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Rebecca Livengood
Skadden Fellow

VIA UNITED PARCEL SERVICE

September 9, 2016

Mark Neary, Clerk
Supreme Court of New Jersey
Hughes Justice Complex
25 Market Street
Trenton, NJ 08625-0970

Re: State of New Jersey v. S.S.
Docket No.: A-5706-14T3

Dear Mr. Neary:

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 nine 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 September 9, 2016;
3. Proposed brief;
4. Certification of Service.

Please file the same. Enclosed is a check to cover the filing fee.

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: Joseph J. Russo, Deputy Public Defender
John R. Mulkeen, Assistant Prosecutor

SUPREME COURT OF NEW JERSEY
DOCKET NO.: A-5706-14T3

STATE OF NEW JERSEY, Plaintiff-Respondent, v. S.S., Defendant-Appellant.	**CRIMINAL ACTION** ON APPEAL FROM A JUNE 25, 2015 LAW DIVISION ORDER SAT BELOW: Hon. Carmen H. Alvarez and Thomas V. Manahan **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:

Joseph J. Russo, Deputy Public Defender
State of New Jersey, Office of the Public Defender
Hudson County Regional Office
438 Summit Avenue
Jersey City, NJ 07306
Attorney for Defendant

John R. Mulkeen, Assistant Prosecutor, Hudson County
595 Newark Avenue, 6th Floor
Jersey City, NJ 07306
Attorney for Plaintiff

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: September 9, 2016

Alicia Rogers

SUPREME COURT OF NEW JERSEY
DOCKET NO.: A-5706-14T3

STATE OF NEW JERSEY, Plaintiff-Respondent, v. S.S., Defendant-Appellant.	**CRIMINAL ACTION** ON APPEAL FROM A JUNE 25, 2015 LAW DIVISION ORDER SAT BELOW: Hon. Carmen H. Alvarez and Thomas V. Manahan **MOTION FOR LEAVE TO SUBMIT A BRIEF AND PARTICIPATE IN ORAL ARGUMENT AS *AMICUS CURIAE***

PLEASE TAKE NOTICE that the American Civil Liberties Union of New Jersey ("ACLU-NJ") hereby moves for leave to file the enclosed brief and participate in oral argument as *amicus curiae* in the above-referenced action currently pending before the Supreme Court of New Jersey. In support of this motion, ACLU-NJ relies upon the attached Certification of Rebecca Livengood dated September 9, 2016.

To:

Joseph J. Russo, Deputy Public Defender
State of New Jersey, Office of the Public Defender
Hudson County Regional Office
438 Summit Avenue
Jersey City, NJ 07306
Attorney for Defendant

John R. Mulkeen, Assistant Prosecutor, Hudson County
595 Newark Avenue, 6th Floor
Jersey City, NJ 07306
Attorney for Plaintiff

Date: September 9, 2016

Rebecca Livengood (028122012)
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION
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Counsel for proposed *Amicus*

SUPREME COURT OF NEW JERSEY
DOCKET NO.: A-5706-14T3

STATE OF NEW JERSEY, Plaintiff-Respondent, v. S.S., Defendant-Appellant.	**CRIMINAL ACTION** ON APPEAL FROM A JUNE 25, 2015 LAW DIVISION ORDER SAT BELOW: Hon. Carmen H. Alvarez and Thomas V. Manahan **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-NJ has participated in a wide variety of cases, directly representing parties or in an *amicus curiae* capacity, involving search and seizure issues. *See, e.g., State v. Coles*, 218 *N.J.* 322 (2014) (holding that illegal detention of defendant vitiated consent given by another); *State v. Earls*, 214 *N.J.* 564 (2013) (recognizing expectation of privacy in cell phone location information); *State v. Hinton*, 216 *N.J.* 211 (2013) (finding no constitutionally implicated search where eviction proceedings had advanced to lock-out stage); *State v. Harris*, 211 *N.J.* 566 (2012) (contesting scope of special needs search under PDVA); *State v. Shannon*, 210 *N.J.* 225 (2012) (dismissing challenge to *Pena-Flores* rule for automobile searches); *State v. Best*, 201 *N.J.* 100 (2010) (challenging special needs searches in school parking lots); *State v. Reid*, 194 *N.J.* 386 (2008) (finding expectation of privacy in Internet Service Provider records); *A.A. ex rel. B.A. v. Attorney General of New Jersey*, 189 *N.J.* 128 (2007) (challenging DNA testing of juvenile offenders); *State v. Frankel*, 179 *N.J.* 586 (2004) (determining parameters of emergency aid doctrine); *Joye v. Hunterdon Central Reg'l High School Brd. Of Ed.*, 176 *N.J.* 568

