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September 23, 2020

Hon. Janet DiFiore
Chief Judge, New York Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York

RE: *People v Nolis Ogando* (APL-2020-00052)
Amicus Curiae Brief Pursuant to Rule 500.23 on behalf of the New York State Association of Criminal Defense Lawyers, New York State Defenders Association, the Chief Defender's Association of New York, the Center for Appellate Litigation, and the Monroe County Public Defender's Office

Dear Judge DiFiore:

This brief is submitted on behalf of the New York State Association of Criminal Defense Lawyers, the New York State Defenders Association, the Chief Defender's Association of New York, the Center for Appellate Litigation, and the Monroe County Public Defender's Office, as *amici curiae* in the above-referenced appeal.[1] This Court has granted leave to appeal in Mr. Ogando's case (and several others) to further address a number of procedural concerns related to appeal waivers following this Court's recent decision in *People v Thomas* (34 NY 3d 545 [2019]).

As discussed below, the *amici* take the position that this Court should either abandon the practice of appeal waivers or make certain improvements on how they may be used. First, this Court should completely abandon the practice of permitting appeal waivers (*People v Seaberg*, 74 NY2d 1 [1989]). This Court disallows similar

[1] Pursuant to Court Rule § 500.1(f), all of the *amici* state that they have no parents, subsidiaries, or affiliates. Each of the *amici* represents indigent criminal defendants at all levels of the New York State criminal justice system or is a membership organization that consists of attorneys who provide such representation. As such, the *amici* have significant experience and insight regarding the issues raised herein.

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agreements that reduce transparency in the legal system because they are against public policy. Second, if this Court does not completely abandon appeal waivers, it should rule that they no longer apply to suppression rulings. Suppression rulings implicate the "important public policies and societal interests" that this Court said should not be subject to appeal waivers. Finally, and only if this Court continues the practice of appeal waivers, this Court should adopt several recommendations outlined below to improve the fairness and predictability of such appeal waivers.

I: CONTRACTS SIMILAR TO APPEAL WAIVERS ARE DISALLOWED BECAUSE THEY REDUCE THE TRANSPARENCY OF THE LEGAL SYSTEM

The right to appeal from a judgment of conviction to an intermediate appellate court in a criminal case is a right "of constitutional dimension" (*People v Pollenz*, 67 NY2d 264, 268 [1986]; *citing* NYS Const. Art. VI, § 4[k]; *see also,* CPL § 450.10[1]). In accord with this important right, the legislature has thought it wise to grant the intermediate appellate courts broad statutory authority to correct a wide variety of wrong decisions in criminal cases (CPL § 470.15). The appellate courts can reverse criminal convictions "[u]pon the facts" and as a "matter of discretion in the interests of justice" (CPL § 470.15[3][b] and [c]). Indeed, this Court has referred to the intermeidate court's factual review power as the, "linchpin of our constitutional and statutory design..." (*People v Bleakley*, 69 NY2d 490, 494 [1987]; *see also, People v Berrios*, 28 NY2d 361, 369 [1971]).

On the whole, these rules of law are an acknowledgment that the criminal justice system operates best when there are broad measures in place to review potential errors. As with all human endeavors, errors are not infrequent. In a 2015 study, the Department of Justice estimated that intermediate appellate courts nationwide reversed, remanded, or modified 13.2% of all appeals filed by criminal defendants (*see,* Waters, Gallegos, Green, and Rozsi, *Criminal Appeals in State Courts*, Bureau of Justice Statistics [September 2015], p. 5, fig. 2). According to the same study, approximately 17% of challenges to excessive sentences succeeded, 13% of challenges to guilty pleas succeeded, and 10% of challenges to suppression rulings succeeded (*Id*, p. 6, fig. 3).

Errors in criminal cases can be catastrophic for the accused. When the criminal justice system errs, lives are destroyed and public confidence in the criminal justice system is eroded. Nonetheless, the public also understands that error is inevitable. When the criminal justice system remedies its errors, the system maintains its integrity because it has publicly admitted its errors and acted to remedy them.

Unacknowledged errors cannot restore public confidence. Moreover, when the system intentionally ignores its errors, the public is left with the impression that the system does not care about its inevitable errors or the lives that the errors destroy. Nonetheless, appeal waivers have become the norm in criminal cases (*People v Batista*, 167 AD3d 69, 81 [2d Dept 2018]), meaning the CPL's system of appellate review is no longer operational. In other words, our current routine operates outside of the clear legislative policy designed to expose errors in the criminal justice system. This routine continues at the expense of public confidence in the rule of law.

