IN THE IOWA SUPREME COURT

NO. 16-0440
CIVIL

IN THE MATTER OF PROPERTY SEIZED FROM JEAN CARLOS HERRERA AND FERNANDO RODRIGUEZ

JEAN CARLOS HERRERA AND FERNANDO RODRIGUEZ

CLAIMANTS-APPELLANTS.

APPEAL FROM THE IOWA DISTRICT COURT OF POTTAWATTAMIE COUNTY
HONORABLE MARK J. EVELOFF AND HONORABLE GREG W. STEENSLAND

APPELLANTS' FINAL BRIEF

STOWERS & SARCONE PLC
Dean Stowers
West Glen Town Center
650 S. Prairie View Drive, Suite 130
West Des Moines, IA 50266
Telephone: (515) 224-7446
Fax: (515) 225-6215
Email: dean@stowerssarcone.com
ATTORNEY FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Other Authorities

STATEMENT OF THE ISSUES

I. Should a Claimant from whom property was seized be able to have his motion to suppress the fruits of a search and seizure heard before being required to provide testimonial details in an answer to an in rem forfeiture complaint to establish standing, when the Claimant claimed ownership and objected to providing such testimonial details and asserted that such information would be fruit of an illegal search and seizure?

In re Flowers, 474 N.W.2d 546 (Iowa 1991).

Simmons v. United States, 390 U.S. 377 (1968).

Wohlstrom v. Buchanan, 884 P.2d 687 (Ariz. 1994).

II. Did Claimant suffer an unconstitutional penalty for exercising his right to challenge the search and seizure and argue for application of the exclusionary rule in forfeiture proceedings when the district court summarily dismissed his claim to the property and forfeited the property to the State because of his objection to providing testimonial details without first addressing the motion to suppress?

State v. Washington, 832 N.W.2d 650 (Iowa 2013).

Spevack v. Klein, 385 U.S. 511, 514 (1967).

U.S. v. James Daniel Good Real Property, 510 U.S. 43 (1993).

Wohlstrom v. Buchanan, 884 P.2d 687 (Ariz. 1994).

III. Is a Claimant entitled to attorney's fees as a prevailing party under Iowa Code § 809A.12(7) both at the trial court level and on appeal where that Claimant had to litigate his claim to the property for six months and was forced to make numerous filings and motions before the State finally withdrew its claim to the property?

In re Marriage of Roerig, 503 N.W.2d 620 (Iowa App. 1993).

ROUTING STATEMENT AND REQUEST FOR ORAL ARGUMENT

Claimants request that this case be retained by the Iowa Supreme Court. This case presents substantial issues of first impression and constitutional questions as to the proper procedure for a court to employ when a claimant asserts the search and seizure upon which the forfeiture is based were improper. Claimants request 15 minutes at oral argument.

STATEMENT OF THE CASE

A. Nature of the Case

Claimants appeal an order by the district court that found Claimants' Answer to the In Rem Forfeiture Complaint insufficient because it objected to providing testimonial statements as to matters requested therein because claimant argued the search and seizure were unlawful and such information would be fruit of the poisonous tree, and simultaneously forfeited the property. (A[1]144-148). Claimant Rodriguez also appeals an order by the district court after the return of his property denying attorney's fees. (A191-193).

B. Course of Proceedings and Disposition in District Court

Both appeals arose out of the same legal proceedings. On September 12, 2015, Claimant Jean Carlos Herrera was stopped for allegedly travelling 74 m.p.h. in a 70 m.p.h zone. (A57). The officer at the stop detained Claimant Herrera for over 40 minutes, subjecting him to interrogation, detention in a squad car, and three separate criminal background checks. (A65, 67). After 40 minutes had passed, the officer conducted a search of the vehicle. Certain property at issue was seized as a result of this prolonged, illegal seizure and search, including a 1999 Ford Expedition (hereinafter "the vehicle"), soft serve ice cream machine, pelican case, cordless drill and battery, and vacuum pump. (A46).

[1] "A" refers to the Appendix.

Shortly after, counsel for Claimant Rodriguez emailed the county attorney about the property. (A75). Claimant Rodriguez was not present during the stop, but was a family friend of Claimant Herrera and possessed valid title to the vehicle. *See* (A1-2). In the email, counsel stated Claimant Rodriguez would be seeking the vehicle's return as an innocent owner under Iowa Code 809A.5 and fees Rodriguez incurred for contesting that return would be recoverable from the State. After reading the email, the officer believed he must have missed something during the search. (A47-56). The officer filed an application for search warrant, and a *second* search of the vehicle was conducted—this time deconstructive in nature. *Id.* The application was based on the officer's improper contention that nobody would pay an attorney to seek return of a vehicle because the cost to secure the return of the vehicle would exceed the vehicle value. During the second search, U.S. currency was located and seized.

On September 23, 2015, Claimant Rodriguez filed an Application for Prompt Probable Cause Hearing under Iowa Code § 809A.12(3)(a)(1), stating he was the owner of the vehicle and was entitled to its immediate return. (A1-2). A hearing was set, and subsequently continued, on that motion. (A3). In addition, on Sept. 25, 2015, Claimant Rodriguez served upon the county attorney and seizing agency a notarized claim for return of seized property under Iowa Code § 809A.11, again claiming to be an innocent owner. (A28-31). Attached was the title to the

vehicle, showing Claimant Rodriguez as the owner. *Id.* This document was later filed for the record, although Iowa Code § 809A.11 does not require the document to be filed. *Id*.