(2003) (challenging random student drug testing); *State v. Carty*, 170 *N.J.* 632 (2002) (finding State Constitution requires reasonable suspicion of criminal activity prior to police seeking consent to search lawfully stopped motor vehicle); *State v. Ravotto*, 169 *N.J.* 227 (2001) (determining that police used unreasonable force in obtaining a blood sample from a DWI suspect where suspect had consented to breathalyzer test); *State in the interest of J.G., N.S. and J.T.*, 151 *N.J.* 565 (1997) (challenging requirement of HIV/AIDS test for those charged with sexual assault); *State v. Novembrino*, 105 *N.J.* 95 (1987) (holding that there is no good faith exception to the exclusionary rule under the State Constitution).

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: September 9, 2016

Rebecca Livengood

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REBECCA LIVENGOOD, ESQ.
Skadden Fellow
973-854-1733
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September 9, 2016

VIA UNITED PARCEL SERVICE

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625
(609) 292-4837

Re: *State v. S.S.*, A-84-15 (077486)
App. Div. Docket No. A-5706-14T3

Honorable Chief Justice and Associate Justices:

Please accept this letter brief in lieu of a more formal submission from *amicus curiae* the American Civil Liberties Union of New Jersey (ACLU-NJ).

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SUMMARY OF ARGUMENT

Unlike federal law, New Jersey law does not require a suspect to invoke his right to silence in a clear, unequivocal manner. In a custodial interrogation, if a suspect, through words or actions, equivocally indicates that he wishes to remain silent, New Jersey law requires police to either cease questioning or to ask clarifying questions to determine whether the suspect has invoked his right to silence.

This deviation from the federal test - which requires an explicit invocation - permits courts to engage in a totality of the circumstances test to determine invocation in an effort to provide more protection for the fundamental right to silence.

One danger of totality of the circumstances review, however, is that courts may apply it in a subjective manner that imports impermissible racial biases and runs afoul of the equal protection guarantee of the New Jersey and federal constitutions.

The Appellate Division's application of the totality of the circumstances test here embodied that danger; the Appellate Division found that, even though S.S. used language nearly identical to language this Court has found sufficient to invoke the right in the past, his tone showed that he did not really mean what he said.

As many scholars have observed, centuries of coercive and violent interactions with police have led many Black men to adopt a calm and deferential tone when dealing with law enforcement. It was this very calm that the Appellate Division cited in finding that S.S. had not invoked his right to silence. The equal protection concerns here are thus particularly obvious, but even in less clear cases, if courts may subject explicit invocations of the right to a totality of the circumstances test that considers tone, there is a risk of undermining equal protection.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For the purposes of this appeal, *amicus curiae* ACLU-NJ accepts the facts and procedural history as recounted in the Supplemental Brief on Behalf of Defendant-Appellant S.S., with the following addition: The ACLU-NJ filed a Motion for Leave to Appear as *Amicus Curiae* simultaneously with this letter brief. *R.* 1:13-9.

Amicus also restates the following facts for clarity:

The interrogation at issue concerned the alleged sexual assault by S.S. of his daughter. S.S. was 24 at the time of the interview. *See* 1T3:21.[1] During the interrogation at the police station, Detective Polly Hans read S.S. the warnings required by

[1] 1T refers to the August 25, 2009 interrogation of S.S., appended to the supplemental brief on behalf of Defendant-Appellant.