The appeal waiver system is at odds with the method of reviewing other errors within the legal profession. For example, the Rules of Professional Conduct prohibit lawyers from negotiating agreements with clients that, "limit[] the lawyer's liability to a client for malpractice" (Rule of Professional Conduct § 1.8[h][1]). This same rule also prohibits an attorney from negotiating agreements prohibiting a client from filing a disciplinary complaint (*Matter of Goldberg*, 82 AD2d 572 [2d Dept 1981][attorney censured for paying complainant $3,500 to withdraw attorney grievances]). There is nationwide agreement that such contracts are against public policy because they erode public confidence in the legal profession.[2] For example,

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[2] *See, State of Oklahoma ex rel. Oklahoma Bar Association v. Colston* (777 P.2d 920 [Okla. 1989][lawyer committed a "clear violation" of former DR 6-102[A] by offering a client $5,000 in exchange for an agreement not to pursue a grievance]); Michigan Informal Opinion RI-257 (1996)(violation of Model Rule 1.8[h] to arbitrate disputes arising out of the representation that relate to the lawyer's ethical conduct); *see also*, Ohio Supreme Court Op. 96-9 (same); *See, People v Moffitt* (801 P2d 1197, 1198-99 [Colo. 1990][lawyer violated DR 1-102(A)(5) by attempting to condition settlement of a malpractice claim upon the client's agreement not to file a grievance against him; deemed a subversion of the grievance process]); *see also, Attorney Grievance Commission of Maryland v. Stancil*, (463 A.2d 789, 791 [Md. 1983][lawyer violated DR 1-102(A)(5) by paying a client $1,400 "at least in part to discourage (the client) from filing a complaint with The Commission concerning the

Arizona Ethics Opinion 91-23 explains that, "agreements limiting an attorney's exposure to disciplinary action have the effect of undermining the Bar's efforts at self-regulation... As a matter of public policy, every attorney must be accountable for his misconduct, and should not be able to contract his way out of it".

The Rules of Professional Conduct reflect the precept that prohibiting lawyers from resolving disciplinary complaints through the expedient of civil settlement is a small price to pay for maintaining control over the regulation of the profession. Naturally, it would be more efficient for attorneys and their clients to negotiate and settle disagreements privately. Moreover, allowing such agreements would be in accord with another public policy goal, namely, the policy in favor of individual contract rights (*Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62 [1978]). Nonetheless, it is understood that the right to engage in contract negotiations must bend when the integrity of the legal system is at stake.

Judges are also subject to a non-waivable system of accountability (*see* NY Const. Art VI, § 22; Judiciary Law § 44[7]). Although the records of judicial disciplinary complaints are initially confidential, a judge has the option to ask for a public hearing of the alleged misconduct (Judiciary Law § 44[4]). Once a judge has been admonished, censured, removed, or retired for misconduct, the report leading to the judge's discipline, "shall be made available for public inspection..." (Judiciary Law § 44[7]). The judge is then permitted to seek review at this Court and ask this Court to review all of the factual and legal conclusions from the underlying hearing (Judiciary Law § 44[7] and [9]).

These rules for judicial misconduct proceedings exist because, "the State has an overriding interest in the integrity and impartiality of the judiciary" (*Nicholson v State Com on Judicial Conduct*, 50 NY2d 597, 607 [1980]). This Court approved the use of

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respondent's conduct."]); District of Columbia Ethics Op. 260 (1995)("Allowing a lawyer to bargain with a client to avoid procedures would significantly impair the Bar's ability to regulate its members as well as protect the courts, the legal profession, and the public's confidence in the integrity and competence of the judicial system, thereby 'seriously interfer[ing] with the administration of justice"); *See also*, Maine Ethics Op. 68 (1986); North Carolina Ethics Op. 83 (1989); Connecticut Informal Ethics Op. 97-13; Connecticut Informal Ethics Op. 95-29.

the "preponderance of the evidence" standard of proof in judicial misconduct proceedings (thereby making it easier to remove disciplined judges than it would be under a higher standard) because, "the interests of the State and of the public in a competent judiciary is superior to the interest of the individual Judge to continue in office" under the higher standard of proof (*In re Seiffert*, 65 NY2d 278, 280 [1985]).