Parallel to the above proceedings, the State filed an In Rem Forfeiture complaint under Iowa Code § 809A.13 for the seized property. (A4-19). This complaint bore the same case number as Clamant Rodriguez's request for a probable cause hearing and Claim for Return of Property. (A3); (A28-31). This created some confusion as to the proper caption of the pleadings and identification of parties, because the caption and parties were different than—but the case number was the same as—the request for probable cause hearing filed by Rodriguez. (A1-2).

On November 5, 2015, Claimants filed an Answer under Iowa Code § 809A.13 on behalf of Jean Carlos Herrera and Fernando Rodriguez in response to the State's complaint. (A20-22). A Motion to Suppress was then filed, and at the hearing and in subsequent briefing it was made clear the motion was made on behalf of both Herrera and Rodriguez. (A23-24; (A70-73).

On December 10, 2015, counsel for Herrera and Rodriguez traveled to Council Bluffs for a scheduled hearing on the motion to suppress. At the beginning of the hearing on the suppression motion, the State orally raised—for the first time—a surprise argument that the Claimants' answer was not sufficient to

give them standing under Iowa Code § 809A.13(4). (A33-38). The State argued if the Answer was insufficient, then Claimants could not be heard on the motion and the property should be forfeited. *Id.* Counsel for Claimants argued Claimants had the right to have the motion to suppress heard first before deciding whether to provide testimonial answers and waive any Fifth Amendment privilege, because any answer would be fruit of the illegal search such that it would be senseless to require a testimonial answer before determining the issues concerning the search. Counsel argued:

> **Mr. Stowers:** Verbally, I would just say this. There's an initial claim where we attached the title of the vehicle. That submittal is part of the claim prior to the filing of the forfeiture complaint.
>
> **The Court:** I did note that you did that.
>
> **Mr. Stowers:** And then we did file an answer which asserts an ownership and possessory interest. At the end of the thing it says, we certify under penalty of perjury, so, um, and then it's signed.
>
> And then the other thing is that it's always been my position in these cases that—and there is case law we can provide to the court to this effect—that when you have the allegation that there's been an unlawful search and seizure of the property that they're seeking to forfeit, that part of the remedy for that violation is protecting the claimant against being required to divulge further information to support their claim to get their property back if the property was, indeed, unlawfully searched an seized. Because part of the remedy on a Fourth Amendment violation is a suppression of the evidence and the fruits of that. So if you start to require somebody who's claiming a Fourth Amendment violation to come into court and say all sorts of things of an evidentiary nature above and beyond what maybe is known already or is claimed already, then you're getting into the issue of requiring somebody to give fruit of the violation that they're claiming.
>
> Now if the Motion to Suppress is denied, then somebody could be required at that point to come back in and amend their claim and their answer. But if you required it now, you would be essentially

> violating the very thing that they're—you'd be sort of prejudging the issue of the violation. So we think it's not appropriate to require detailed disclosures when there's a Fourth Amendment issue that has to be taken up first.

(A36-37).

The hearing on the motion to suppress was fully conducted at that time. Briefing was subsequently submitted to the court (on behalf of both Claimants) on this issue and on the Motion to Suppress. (A91-98); (A99-143). On Feb. 9, 2016, the court entered an order that simultaneously found the Answer insufficient and declared the property forfeited—all without addressing the legality of the search, the Claimant's right to silence, or the argument that any required testimonial answer would be fruit of the challenged search and seizure. (A144-148). *Id.* Claimants appeal this holding.

As a result of the confusing pleading captions and party identifications—and despite clarifying the issue expressly at the hearing of December 10, 2015—the court also found that Rodriguez had not moved to suppress any evidence. (A144-148). In response, counsel filed a Motion to Expand the ruling to have the court address it as to Claimant Rodriguez. (A149-151). Out of an abundance of caution, counsel also filed a separate Motion to Suppress on behalf of Rodriguez. (A152-153).

At that point, the State indicated to the judge in an *ex parte* discussion—for the first time since litigation had ensued in September—it would no longer be

contesting return of the vehicle to Rodriguez. The court entered an order directing the vehicle be returned. (A154-155). The prosecutor and the court evidently had the understanding that "voluntarily" withdrawing the claim to forfeiture of the vehicle at the last second and on the eve of the hearing after resisting it for five months would somehow avoid any claim to attorney fees. The County Attorney and the court have reportedly engaged in this practice on other occasions as a way to avoid attorney fee claims.

Claimant Rodriguez submitted an Application for Attorney's Fees and Attorney Fee affidavit as the "prevailing party" under Iowa Code 809A.12 because the vehicle had been ordered returned (which was the relief Rodriguez had sought). (A156-157); (A158-159). The State then filed a Motion to Reopen the case, falsely claiming that the vehicle had been ordered returned to Claimant Rodriguez pursuant to an alleged agreement whereby Rodriguez, who had been trying for many months to obtain his vehicle with help of counsel, would not claim attorney fees. (A160-162). Claimant Rodriguez submitted to the court documentation showing that ***no*** such agreement, let alone discussions of any agreement, had ever existed or taken place. (A163-172). The State then withdrew this argument, but still maintained Claimant was not a prevailing party under the statute. (A175); (A192). The lower court agreed, and went further to find that counsel had performed *no* services for Rodriguez whatsoever to have his claim—made by

counsel since September—result in a favorable Order returning his vehicle. *Id.* at (A191-193). Claimant Rodriguez appeals this holding. Claimants also seek fees in this appeal.

