abuse of discretion here.

Before addressing the additional issues raised in counsel's brief, we focus on the issues raised by defendant in his pro se filing.

Defendant **[*14]** first asserts that the trial judge erred in failing to suppress his statement. His claim is based on a vague suggestion that he "exercised his right to be identified by the accusers." We have difficulty discerning what specific right he is invoking. Judge Mulvihill found that:

> [defendant] was given his *Miranda*[2] warnings; that he finally understood his *Miranda* warnings; that he gave a voluntary statement. He was not coerced, threatened, intimidated. He knew what was happening. He said he was playing a game with the police so he knew exactly what was going on and he gave a voluntary statement to the police. I find that beyond a reasonable doubt and the

[2] *Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)*.

motion is denied.

The judge's findings were based on the facts adduced on the record, *State v. Yohnnson, 204 N.J. 43, 62, 6 A.3d 963 (2010)* ("credibility determinations are entitled to deference and . . . factual findings must be sustained as long as they are supported by sufficient, credible evidence in the record"), and defendant's argument as to this issue and the other issues raised in his supplemental brief are without merit. We perceive of no basis for our intervention.

Defendant **[*15]** also asserts that the judge erred in the imposition of sentence. The thrust of defendant's argument is that the imposition of consecutive sentences was inappropriate and the judge failed to consider relevant mitigating factors.

Our review of sentencing decisions is relatively narrow and is governed by an abuse of discretion standard. *State v. Blackmon, 202 N.J. 283, 297, 997 A.2d 194 (2010)* (citing *State v. Jarbath, 114 N.J. 394, 401, 555 A.2d 559 (1989)*). In conducting the review of any sentence, we consider "whether the trial court has made findings of fact that are grounded in competent, reasonably credible evidence and whether the 'factfinder [has] appl[ied] correct legal principles in exercising its discretion.'" *Ibid.* (quoting *State v. Roth, 95 N.J. 334, 363, 471 A.2d 370 (1984)*). The traditional articulation of this standard limits our reviewing authority to those situations where the application of the facts to law has resulted in a clear error of judgment or a sentence that "shocks the judicial conscience." *Ibid.* (citing *Roth, supra, 95 N.J. at 363-65*). If the sentencing court has not demonstrated a clear error of judgment or the sentence does not shock the judicial conscience, we will not substitute our judgment for **[*16]** that of the trial court. *Ibid.*

At sentencing, Judge Mulvihill summarized the relevant facts related to the convictions:

> [There were] very horrendous predatory acts on the part of this defendant to seek out these older people when they're going to the store, coming from a store, whether it be Macy's, whether it be a supermarket and just brazenly parking near where they are presumably with a stolen car and just going up and grabbing their purse from the shopping cart but in the one case he actually went into Mrs. Schwartz' car to grab that purse across the driver's body and whether he was pulling on that and it got caught on her or she resisted but she was pulled out, fell to the ground, was injured, had to walk back into Macy's. These victims who include Ms. Schwartz, Ms. Kentos, and Ms. Kentos she was a very fragile woman. She looked every day of her age of . . . 83.
>
> . . . .
>
> So these people whenever they go to the store they go get a loaf of bread or a quart of milk, go to the shopping mall and they come out they're going to be remembering what happened to them, what [defendant] did to them. They're going to be unduly alarmed when that happens so this is going to affect them. Let's see, **[*17]** Mrs. Schwartz said a terrible experience for her. . . . And she said she felt very violated when [defendant] climbed into her car.

The "paramount" goal of the New Jersey Code of Criminal Justice is "uniformity in sentencing." *Blackmon, supra, 202 N.J. at 296* (citing *State v. Kromphold, 162 N.J. 345, 352, 744 A.2d 640 (2000)*). *See also State v. Bieniek, 200 N.J. 601, 607, 985 A.2d 1251 (2010)*. The goal of uniformity is "'achieved through the careful application of statutory aggravating and mitigating factors.'" *Blackmon, supra, 202 N.J. at 296* (quoting *State v. Cassady, 198 N.J. 165, 179-80, 966 A.2d 473 (2009)*).

"In exercising its authority to impose sentence, the trial court must identify and weigh all of the relevant aggravating factors that bear upon the appropriate sentence as well as those mitigating factors that are 'fully supported by the evidence.'" *Blackmon, supra, 202 N.J. at 296* (quoting *State v. Dalziel, 182 N.J. 494, 504-05, 867 A.2d 1167 (2005)*).