Miranda v. Arizona, 384 *U.S.* 436 (1966), and began questioning him. After about forty-five minutes, during which Hans primarily elicited background information, Sergeant Kenneth Kolich entered the room and joined the interrogation. About fifteen minutes later, Kolich pressed S.S. on his denial of guilt, saying, "there's something inside you want to say, and you're fighting it." 1T73:12-14. S.S. responded, "No, that's all I got to say. That's it." *Id.* at 73:15-16. Kolich and Hans continued interrogating S.S. Kolich asked S.S. again why his daughter would say he had assaulted her if it wasn't true. S.S. responded, "I don't know. That's all I can say." *Id.* at 75:12-13. A few minutes later, Kolich suspended the interrogation for about forty-five minutes. He and Hans then resumed the interrogation, and Kolich asked, "Is there anything that you thought about? Anything you want to tell us?" S.S. responded, "No." A few minutes later, S.S. asked if Hans could leave the room so he could speak to Kolich alone. When he was speaking to Kolich, he told him he had engaged in the alleged conduct.

The trial court found that when S.S. said, "That's all I got to say, that's it," he unequivocally invoked his right to

silence, and the interview should have ended there. *See* 7T14:17-19.[2]

The Appellate Division reversed. The court acknowledged that "[i]f considered exclusively from the written statement, at a minimum, defendant's words, in accordance with *Johnson*, warranted exploration by the officers." *State v. S.S.*, No. A-5706-14T3, 2016 *N.J. Super. Unpub. LEXIS* 559, at *8 (App. Div. 2016) (hereinafter "*S.S.*") (citing *State v. Johnson*, 120 *N.J.* 263 (1990)). However, based on its *de novo* review of the video, the court concluded that "defendant's words and silences, when witnessed on the videotape, did not require exploration by the officers, or that the questioning stop." *Id.* at *9. Specifically, "[d]efendant, who appeared composed, spoke in quiet tones. His demeanor, until he confessed, was tense but calm." *Id.* The Appellate Division continued, "[i]t is clear from the defendant's level of unchanged tone when he responded that he meant he had no explanation for his daughter's conduct. He had said what he was going to say about the subject." *Id.* at *11. The Appellate Division similarly rejected S.S.'s other statements as invocations of silence: "it appears to us from defendant's even tone of voice that he means that he is at a loss for words to explain the reason his daughter would have

[2] 7T refers to the June 25, 2015 oral decision of the trial court, appended to the Supplemental Brief on behalf of Defendant-Appellant.

accused him. It simply does not, in context or in tone, sound like an invocation of the right to silence." With respect to S.S.'s negative response after the break to the question of whether he had anything more to say, the Appellate Division concluded, "from defendant's tone and in the context of the flow of the conversation, it seems clear that defendant was only denying culpability, not that he was expressing the desire to stop the questioning." *Id.*

ARGUMENT

I. THE APPELLATE DIVISION'S FINDING OF NO WAIVER FLOUTS NEW JERSEY INVOCATION LAW AND CREATES INCENTIVES THAT UNDERMINE *MIRANDA*'S PROTECTION. (NOT RAISED BELOW)

New Jersey has long rejected the federal approach that a suspect invoking the right to silence must make "a clear and unambiguous assertion of the right." *State v. Diaz-Bridges*, 208 *N.J.* 544, 564 (2011). As this Court noted in *Diaz-Bridges*, though the United States Supreme Court in *Berghuis v. Thompkins*, 560 *U.S.* 370 (2010), affirmed the requirement of a clear and unambiguous assertion, New Jersey continues to employ a "totality of the circumstances approach that focuses on the reasonable interpretation of defendant's words and behaviors." *Diaz-Bridges*, 208 *N.J.* at 564.