STATEMENT OF THE FACTS

Both appeals arose out of the same factual circumstances. On September 12, 2015, Officer Killpack conducted a traffic stop of Claimant Jean Carlos Herrera travelling westbound on I-80 for allegedly speeding 74 m.p.h. in a 70 zone. (A57). Officer Killpack admitted at the suppression hearing that when he went to stop the vehicle, "[he] pull[ed] them over for going 74 in a 70, but [was] really interested in knowing about whether or not this vehicle plated in New York might be potentially transporting drugs." (A61).

With this goal in mind, the Officer Killpack detained Claimant Herrera for roughly 40 minutes on the side of the road. (A65, 67). During the stop—and supposedly in pursuit of a mere speeding infraction—the officer looked at the undercarriage of the vehicle using a flashlight, directed Claimant Herrera back to the squad car, asked Claimant Herrera about his destination and employment history, requested the passenger's license, conducted a several minute "pipeline check" through the El Paso Intelligence Center, and performed three separate criminal checks on Claimant Herrera, the passenger, and the vehicle owner. (Recording of Stop, Suppression Hrg. Exh. 5); (A111). Through his questioning, the officer learned that the vehicle belonged to a family friend, Claimant Fernando Rodriguez. (A41). At 34 minutes into the stop, the officer began filling out the warning citation for speeding, which took only 8 minutes to complete. (A66-67).

Upon completing the warning citation, the officer asked for permission to search the vehicle. (A42). When Claimant Herrera declined this request, the officer ran a drug dog around the vehicle and directed it to jump up on the vehicle, performing a trespassory intrusion onto Claimants' property. (A43, 68-69). After the dog allegedly alerted, the vehicle was searched, and remnants of a green, leafy substance and drug paraphernalia were supposedly found, although these have not been seen since. (A44). The vehicle was then transferred to the station, where it was searched more thoroughly. (A45). From this search, officers seized the vehicle, a soft serve ice cream machine, pelican case, cordless drill, and vacuum pump. The forfeiture paperwork was given to Claimant Herrera, and he was sent on his way. (A46).

A few days later, the county attorney was contacted by counsel for Claimant Rodriguez, inquiring about return of the vehicle. (A75). Counsel made the State aware that Claimant Rodriguez would be pursuing an innocent owner claim, stating:

> Shelly, one thing to consider is the owner has an innocent owner position and will be entitled to attorney fees should he prevail in that position. We have gotten fees for innocent owner cases before in other counties. It is provided by statute. I am sure the fees are going to be greater than the vehicle value, so this might be one to let go.

Id.

Rather than return the vehicle after this contact the State used counsel's emails as a basis to pursue *a second search.* (A47-56). The officer concluded the act of securing representation to seek return of *one's own property* was suspicious. (A83). He concluded this, despite the fact that the officer had served upon the Claimant forfeiture papers advising: "read [the forfeiture notice] carefully and seek advice from an attorney if you feel it is needed." (A49). In the application, the officer listed grounds for the warrant as it being suspicious to "spend a significant amount of money in attorney's fees, in an attempt to reclaim" a low-value vehicle. (A83).

However, what the officer failed to mention in the search warrant, even though he was on notice from the county attorney, was that Claimant was not known to be spending a significant amount of money—or any money at all, in fact—because Claimant Rodriguez was pursuing attorney fees from the State as an innocent owner. (A51-64). The prosecutor approved the application despite the material omission, and a warrant was obtained for a second search—this time deconstructive in nature. *Id.* During that search, U.S. currency was located and seized.

Based on these events, both Claimant Herrera and Claimant Rodriguez believed, on the advice of counsel, they had a valid interest in the property, and a valid claim that the searches and seizures were unlawful. Claimant Rodriguez filed

an application for a probable cause hearing pursuant to Iowa Code § 809A.12(3)(a)(1), and served upon the county attorney and seizing agency a claim of exemption. (A1-2); (A28-31). In each of these documents, Rodriguez claimed an ownership interest in the vehicle, and there was no issue concerning the legitimacy of his ownership claim because title was in his name. *See id.*

Claimants also filed an Answer to In Rem Forfeiture Complaint, signed by Claimant Herrera, where Claimant Herrera asserted he owned and had a possessory interest in the items inside the vehicle, including the U.S. currency. (A20). Central to this appeal, claimants stated the following in paragraphs 4 thru 6 of the Answer:

> 4. With this answer we are also filing a motion asserting that the vehicle stop, the subsequent detention and seizure, and the search of that vehicle, violated the prohibition against unreasonable searches and seizures found in the Fourth Amendment to the United States Constitution and the corresponding provision of the Iowa Constitution.
>
> 5. The exclusionary rule under the Fourth Amendment and Iowa Constitution applies in forfeiture proceedings. See In the Matter of Property Seized from Sharon Kay Flowers, 474 N.W.2d 546 (Iowa 1991).
>
> 6. By virtue of the application of the exclusionary rule, further statements concerning the vehicle and its content would constitute derivative evidence also subject to the exclusionary rule. Consequently, until there is a determination on the motion to suppress, we object to providing further information for the reason that such further information would be the product of the original search and seizure that we believe violated [ ] constitutional rights.

(A20-21). The district court: (1) overruled Claimants' objection, (2) declared the answer insufficient, (3) declined to address Claimant's suppression motion, and (4) simultaneously declared the property automatically forfeited under Iowa Code §

809A.16(3), all without giving the parties further opportunity to respond. (A144-148). Claimants appeal this ruling.