In short, public policy does not allow attorneys or judges to obscure errors or potential misconduct from review. Attorneys cannot avoid scrutiny by making a contract to obscure it. In cases of judicial misconduct, disciplinary findings are made public and this Court has decided to cast a broad net to eliminate as much potential misconduct as possible. In both instances, the public policy is aligned toward broad review of errors and misconduct, with the goal of promoting faith in the legal system. Notably, New York's constitutional and statutory structure requires the same thing in criminal proceedings, but appeal waivers are allowed to subvert that policy.

Seaberg has been incorrect from the beginning. In the thirty years since *Seaberg*, it has become apparent that appeal waivers do not serve their intended purpose. Instead, their only reliable impact is to reduce accountability and public confidence in the law. Under these circumstances, this Court is free to depart from the confines of *stare decisis*. As Chief Judge Cardozo observed:

> "When a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment... There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years"

(B. Cardozo, *The Nature of the Judicial Process* [1921] at 150-151).

This Court should rule that appeal waivers are no longer permitted by New York's public policy of broad appellate review and deep concern for the integrity of the criminal justice system. Doing so would simply reaffirm legal precepts that have long governed the criminal justice system. Plus, the court would promote the legislature's goal of ensuring broad opportunities for appellate review of errors in criminal cases.

II: IF THIS COURT DOES NOT COMPLETELY ABANDON APPEAL WAIVERS ON PUBLIC POLICY GROUNDS, IT SHOULD RULE THAT APPEAL WAIVERS DO NOT APPLY TO SUPPRESSION DECISIONS

Even if this Court does not completely abandon appeal waivers, it should at least rule that they can no longer apply to shield suppression decisions from appellate review. Abandoning appeal waivers in suppression cases would promote the legislature's goal of a broad appellate review for suppression decisions (CPL § 710.70[2]).

The purpose of the exclusionary rule is to deter police misconduct (*People v Stith*, 69 NY2d 313, 319 [1987]). The exclusionary rule serves as a check on law enforcement in the same way that disciplinary proceedings serve as a check on the bar and the judiciary. Yet, the widespread use of appeal waivers has led to a, "proliferation of unreviewable legal errors" (*People v Holz*, 35 NY3d 55, 62 [2020]).

When this Court decided *Seaberg* in 1989, it probably could not have imagined how DNA evidence and the prevalence of cell phone cameras would definitively expose the failures of our criminal justice system (*People v Tiger*, 32 NY3d 91, 98 [2018]["the system is far more imperfect than previously believed"]). Indeed, it is now clear that wrongful convictions are a prevalent and important problem in the criminal justice system (*see, Preliminary Report of the New York State Bar Association's Task Force on Wrongful Convictions*, January 30, 2009).

In September of 2020, the National Registry of Exonerations published a report examining all of the 2,663 known exonerations in the United States since

1989, which was the same year *Seaberg* was decided (Gross, Possley, Roll, and Stephens, *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, National Registry of Exonerations, [September 1, 2020]).[3] The report explained that, "[p]olice officers committed misconduct in 35% of cases. They were responsible for more of the witness tampering, misconduct in interrogation, and fabricating evidence -- and a great deal of concealing exculpatory evidence and perjury at trial" (*Id*, at iv). Overall, the report concluded that, "[o]fficial misconduct contributed to the false convictions of 54% of defendants who were later exonerated." (*Id*, at iii).

A 2018 article in the New York Times documented the continuing problem of false police testimony (Goldstein, *"Testilying" by Police: A Stubborn Problem*, New York Times, March 18, 2018). Stories of police falsification have become so pervasive that the moniker "testilying" has developed to describe the practice of the police giving false testimony (*see* Capers, *Crime, Legitimacy, and Testilying*, 83 Ind LJ 835, 836 [2008][noting that in New York a commission founded to investigate police corruption found that perjury "was so common in certain precincts" that it spawned the use of the term "testilying"]). Not unexpectedly, the relationship between police perjury and wrongful convictions has been well documented (Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 Was U L Rev [2013]; *People v Warney*, 299 AD2d 956 [4th Dept 2002][defendant later exonerated by DNA evidence "gave accurate descriptions of many details of the crime scene"]).