New Jersey diverges from the federal approach out of a desire to protect the fundamental right against self-

incrimination. *See, e.g.*, *State v. Bey*, 112 *N.J.* 45, 65 (1988) ("*Bey I*") (citing *State v. McCloskey*, 90 *N.J.* 18, 25 (1982) for the proposition that "courts assume defendants seek the advantage of basic protections such as the right to remain silent, and will 'indulge every reasonable presumption against waiver'"); *State v. Presha*, 163 *N.J.* 304, 312-13 (2000) ("The privilege against self-crimination, as set forth in the Fifth Amendment to the United States Constitution, is one of the most important protections of the criminal law."). As this Court has explained in the related and analogous context of the right to counsel, "courts interpret equivocal requests for counsel in the light most favorable to the defendant" because "the right to counsel is fundamental . . . ." *McCloskey*, 90 *N.J.* at 26 n.1. Similarly, in invoking the right to silence, "[a]ny words or conduct that reasonably appear to be inconsistent with defendant's willingness to discuss his case with the police are tantamount to an invocation of the privilege against self-incrimination." *State v. Bey (Bey II)*, 112 *N.J.* 123, 135 (1988).

Thus, a "suspect is not required to express a desire to terminate interrogation with the utmost of legal precision . . . [A]n equivocal indication of a desire to remain silent, like an unequivocal indication, suffices to invoke *Miranda*'s requirement that the interrogation cease." *Johnson*, 120 *N.J.* at 281 (quotation marks omitted). Once a suspect has invoked the right,

"it must be 'scrupulously honored.'" *Id.* at 282 (quoting *Michigan v. Mosely*, 423 *U.S.* 96, 102-03 (1975)).

If a suspect invokes the right in an equivocal manner, such that "the police are reasonably unsure whether the suspect was asserting that right, they 'may ask questions designed to clarify whether the suspect intended to invoke his right to remain silent.'" *Id.* at 283 (quoting *Christopher v. Florida*, 824 *F.*2d 838, 842 (8th Cir. 1987)). Where police fail to ask clarifying questions and simply continue the interrogation after an equivocal assertion, they have not scrupulously honored the right, and a subsequent confession must be suppressed. This is precisely what happened in *Johnson*: "[t]he officers failed to clarify defendant's meaning. They continued defendant's interrogation as if nothing had happened . . . [t]he failure of interrogating detectives to have scrupulously honored defendant's right . . . makes inescapable the conclusion that defendant's subsequent oral confession had been unconstitutionally compelled" and "is therefore inadmissible in the State's case-in-chief." 120 *N.J.* at 284-85.

S.S. here used words nearly identical to those that this Court has found to invoke the right to silence in the past, saying, "[t]hat's all I got to say, that's it." In *Johnson*, this Court observed, "a suspect who has nothing else to say, or who does not want to talk about the crime, has asserted the right to

remain silent, thereby requiring the police immediately to stop questioning." 120 *N.J.* at 281 (quotation marks and citations removed).

If S.S.'s conduct rendered the statement unclear, it was the officers' obligation to ask clarifying questions to determine whether he was invoking his right to silence. *Johnson*, 120 *N.J.* at 284-85. The failure to clarify was the fault of the officers. *See Johnson*, 120 *N.J.* at 284 ("[I]t was not defendant's obligation to state his position more clearly; the police officers had the duty to determine specifically whether defendant's uncooperative responses constituted an assertion of the right to cut off questioning."). This error results in suppression under *Johnson*.

A contrary rule would encourage police not to ask clarifying questions when a suspect's actions suggest that words that appear to invoke the right to silence are in fact ambiguous. Officers would have every incentive to continue with the interview under those circumstances. This Court has roundly rejected such conduct in the past, *Bey I*, 112 *N.J.* at 65, n.10; *State v. Wright*, 97 *N.J.* 113, 120 n.4 (1984), and it should not allow it here.

II. REQUIRING SUSPECTS TO INVOKE THE RIGHT TO REMAIN SILENT USING A PARTICULAR TONE RAISES EQUAL PROTECTION CONCERNS. (NOT RAISED BELOW)

The Appellate Division's approach - whereby ambiguity created by the officers' failure to clarify the defendant's statement benefits the State - is particularly troubling in this case because it raises equal protection concerns.