The district court also concluded that Claimant Rodriguez was not subject to this ruling, evidently due to confusion regarding the pleadings. *See id.* Therefore, Claimant Rodriguez was forced to continue to litigate his claim to the vehicle until eventually the State withdrew the claim and the vehicle was ordered returned. (A154). The State now contends Rodriguez is not entitled to attorney's fees because he was not a prevailing party under the statute, even though as early as Sept. 18, 2015 (when counsel originally contacted the county attorney) the State was aware that Rodriguez would be seeking attorney's fees as an innocent owner if forced to proceed to defend a forfeiture action and assert his innocent interest. (A75). On April 13, 2016, Claimant Rodriguez's claim for attorney fees was denied, and Claimant Rodriguez appeals this holding. (A192).

Because the trial court never reached the merits of the motion to suppress, those issues are subject to determination by the trial court on remand. Claimant Rodriguez also seeks attorney fees associated with this appeal.

ARGUMENT

I. SHOULD A CLAIMANT FROM WHOM PROPERTY WAS SEIZED BE ABLE TO HAVE HIS MOTION TO SUPPRESS THE FRUITS OF A SEARCH AND SEIZURE HEARD BEFORE BEING REQUIRED TO PROVIDE TESTIMONIAL DETAILS IN AN ANSWER TO AN IN REM FORFEITURE COMPLAINT TO ESTABLISH STANDING, WHEN THE CLAIMANT CLAIMED OWNERSHIP AND OBJECTED TO PROVIDING SUCH TESTIMONIAL DETAILS AND ASSERTED THAT SUCH INFORMATION WOULD BE FRUIT OF AN ILLEGAL SEARCH AND SEIZURE?

A. Preservation of Error.

Claimants presented arguments on the sufficiency of the Answer and the Fourth Amendment violation at the hearing on the Motion to Suppress and in subsequent briefing to the court. (A35-40; 100-106). In those arguments, Claimants asked the court to rule on the Fourth Amendment violation prior to requiring them to plead testimonial evidence under the forfeiture statute. Despite this request, the lower court struck the answer and automatically declared the property forfeited. (A147). Claimants appeal this ruling.

B. Standard of Review.

The court's review of forfeiture proceedings is for correction of errors at law. *In re Young*, 780 N.W.2d 726, 727 (Iowa 2010). However, to the extent Claimant raises constitutional issues, the court's review is de novo. *Id.* Thus, questions concerning the exclusionary rule and whether the claimant was denied a due

process right to be heard by forcing him to make an unconstitutional choice are reviewed de novo.

C. Argument.

The answer to the complaint, filed on behalf of Claimants on November 5, 2015, after the State's second search of the vehicle under the faulty search warrant, complied with the requirements of Iowa Code § 809A.13(4). Iowa Code § 809A.13 sets out the requirements for answers to in rem forfeiture complaints, stating:

> 4. The answer shall be signed by the owner or interest holder under penalty of perjury and shall be in accordance with rule of civil procedure 1.405 and shall also set forth the following:
> (a) The caption of the proceedings and identifying number, if any, as set forth on the notice of pending forfeiture or complaint and the name of the claimant
> (b) The address where claimant will accept mail
> (c) The nature and extent of the claimant's interest in the property
> (d) The date, the identity of the transferor, and the circumstances of the claimant's acquisition of the interest in the property
> (e) The specific provision of the chapter relied upon in asserting that it is not subject to forfeiture
> (f) All essential facts supporting each assertion
> (g) The specific relief sought.

Iowa Code § 809A.13(4). Pursuant to the Code, the answer was signed by Claimant Herrera under penalty of perjury, and provided the caption of the proceedings, mailing address, Claimants' interest in the property, essential facts supporting the interest, and specific relief sought. (A20)(hereinafter "Answer"). The answer also asserted a Fourth Amendment violation based on the illegal search

of the vehicle, and objected to giving any further information concerning the nature of the acquisition or identity of the transferor as fruit of the violation. *Id.* at A21. A motion to suppress was filed shortly after the filing of the answer. (A23-24). Still, on February 9, 2015, the court refused to address the suppression motion, overruled the objection, and found that as to Claimant Herrera, the answer did not comply with Iowa Code § 809A.13(4)(c), and (d). (A146). The court did not address the motion with respect to Claimant Rodriguez. *Id.* at A147. This ruling was in error.

1. The Answer Sufficiently Identified the Nature and Extent of the Claimant Herrera's Interest in the Property Under Subsection (c).

Claimant Herrera sufficiently pled the nature and extent of his interest in the property in the answer, lines 1 and 2. (A20). The answer states Jean Carlos Herrera "was in lawful possession of the 1999 Ford Expedition, soft serve ice cream machine, pelican case, cordless drill and battery, vacuum pump and U.S. Currency identified in the complaint as being subject to forfeiture and ha[s] a legal ownership and possessory interest in those items." *Id.* This information—identifying both a possessory and legal ownership interest—was sufficient to comply with Iowa Code § 809A.13(4)(c), which merely requires Claimant provide the "nature and extent" of his interest in the property. This is particularly true regarding the U.S. currency, where possession raises a presumption of ownership. *In re Williams' Est.*, 45 N.W.2d 146, 147-48 (Iowa 1950).

2. The Answer Sufficiently Addressed Subsection (d) By Asserting a Fourth Amendment Violation, The Merits of Which Should Have Been Heard Prior to Requiring the Claimant to Plead Testimonial Evidence Subject to Exclusion.

With respect to subsection (d), requiring the answer to state "[t]he date, the identity of the transferor, and the circumstances of the claimant's acquisition of the interest in the property," the answer stated:

> By virtue of application of the exclusionary rule, further statements concerning the vehicle and its contents would constitute derivative evidence also subject to the exclusionary rule. Consequently, until there is a determination on the motion to suppress, we object to providing further information for the reason that such further information would be the product of the original search and seizure that we believe violated [] constitutional rights.