The public is aware of this problem. In a 2016 study published by the Cato Institute, 49% of respondents said that "most" police officers think they are above the law and 46% said the police are "generally not" held accountable for misconduct (Ekins, *Policing in America: Understanding Public Attitudes Toward the Police. Results from a National Survey*, Cato Institute [2016], page 4).[4] 65% of respondents said they believe that "police officers regularly racially profile Americans" and 58% said that the

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[3]www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf

[4] https://www.cato.org/survey-reports/policing-america

criminal justice system "fails to treat everyone equally before the law" (*Id*, at 3-4). Among minority groups, confidence in the police is even lower (*Id*, at 3-4)

In suppression cases, criminal courts must regularly evaluate whether the police have engaged in valid street encounters, whether they have engaged in permissible interrogation tactics, and whether they have collected evidence of identity in a way consistent with due process. In many criminal cases, losing the suppression hearing virtually guarantees a finding of guilt at trial, meaning the suppression hearing is often more important to the defendant than the trial itself. Notably, in cases where a suppression decision is likely important to the outcome (such as drugs and weapon possession) appellate courts reverse between 16% and 19% of the time (*see,* Waters, Gallegos, Green, and Rozsi, *Criminal Appeals in State Courts,* Bureau of Justice Statistics [September 2015], p. 6, fig. 4).

Given the prevalence of police misconduct, its contribution to wrongful convictions, the erosion of public confidence in the police, and the frequency of appellate reversals in such cases, this Court should disallow appeal waivers of suppression issues. Doing so will improve public confidence in the fair administration of justice.

When appeal waivers are allowed in cases where the exclusionary rule would apply, the criminal justice system allows a contract that obscures potential official misconduct or overreach. As discussed in Point I, above, public policy prevents the bar and the judiciary from limiting scrutiny of their own conduct because doing so promotes an important public policy objective. The police, who have daily contact with the citizenry, should be held to at least the same standard as the attorneys and judges in the criminal justice system.

Moreover, there is no good legal reason to allow public prosecutors to obscure errors in a way that other players in the justice system cannot make. Prosecutors are lawyers who must comply with the Rules of Professional Conduct (*Schumer v Holtzman*, 60 NY2d 46 [1983]). Prosecutors are also quasi-judicial officers (*People v Baker*, 99 AD2d 656 [4th Dept 1984]). Like judges, prosecutors are expected to act

solely in the interests of justice (*Berger v United States*, 295 US 78, 88 [1934]). A prosecutor is also a law enforcement official (County Law § 700[1]), but prosecutors are allowed to enter into agreements that would limit review of their own errors or errors committed by other officials, even though lawyers are not allowed to make those types of agreements in similar contexts.

This Court does not permit a party to negotiate for the right to engage in an act that harms the public. For example, in a civil action for a public nuisance, a plaintiff is entitled to a permanent injunction requiring a defendant to abate the nuisance (*Boomer v Atlantic Cement Company, Inc*, 26 NY2d 219 [1970]). This Court has concluded that monetary damages alone are insufficient because, without the injunction, the tortfeasor would be allowed to essentially "buy[] the right to violate the law", which would be "contrary to sound public policy" (*Little Joseph Realty, Inc. v Town of Babylon*, 41 NY2d 738, 744 [1977]).

New York's system of appeal waivers creates the same conditions that this Court sought to avoid in *Boomer* and *Little Joseph Realty*. The waiver allows the prosecution to "buy the right to violate the law" because the prosecutor can offer a favorable plea and/or sentence in cases where it fears reversal on appeal. An individual defendant is likely to jump at such an offer. But the individual defendant's interests in gaining a favorable plea are not necessarily aligned with the public's interest in a fair system of justice. In this way, the appeal waiver system creates an unsavory incentive for the prosecutor to offer waivers in the very worst cases, thereby creating the perception (and reality) that egregious errors will likely go unreviewed. This creates a vicious cycle because reduced accountability simply creates more error and less judicial guidance for future cases.

Over the last several decades, the police have become protected by a strong legal infrastructure that protects the police from judicial and public scrutiny. The rule in *Stone v Powell* prevents federal courts from reviewing Fourth Amendment violations in a *habeas corpus* proceeding (428 US 465 [1976]). The rule in *City of Los Angeles v Lyons*, prevents citizens from seeking an injunction to stop police from using unconstitutional physical restraints (461 US 95 [1983][citizen lacked standing to

challenge police use of chokeholds]).[5] The rule in *Lyons* directs individual plaintiffs to bring civil suits for civil rights violations, but the doctrine of qualified immunity protects the police from accountability, even when their misconduct seems apparent (*see Ziglar v Abbasi*, ___US___ , 137 S Ct 1843, 1871 [2017][Thomas, J., concurring][urging the court to reconsider the doctrine of qualified immunity because the jurisprudence has, "diverged from the historical inquiry mandated by the statute"]). The rule in *Seaberg* is part of this infrastructure because it further shields police from review of their conduct.