Article I, Paragraph 1 of the New Jersey Constitution "protects against injustice and against the unequal treatment of those who should be treated alike." *Lewis v. Harris*, 188 *N.J.* 415, 442 (2006) (citations omitted). Affording suspects disparate constitutional protection based on race violates the New Jersey and the United States constitutional equal protection guarantees. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 *U.S.* 127, 128 (1994) (Jury selection based on race is impermissible because "potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."); *State v. Maryland*, 167 *N.J.* 471, 485 (2001) (observing that "[t]he Equal Protection Clause of the Fourteenth Amendment requires that the selection of a person for a field inquiry . . . may not be based solely on that person's race . . . ." and holding that Article I, paragraph 1 sets the same standard).

As described above, New Jersey courts have sought to ensure that all defendants equally enjoy the protection of the right to silence by allowing totality-of-the-circumstances review in the

absence of an explicit invocation. One downside of totality-of-the-circumstances tests, however, is that they are subjective assessments, and judges may apply them inconsistently and in light of their own biases and cultural understandings. *See, e.g., Crawford v. Washington*, 541 *U.S.* 36, 63 (2004) (questioning the reliability test for admissibility in the Confrontation Clause context on the ground that "[r]eliability is an amorphous, if not entirely subjective, concept" that existing multi-factor tests do little to clarify because "[w]hether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them," and so "[s]ome courts wind up attaching the same significance to opposite facts."); Hon. Sonya Sotomayor, *Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation*, 13 La Raza L.J. 87, 92 (2002) ("Whether born from experience or inherent physiological or cultural differences . . . our gender and national origins may and will make a difference in our judging."); cf. Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 Mich. J. Race & L. 261, 316-17 (1996) (cataloguing ways in which race may affect credibility determinations due to conscious and unconscious biases and stereotypes) (hereinafter "Johnson").

The equal protection concern is that where judges' biases and understandings accord with those of some suspects but not others, similarly situated defendants will not be treated similarly, based on the impermissible factor of race. *See* Johnson at 339 ("[E]qual protection arguments constrain race and credibility inferences made by juries and courts."). The current New Jersey test limits this danger in two ways: first, the test recognizes that an unequivocal invocation of the right is sufficient, such that all suspects who unequivocally express a desire to remain silent should be equally protected. Second, by requiring clarification by police in the event of an ambiguous assertion of the right, the standard demands that police investigate and cease questioning in response to the wider variety of equivocal assertions. Though the New Jersey standard mitigates to some extent the dangers of unequal protection on the basis of race, the Appellate Division did not apply that test faithfully here.

Instead of recognizing the clear invocation of the right, the Appellate Division based its conclusion that S.S. had not asserted his right to remain silent on the fact that he "appeared composed [and] spoke in quiet tones. His demeanor, until he confessed, was tense but calm." *S.S.* at *9. Later, the panel observed, "[i]t is clear from the defendant's level unchanged tone when he responded that the meant he had no

explanation for his daughter's conduct." *Id.* at *10. Again: "it appears to us from defendant's even tone of voice that he means that he is at a loss for words to explain the reason his daughter would have accused him." *Id.* at *11.

Basing the conclusion that S.S. did not invoke his right to silence on the evenness of his tone raises equal protection concerns because evenness of tone may reasonably have been a response by S.S., as a young Black man, to encounters with law enforcement. Many scholars have observed a phenomenon that people of color living in heavily-policed communities experience daily: because of the life-or-death stakes of encounters with the police, many young Black men learn to speak to police officers in deferential, even tones out of a need to protect themselves. As one scholar summarized, "the racial conventions of black and white police encounters" are:

> "Don't move. Don't turn around. Don't give some rookie an excuse to shoot you" . . . if you get pulled over by the police "never get into a verbal confrontation . . . Never! Comply with the officer. If it means getting down on the ground, then get down on the ground. Comply with whatever the officer is asking you to do."
>
> [Devon W. Carbado, *Eracing the Fourth Amendment*, 100 MICH. L. REV. 946, 953-54 (2002) (quoting Christopher A. Darden, IN CONTEMPT 110 (1996)) (hereinafter "Carbado"); Kenneth Meeks, DRIVING WHILE BLACK: HIGHWAYS, SHOPPING MALLS, TAXICABS, SIDEWALKS: WHAT TO DO IF YOU ARE A VICTIM OF RACIAL PROFILING 138 (2000).]