(A21). Thus, it was not the case that Claimant failed to address subsection (d) and its supporting facts; rather, Claimant Herrera addressed subsection (d) by pleading facts sufficient to apprise the court that Claimant was relying on the exclusionary rule and suppression remedy as the basis for his objection to providing further information. The State lodged no objection to the sufficiency of that Answer prior to appearing at the suppression hearing, where the State raised it orally. (A33-38).

At this point, it is worth taking a moment to understand the constitutional dilemma Claimant was placed in by virtue of the literal requirements of Iowa Code § 809A.13(4). Claimant believed, on advice of counsel, there was a legitimate claim of a search and seizure violation based on the illegal search of the vehicle (twice) for both himself and Claimant Rodriguez. However, in order to make that

claim in full detail and to vindicate his constitutional rights, Claimant would be forced to plead, "under penalty of perjury," specific matters concerning the acquisition of the property, which would be fruit of the underlying violations. *See* Iowa Code § 809A.13(4). Had claimant not made that objection, his statements might be considered voluntary, or they may be not treated as fruit based on some attenuation theory that might avoid exclusion. The only safe approach for any reasonably competent counsel would be to assert the objection first and require the court to address it if the State contended the objection needed to be addressed before the suppression issues. Therefore, Claimant objected and asked that the court decide the suppression motion prior to requiring him to plead these matters. In response to this objection, the Court declared the answer insufficient and gave the property to the State as reward, thereby penalizing claimant for exercising their right to make a bona fide objection to the search and seizure and seek application of the exclusionary remedy. (A144-148).

The trial court's approach required a detailed, interrogatory-style, testimonial answer be furnished by Claimants before they could be heard to challenge the search and seizure in a case where the ownership interest was not genuinely disputed as a factual matter and had been clearly sworn to in the answer. *See* A20-21. The court's approach put the cart ahead of the horse. Until there is some adjudication that the search and seizure were lawful, there should be no need or

reason for a claimant who has sworn to his ownership interest to decide whether to plead detailed testimonial matters or invoke his right to remain silent, especially where any compelled answer or silence would furnish evidence that would be fruit derivative of the violation. *See Craig Foster Ford, Inc. v. Iowa Dept. of Transp.*, 562 N.W.2d 618, 623-24 (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)) (allowing an inference to be drawn from silence in civil proceedings).

Even if Claimants' interrogatory-style answer could be excluded from use at the forfeiture proceeding, the statements would arguably be voluntary and, if so, might still be used in a subsequent criminal or other matter, or as a means to place Claimant under investigation—all without violating the Fifth Amendment or perhaps the Fourth Amendment. The bottom line is Claimant did the only thing safe to do: object to answering the interrogatory-style answer aspects while asserting ownership (which gives him standing) and also apprising the court he believes he should not be required to answer while his motion to suppress remains undecided.

The dilemma Claimant was placed in under the statute has allowed the State—quite successfully, up until this point—to use the literal requirements of Iowa Code § 809A.13(4) as a means to either (1) deter people who do not wish to waive their constitutional rights from making claims to property, or (2) throw out the claims of those who attempt to assert their rights on the grounds that they cannot establish

standing. Even more troublesome is that the State is able to conduct this practice all on the basis of an illegal search: the State illegally searches a vehicle and seizes contents, but the Claimant never gets the chance to adjudicate his constitutional claims without waiving his privilege or rights regarding searches and seizures, so the State keeps the property. In situations such as this, the only proper remedy—and the only one that allows a Claimant to maintain his constitutional rights under both the federal and Iowa constitutions—is allowing the Claimant's suppression claim to be decided on the merits prior to requiring the Claimant to make the testimonial assertions required in § 809A.13(4).

A. The statements required under subsection (d) are fruit of the poisonous tree and should be excluded.

To begin, it is well-settled that the exclusionary rule of the Fourth Amendment applies to forfeiture proceedings. *In re Flowers*, 474 N.W.2d 546, 548 (Iowa 1991). While a Fourth Amendment violation "is not a bar to forfeiture," "the State may not rely on evidence obtained in violation of the fourth amendment protections nor derived from such violations" in forfeiture matters. *Id.*

For example, in *In re Flowers*, the State attempted to rely on evidence at a forfeiture proceeding that had been suppressed at the prior criminal trial. *Id.* Concluding the exclusionary rule applied to both the criminal and forfeiture matters, the court recognized, "forfeiture is clearly a penalty for the criminal offense" and "it would be anomalous indeed, under these circumstances, to hold

that in the criminal proceeding the illegally seized evidence is excludable while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible." *Id.* (quoting *One 1958 Plymouth Sedan v. Commonwealth*, 380 U.S. 693 (1965)). Thus, under *Flowers*, any evidence derived from a Fourth Amendment violation should properly be excluded in a forfeiture proceeding. *Id.*

Further, *Flowers* does not limit its holding to merely derivative evidence, but also to inferences from that evidence. The *Flowers* court stated:

> We need not consider the property claimants' additional argument that their rights guaranteed by the fifth amendment to the federal constitution were also violated by the court's willingness to draw adverse inferences from their reliance on fifth amendment privilege while testifying at the hearing. *It appears that the inferences would, in the present case, be derivative of the underlying fourth amendment violation and should not be considered on that basis.*

Id. (emphasis added). Thus, *Flowers* stands for the proposition that statements or inferences that are fruit of the search should also be excluded, given that but for the illegal search resulting in forfeiture, those statements would not be admissible. It makes no sense to say that the statements are inadmissible as fruit of the search while denying a claimant the opportunity to be heard on claimant's challenge to the search itself because claimant asserted that position in his claim. The remedy selected by the trial court leaves claimants in the position where they have no remedy in the forfeiture case itself unless they gave up their Fifth Amendment

right to silence, or potentially waived their exclusionary remedy by voluntarily answering and providing the information upon advice of counsel.