The only place where police oversight might occur would be in the criminal justice system, but appeal waivers have allowed the police to avoid full oversight in this context as well. A reasonable police officer might therefore conclude that it is unlikely for any adverse consequences to come from his or her misconduct.

All this Court must do to ensure the proper amount of police scrutiny is to require the type of review that the legislature has established in the CPL. Even if appeal waivers are permitted to continue with respect to other subjects, the issues that are regularly addressed in suppression decisions are simply too weighty to avoid full scrutiny. The integrity of the criminal justice system requires that appeal waivers should no longer apply to suppression decisions.

III: THE JUSTICE SYSTEM DOES NOT EXPERIENCE ANY SIGNIFICANT BENEFIT IN EXCHANGE FOR THE DAMAGE TO PUBLIC CONFIDENCE

The only possible reason for allowing such a system to continue might be if it achieved some other public benefit that offset the decrease in public confidence, but the current routine does not even accomplish that goal.

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[5] Tragically, the practice of chokeholds and neck restraints have continued to the present day, thus setting the conditions for George Floyd's death and the civil unrest that followed (Baker, et al., *Three Words.. 70 cases. The tragic History of 'I Can't Breathe'*, NY Times [June 29, 2020][discussing deaths of Eric Garner, George Floyd, and 68 other people killed in law enforcement custody whose last words included the statement, "I can't breathe"]). A different rule in *Lyons* might have saved lives and improved the overall relationship between the police and the public.

One of the primary arguments in favor of appeal waivers is that they improve efficiency of the appellate system and alleviate court congestion by weeding out frivolous or low-quality appeals. In other similar contexts, this Court has concluded that it is improper to place concerns for court congestion and scheduling above a defendant's constitutional rights (*People v. Foy*, 32 NY 2d 473 [1973][narrowly construing trial court's discretion to deny an adjournment when the protection of a fundamental right is impacted by the request]). Therefore, this Court should not rely on perceived efficiency of the appeal waiver system to overcome constitutional or public policy objections.

Moreover, as discussed above, it is not clear that weeding out low-quality appeals is a guaranteed benefit of the appeal waiver system. The current system also creates strong incentives for prosecutors to require waivers in the most serious cases of misconduct. Of course, defendants with little chance of success on appeal might also choose to waive their rights, but a defendant with little chance of success on appeal is unlikely to achieve much of a benefit in exchange for his waiver. Waivers are a problem when they obscure serious errors. This Court should not tolerate a system that creates incentives for obscuring serious misconduct simply to discourage a defendant from filing an appeal that will ultimately be affirmed.

However, assuming that limiting review of frivolous appeals is the goal of the appellate waiver system, that goal is already addressed by two other procedural mechanisms that do not implicate any constitutional or public policy concerns. The Rules of Professional Conduct already prohibit lawyers from advancing frivolous claims on appeal (Rule 3.1). The Appellate Divisions provide attorneys in criminal cases with a method of informing the court that an appeal is frivolous, thereby resulting in dismissal of the appeal (*see* 22 NYCRR § 1250.11[f]; *Anders v California*, 386 US 738 [1967]; *People v Crawford*, 71 AD 2d 38 [4th Dept 1979]).

A system that allows defense attorneys to evaluate the merits of an appeal is vastly superior to the current appeal waiver system. Instead of having a blanket policy for appeal waivers that creates an incentive to hide cases of misconduct, the Rules of the Appellate Divisions establish a system in which cases are evaluated

individually. Under this procedure, the defendant is provided with an explanation (in the form of defense counsel's *Anders* brief) of why the case is frivolous. Again, this is superior to the appeal waiver system in which the prosecutor or the judge asks the defendant to waive his rights without any inquiry regarding the merits of the appeal. As discussed at length above, this leaves criminal defendants with the impression that judges and prosecutors are not concerned about the possibility of error in the justice system or that judicial and quasi-judicial officials are seeking to obscure error (*People v Benevento*, 91 NY2d 708, 714 [1998]["our legal system is concerned as much with the integrity of the judicial process" as it is with "guilt or innocence"]). Since approximately 49% of Black males will be arrested by age 23 and 38% of white males will be arrested by age 23, a significant percentage of the population is likely to have some contact with this aspect of the criminal justice system,[6] thereby degrading overall confidence in the system.