This need for Black men to interact with police in quiet, measured tones is widely acknowledged in academic and popular commentary. *See, e.g.*, Jerome McCristal Culp, Jr., *Notes From California: Rodney King and the Race Question*, 70 DENV. U. L. REV. 199, 200 (according to the "rules of engagement of black malehood," Black men must "make no quick moves, remove any possibility of danger and never give offense to danger."); Charles Blow, "Library Visit, Then Held at Gunpoint," *New York Times*, Jan. 26, 2015 (describing a police encounter where his son, who is Black, was detained at gunpoint: "My son was unarmed, possessed no plunder, obeyed all instructions, answered all questions, did not attempt to flee or resist in any way . . . I was exceedingly happy I had talked to him about how to conduct himself if a situation like this ever occurred.").

The Appellate Division relied on this very tone in finding that S.S. did not intend to invoke his right, rendering the conciliatory tactic Black men have had to adopt for self-protection a basis for finding that an explicit invocation of the right to silence was not in fact an invocation of that right. Such reasoning cannot be squared with the equal protection guarantees of the New Jersey and United States Constitutions.

Moreover, while the instant case involves a young, Black, male defendant, the equal protection concern it raises is not

limited to Black defendants. As one article posits, "behavioral science research on deception strongly supports th[e] thesis of a 'Demeanor Gap'" whereby "race changes the way that people determine credibility, what they look for when they attempt to detect deception, and what witnesses will do when they try to appear sincere" such that "race is . . . different from characteristics such as age, education level, or economic class," because "[r]ace involves cultural differences that change the way that people communicate, present themselves, and process information." Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 54, 67 (2000). Other factors that may affect treatment based on race "are limited English proficiency or heavily accented English." Carbado at 1001 n.229 (citing Angelo N. Ancheta, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 75-77 (1998)).

The fundamental concern is that when a court looks beyond an explicit invocation of a right to determine meaning by tone, it risks misinterpreting a defendant's statement according to prohibited criteria, resulting in like defendants receiving unequal treatment according to race.[3]

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[3] Moreover, social science research raises serious questions about the utility of tone in understanding meaning. The cultural implications of tone described above offer one reason to question the accuracy of inferring meaning from tone. For example, "most people believe that stress increases the reliability of an identification (e.g., "I will never forget

New Jersey's invocation test accounts for these concerns to some extent, but the Appellate Division deviated from that test here by relying on tone rather than on the express meaning of S.S.'s words, and in doing so, raised a concern about equal treatment based on race.

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that face!"), when in fact stress actually detracts from reliability." Johnson at 313 (quoting David B. Fishman & Elizabeth F. Loftus, *Expert Psychological Testimony on Eyewitness Identification*, 4 LAW & PSYCHOL. REV. 87, 92 (1978) for the conclusion that "in general, extreme stress in an identification situation results in less reliable testimony.").

CONCLUSION

A faithful application of *Johnson* and its progeny requires finding that S.S. invoked his right to remain silent, and the police should have honored that invocation by ceasing questioning or asking clarifying questions. Their failure to do so violated the rule set forth in *Miranda* and long observed in New Jersey courts, and so the subsequent statements should have been suppressed. Finding otherwise based on tone raises the concern that defendants will not receive equal protection of the laws because of differences in tone associated with race. For these reasons, the Court should reverse the holding of the Appellate Division.

Respectfully submitted,

REBECCA LIVENGOOD (ID #028122012)
ALEXANDER SHALOM
EDWARD BAROCAS
JEANNE LOCICERO
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION
Counsel for *Amicus Curiae*

Dated: September 9, 2016