Therefore, before requiring Claimant to make testimonial statements, or before penalizing Claimant's refusal to do so, the court must make a determination as to whether the statements or inferences are derivative of the constitutional violation. *Id.* In order to determine this, the court must look to the merits of Claimant's motion to suppress; only then can the court decide whether a Fourth Amendment violation has occurred. *See Flowers*, 474 N.W.2d at 547 (motion to suppress previously decided, and finding applied at forfeiture proceedings).

Here, if an illegal search occurred—and due to that illegal search, the property in question was forfeited—statements concerning, "[t]he date, the identity of the transferor, and the circumstances of the claimant's acquisition of the interest in the property," as required by Iowa Code § 809A.13(4), would be derivative therefrom and typically subject to exclusion. Without the illegal search of the vehicle (twice), Claimants' property would not have been seized and Claimant would not be forced to make a claim. Therefore, to prevent Claimant from being forced to plead matters which are fruit of the illegal search, or subject to a valid Fifth Amendment objection due to their testimonial nature, the suppression motion should be decided at the outset.

B. Claimant asserted a valid objection to providing fruit of the illegal search, which should be heard on the merits.

Because any testimonial statements under Iowa Code § 809A.13(4)(d) would have been fruit of the poisonous tree, Claimants raised a valid objection about having to provide them. (A21). Although Claimants objected to providing testimonial statements as to "[t]he date, the identity of the transferor, and the circumstances of the claimant's acquisition of the interest in the property," Claimants pled a bona fide claim of legal and ownership interest. Iowa Code § 809A.13(4). As such, Claimants established both legal standing and the right to be heard on the Fourth Amendment violation. However, the lower court overruled Claimants' objection, and simultaneously dismissed the claim.

Claimants established both legal standing and right to be heard on the suppression motion. Claimant pled facts showing he had a "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Citizens Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 474 (Iowa 2004). In the Answer, Claimants asserted a personal proprietary and possessory interest in the property, and if the property is forfeited Claimants will suffer harm to this interest. (A20).

Moreover, the Answer was also sufficient to show Claimant's standing to object on Fourth Amendment grounds: he claimed a proprietary interest in the items when they were taken from his own possession, and there was a legitimate expectation of

privacy in both the places searched and the items seized. *See Rakas v. Ill.*, 439 U.S. 128, 140 (1978). Because Claimant established both legal standing and standing to object on Fourth Amendment (and Art. I., § 8) grounds, Claimant's motion should have been heard on the merits rather than deferring to an arbitrary pleading standard.

It is also worth mentioning that Iowa, and the forfeiture statute by extension, requires only notice-pleading, and the State certainly had notice of Claimants' asserted rights in the property. *See* Iowa Code § 809A.13(4) ("The answer . . . shall be in accordance with rule of civil procedure 1.405."); Iowa R. Civ. P. 1.405; *Rees v. City of Shenandoah*, 682 N.W.2d 77, 29 (Iowa 2004)("Under notice pleading, nearly every case will survive a motion to dismiss."). The statements were also not pertinent to the motion to suppress itself, and the State can't very well complain they needed the information to establish the legality of their search and seizure. In a matter such as this, where the State would not suffer prejudice and Claimant has pled a valid ownership interest, allowing Claimant to be heard is the appropriate remedy, not unceremoniously kicking the Claimant out of court for failing to meet arbitrary pleading requirements.

C. The court erred in dismissing the Claimant's answer outright based on an objection.

Even if the lower court was correct that Claimant was not entitled to be heard on the suppression motion prior to pleading the matters in 809A, dismissal was not

the proper remedy. Claimant objected to having to give testimonial statements on search and seizure grounds; he did not refuse to do so, nor did he fail to file an Answer within the time proscribed. Normally, if an objection is lodged—particularly to answering an interrogatory-style inquiry—the court rules on the objection and the case proceeds accordingly. *See* Iowa R. Civ. P. 1.509. Where the objection to providing the information is overruled, the Defendant is given an opportunity or supply the requested information or to amend. Iowa R. Civ. P. 1.509. The claim is not dismissed in its entirety for merely making a good-faith objection, as was the case in the present matter.

Here, if the court had merely sustained or overruled the objection (as is typical), then Claimant would have had the opportunity to decide whether to amend his claim and assert the Fifth Amendment, or amend his claim and waive his Fifth Amendment privilege. However, the district court's decision took that choice away from the Claimant; rather than merely ruling on the objection, the district court dismissed Claimant's entire claim and declared the property forfeited. This denied Claimant the right to be heard.

3. Declining to Address the Motion to Suppress before Requiring Claimant to Plead Essential Facts Required Under Subsection (d) Forces Claimant to Make an Unconstitutional Choice Between Rights.

A. Iowa's current forfeiture statute requires claimant to choose between exercising his Fourth and Fifth Amendment rights.