Moreover, the appeal waiver system does not necessarily result in the filing of fewer appellate briefs. Indeed, appellate waivers simply create appellate litigation about the waiver. A conscientious appellate advocate understands that there are many reasons why an appellate waiver may be invalid and that there are many issues that survive the waiver of the right to appeal. Moreover, the law related to appellate waivers is constantly changing and may continue to change in the future. Therefore, an appellate attorney may typically make an argument that an appellate waiver was invalid because either the law or the specific waiver itself was vague (Rules of Professional Conduct 3.1, comment 1). Moreover, an appellate attorney may always make a non-frivolous request for a change in the law (Rules of Professional Conduct 3.1[b][1]). Having argued that the appeal waiver is invalid, the appellate attorney will then typically ask the court to address the merits of the case. Under this system, neither the appellate court nor the attorneys have done less work. In fact, without the waiver, the appellate court would *only* have to address the merits of the case. It would be more efficient to simply argue about the merits of the case.

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[6] Brame, Bushway, Paternoster, and Turner. *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, Crime & Delinquency, Vol 60, Issue 3, pages 471-486

For all of the reasons stated above, this Court should abandon the practice of appeal waivers. They do not provide any benefit in exchange for the erosion of public confidence in the legal system.

IV: IF THE COURT CONTINUES TO PERMIT APPEAL WAIVERS, IT SHOULD ADOPT SEVERAL IMPROVEMENTS TO THE SYSTEM

To the extent that this Court may choose to continue the appeal waiver system, *amici* propose the following changes to improve the fairness and transparency of the system.

First, the judge taking the waiver should make a finding in every case that the particular waiver is not against public policy. This Court has interpreted *Seaberg* to mean that appeal waivers are valid, "provided that the waiver was voluntarily made and *no important public policies or societal interests are implicated*" (*People v Callahan*, 80 NY2d 273, 277 [1992][emphasis added]). Despite this clear public policy limitation on appeal waivers, courts almost never make an explicit finding that the waiver is not against public policy. This Court should make clear that a waiver can only be valid if the judge taking the waiver finds that the waiver is not against public policy.

Second, a defendant should be informed that he *always* has the right to file a Notice of Appeal, even if he has entered into an otherwise valid waiver.

Third, a defendant should be informed that many legal issues survive valid waivers of the right to appeal (including, importantly, the validity of the waiver itself) and that despite the waiver, he is entitled to the assistance of an attorney to review the transcript of proceedings to determine which issues might still be reviewable on appeal.

Fourth, the judge should confirm that there is harmony between the oral waiver and any written waiver that the defendant might sign. If the oral and written waiver are not in harmony in a material respect, then an appellate court should conclude that the defendant was not properly informed of the waiver. Currently, this

Court permits some disagreement between the written and oral waiver (*People v Bradshaw*, 18 NY3d 257 [2011]), but that rule only interjects confusion and uncertainty for the defendant into the process. Uncertain appellate waivers simply invite litigation of the waiver, thereby defeating the purpose of the waiver itself.

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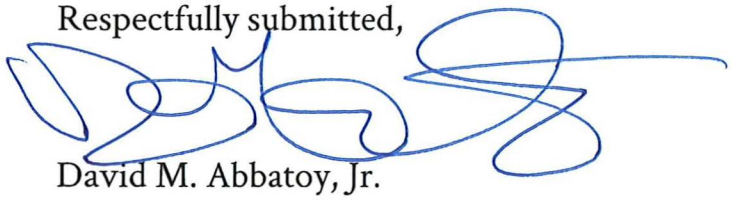
Finally, the *amici* encourage this Court to remove Mr. Ogando's appeal from SSM review and place the matter on full briefing and oral argument. The issues raised in this appeal (and the other cases currently under review addressing appeal waivers) are of statewide importance and would benefit from further discussion and analysis.

Pursuant to Rule 500.11(m), the undersigned certifies that this letter was prepared by computer, and that the total word count is 4,467, as determined by the word-count function of the word processing computer program.

Thank you for your attention to these additional arguments.

Respectfully submitted,



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On Behalf of Amici

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