Furthermore, subject to certain conditions, multiple sentences imposed for more than one offense "shall run concurrently or consecutively as the court determines at the time of sentence." *N.J.S.A. 2C:44-5(a)*. The imposition of consecutive sentences must be justified by the criteria set forth **[*18]** in *State v. Yarbough, 100 N.J. 627, 643-44, 498 A.2d 1239 (1985)*. *See also State v. Hannigan, 408 N.J. Super. 388, 393, 975 A.2d 466 (App. Div. 2009)*. The judge must state on the record whether:

> (a) the crimes and their objectives were predominantly independent of each other;
>
> (b) the crimes involved separate acts of violence or threats of violence;
>
> (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
>
> (d) any of the crimes involved multiple victims;
>
> (e) the convictions for which the sentences are to be imposed are numerous;
>
> [*Yarbough, supra, 100 N.J. at 644* (footnote omitted).]

Here, defendant argues that mitigating factors one and two

should have been considered by the court. Mitigating factor one, that defendant's conduct neither caused nor threatened serious harm, *N.J.S.A. 2C:44-1(b)(1)*, was properly rejected. Defendant argues that the robberies "were less serious and involved less danger than most." However, the court's finding that serious harm did occur is supported by substantial and credible evidence in the record. When defendant reached into Ms. Schwartz's car, he literally dragged her, **[*19]** a 75-year-old woman, from the car, lacerating her wrists. Similarly, mitigating factor two, that defendant did not contemplate that his conduct would cause or threaten serious harm, *N.J.S.A. 2C:44-1(b)(2)*, was also appropriately disregarded. There is no question that defendant was aware that he would be robbing these victims. Although defendant argues that he did not "display either intentional or gratuitous violence," gratuitous violence is not required to find serious harm. In sum, the judge properly relied upon evidence in the record in rejecting mitigating factors one and two.

As to the consecutive sentences, defendant argues that the determination not to sever the counts precludes finding that the counts should be sentenced consecutively. However, the *Yarbough* factors are clearly distinct from a *Cofield* analysis. The first *Yarbough* factor favors concurrent sentences, as defendant's objectives in committing these crimes were largely identical: pecuniary gain. The second factor weighs in favor of consecutive sentences, as each robbery was a separate act or threat of violence. The third factor, which considers spatial and temporal similarity, is most similar to the *N.J.R.E. 404(b)* analysis, **[*20]** but in this context supports consecutive sentences. Although the crimes all occurred near Route 1, and within several weeks of each other, "a single period of aberrant behavior," *Yarbough, supra, 100 N.J. at 644*, implies a much closer relationship than the facts here indicate. Additionally, each crime involved a separate victim, factor four, and supports consecutive sentences. Finally, the imposed crimes were not so numerous, factor five, as to make consecutive sentencing unjust.

Judge Mulvihill did not abuse his discretion in concluding that the crimes were separate and distinct under *Yarbough*.

Finally, defendant raises an argument as to the impact of Muslim's prior plea to the eluding charge, the same charge that was pressed against defendant and resulted in a conviction. The State concedes that the eluding charge is personal to a single individual and only one person can be convicted of the offense.

While we find the issue troublesome, we do not see it as a basis for overturning defendant's conviction as to that offense. In fact, at trial, Muslim was called as a defense witness. He claimed that he was driving the vehicle that resulted in the police chase and, ultimately, the eluding **[*21]** charge.

He, too, was charged with eluding, and prior to defendant's trial, Muslim entered a plea to eluding. While we have not been provided a copy of the transcript of Muslim's plea, he indicated at defendant's trial that he informed the plea judge that he was driving the vehicle. The plea was entered, and Muslim was sentenced.

Clearly, the jury gave little credit to Muslim's testimony as the jurors convicted defendant of eluding. We are concerned, however, about the process and procedure here.

The State concedes that only one defendant can be convicted of eluding, and the State cannot seek the conviction of both Muslim and defendant for this offense. Moreover, the State agrees that the offense, under the facts presented here, is not susceptible to accomplice liability. Since, at trial, the State chose to proceed against defendant on the eluding charge, even after Muslim had plead guilty to the offense and had been sentenced, Muslim's conviction may be subject to collateral attack. We need not address that issue on defendant's appeal; however, we refer this matter to the attention of both the prosecutor and public defender to pursue such action as may be appropriate.

Affirmed.

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