If the court declines to allow Claimant to be heard on the suppression motion prior to requiring Claimant to plead the testimonial matters contained within 809A.13(4), the court will force Claimant to make an unconstitutional choice: either (1) plead testimonial matters which could later be used against him in order to make a valid suppression claim, or (2) assert the Fifth Amendment privilege as to those matters, which may cause the claim to be dismissed and the suppression motion never to be heard. If a claimant attempts to do both—to contest the forfeiture and retrieve the property, but also assert the Fifth Amendment privilege—the claim is dismissed for lack of standing, depriving him of both the right to be heard *and* his rights in the property. *See* A147 (dismissing claim and declaring property forfeited). This forces Claimant to make an unconstitutional choice between his Fourth and Fifth Amendment rights, and is untenable under both the Iowa and federal constitution.

The Supreme Court has previously held that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968). The Fifth Amendment applies to forfeiture proceedings and allows a Claimant to refuse to be a witness against himself, yet Iowa Code § 809A.13(4) requires a claimant to provide testimonial "essential facts" "under penalty of perjury," to assert a claim to his own property. Iowa Code § 809A.13(4); *see* U.S. Const. Amend. V; *Lefkowitz v. Turley*, 414 U.S.

70, 77 (1973). Compelling claimants—rightful owners whose Fourth Amendment interests were violated—to provide testimonial evidence against themselves in order to assert a suppression claim violates a due process right to be heard. It forces them to make an unconstitutional choice between giving up a valid property interest in the items seized, or choosing to waive the Fifth Amendment right.

The Arizona case of *Wolstrom v. Buchanan* illustrates this point. 884 P.2d 687 (Ariz. 1994). There, a claimant filed a claim to property in a forfeiture proceeding and asserted a Fourth Amendment illegal search. *Id.* at 688. He asserted a possessory interest in the property, but claimed his Fifth Amendment privilege concerning more specific facts. *Id.* The relevant Arizona statute required the claimant to plead strikingly similar requirements as the Iowa statute, including "the nature and extent of the claimant's interest in the property," and "[t]he time, transferor, and circumstances of the claimant's acquisition of the interest in the property," all "under penalty of perjury." *Compare* Ariz. Rev. Stat. § 13-4311(E)(2016); *with* Iowa Code § 809A.13(4). Based on these requirements, the trial court struck the Claimant's claim to the property, finding he lacked standing. *Id.* The Arizona Supreme Court reversed, finding that requiring the claimant to plead the particulars of the statute forced him to choose between the right to be heard on his Fourth Amendment claim and his Fifth Amendment privilege. *Id.* at 693. Here, the Claimant will be forced to make the same choice if the court

declines to hear the Motion to Suppress before requiring the pleading of testimonial matters of Iowa Code 809A.13(4).

The problem of this forced choice is particularly acute where the testimonial statements are derivative of the illegal search, and the purpose behind the statute would not be furthered by requiring such statements. Statutes such as 809A.13 are meant to reduce the risk of fraudulent claims by forcing Claimants to plead "essential facts" of ownership; the statute is not meant to act as a trap for people, like Claimants, who attempt to assert their constitutional rights and have their property forfeited. *See id.* at 691. Here, the possibility of fraud is slight: The property was taken out of the vehicle Claimant Herrera was driving, Herrera claimed an interest in the property, and no other claims of ownership have been made. (A20). Claimant Rodriguez presented title to the vehicle, validating him as the owner. (A30). In circumstances such as this, where a valid ownership interest has been shown and there are no competing claims, compelling Claimants to plead the particulars of time, transferor, and circumstances of the acquisition of the property "would not appreciably reduce the chances of a bogus claim and could conceivably expose [Claimant] to the risk that [the] statements might be used against him in a future prosecution." *Id.* at 691-92.

B. Claimant could be given an accommodation to vindicate his Fourth and Fifth Amendment Rights.

In addition, courts have found that where "it [is] necessary for a claimant to provide incriminating information" to establish standing, accommodations should be made. *Id.* at 693. At present under Iowa's forfeiture statute, "a [Claimant] who wishes to establish standing must do so at the risk that the words which he utters may later be used to incriminate him." *Simmons*, 390 U.S. at 393. Thus, the court should provide the accommodation of allowing the motion to suppress to be heard on the merits prior to requiring Claimants to plead the testimonial matters of Iowa Code 809A.13(4).

Iowa's forfeiture statute currently affords no protection to statements made to establish standing under Iowa Code § 809A.13—no immunity is granted, and the statements are required to be made "under penalty of perjury." Even if the statements made in the answer could somehow subsequently be excluded from use in the forfeiture proceeding, nothing in Chapter 809A bars the State, after receiving this information, from following up with a criminal investigation and using the statements against the Claimant. Sandra Guerra, *Between A Rock and A Hard Place: Accommodating the Fifth Amendment Privilege in Civil Forfeiture Cases*, 15 Ga. St. U. L. Rev. 555, 558 (1999)(noting that a claimant trying to retrieve property "while the threat of criminal charges looms" will likely be forced to choose to remain silent and therefore lose his property). Moreover, nothing in

Chapter 809A bars the State from forwarding the information to other authorities, such as taxing or out-of-state authorities, who could also use the information to attempt to prosecute the Claimant.

The Supreme Court addressed this problem in the analogous case of *U.S. v. Simmons*. 390 U.S. 377. There, the government attempted to use testimonial statements made to establish standing at a suppression hearing against the defendant at a criminal trial. *Id.* The Supreme Court found this practice troubling, stating:

> A defendant is 'compelled' to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forego a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit. However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case [Defendant] was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.

Id. at 393-94. Thus, an accommodation (such as immunity) should be made where an individual is forced to choose between two constitutional rights, particularly in the context of establishing standing. *Id.*

Where a Claimant raises the issue and requests an accommodation for this purpose, accommodations should be—and frequently are—made, such as allowing testimony to establish standing to be immunized, or staying the forfeiture proceedings pending the outcome of a criminal matter. *See id.* at 394; *see also U.S. v. $133,420.00 in U.S. Currency*, 672 F.3d 629, 643 (9th Cir. 2012)(recognizing obligation to accommodate in forfeiture cases when requested); *U.S. v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992)("[B]ecause of the troublesome fifth amendment problems potentially generated by the government's use of the civil forfeiture statutes, district courts—absent some sort of extraordinary situation—should exercise their discretion to stay civil forfeiture proceedings pending the completion of related criminal proceedings against the claimants."); *U.S. v. Parcels of Land*, 903 F.2d 36, 44 (1st Cir. 1990)(entering a protective order to protect privilege); *U.S. v. U.S. Currency*, 626 F.2d 11, 16-18 (6th Cir. 1980)(exploring numerous possible accommodations available for protections of Fifth Amendment privilege).

Here, Claimant raised the issue and requested an accommodation: Allowing the Fourth Amendment motion to be heard before forcing him to plead the testimonial matters set forth in Iowa Code § 809A.13(4). (A103-106).This would have allowed Claimant to vindicate his Fourth Amendment right without being forced to choose whether to sacrifice his Fifth Amendment privilege. The lower

court not only declined this accommodation, but also dismissed the claim and automatically declared the property forfeited. (A147).

In this case, an accommodation seems unnecessary when a simpler, more efficient remedy is presented. The simple remedy is to allow a claimant who has established factually or through a claim of ownership the right to the property to have his challenge to the search and seizure heard first. In certain rare cases, it may be necessary to accommodate a claimant by immunizing their claims or testimony pertaining to standing as in *Simmons*.

4. The Lower Court's Reliance on *In re Aronson* Is Misplaced.

The lower court, relying primarily on *In re Aronson*, concluded that "[C]onstitutional evidentiary questions are moot until a claimant has established standing" under the forfeiture statute, and dismissed Claimant's claim. (A146). *In re Aronson* was a 1989 case that determined that because Claimants had asserted *no* ownership interest in the property, and because forfeiture was a civil—rather than criminal—proceeding, certain constitutional protections of claimants could not be realized. 440 N.W.2d 394 (Iowa 1989). However, *In re Aronson* is distinguishable from the present matter, and further, is of questionable validity.

First, *In re Aronson* is distinguishable from the facts at hand. In *Aronson*, claimants made ***no*** claim of ownership interest in their pleadings, and then asserted the Fifth Amendment at a subsequent hearing on the merits of forfeiture. *Id.* at 395.

Only after the property was declared forfeited did the Claimants file a motion to suppress in the related criminal action, which was denied. *Id.* On appeal of the forfeiture, the court found that because Defendants failed to assert any interest in the property at the forfeiture proceeding, the claims of violations of constitutional rights were "moot in the face of their failure to have standing." *Id.* at 398. The court stated:

> To have standing to contest forfeiture, one must be a "claimant." A "claimant" is one who claims to own the article or merchandise or to have an interest therein. The plaintiffs are not "claimants" because they have alleged no specific property interest in the forfeited items.

(quoting *Baker v. U.S.*, 722 F.2d 517 (9th Cir. 1983) (internal quotations and citations omitted).

In contrast, here the court is presented with a much different scenario: Unlike the claimants in *Aronson*, who made ***no*** claim to the property, here Claimants pled a valid ownership and possessory interest. *See* A20; *In re Williams' Est.*, 45 N.W.2d at 147-48 (possession of currency creates rebuttable presumption of ownership interest). Additionally, unlike the Claimants in *Aronson*, who did not raise the Fourth Amendment violation until after the forfeiture, here the court was presented with the Fourth Amendment claim prior to the forfeiture determination. *See* A21.

Even the Ninth Circuit, which *Aronson* relies heavily upon, has recognized the difference between the failure to claim *any* interest and claiming an interest but

refusing to explain that interest in detail.[2] *Compare Baker v. U.S.*, 722 F.2d 517 (9th Cir. 1983)(Claimant did not assert any interest); *with U.S. v. $191,910 in U.S. Currency*, 16 F.3d 1051 (9th Cir. 1994)(holding that claimant had asserted interest, even though he had refused to explain his interest "in detail," and stating "this case is not like *Baker* . . . There, the court found no standing where a claimant refused to claim *any* particular interest in the property"), *superseded by statute on other grounds as stated in U.S. v. $80,180 in U.S. Currency*, 303 F.3d 1182 (9th Cir. 2002). Where a claimant declares an interest, but also asserts the Fifth Amendment privilege, the Ninth Circuit has found the claimant has standing and his interests should be accommodated. *See $191,910 in U.S. Currency*, 16 F.3d 1051.

Further, *Aronson*—and consequently, the lower court's holding—is of questionable validity. *Aronson* relies on the logic that constitutional protections do not apply, because forfeiture is a civil proceeding, stating there is no "indication in the statutory scheme of a punitive purpose." *Aronson*, 440 at 397. However, subsequent cases "have noted Iowa courts have traditionally construed forfeiture

---

[2] At this point, it is pertinent to note that the Ninth Circuit cases, which *Aronson* relies upon, are based upon the federal statute, which does not obligate a claimant to plead the specific, essential facts that Iowa Code § 809A.13(4) requires. *See Baker*, 722 U.S. 517; 21 U.S.C. § 881. Thus, the conflict between the Fifth Amendment privilege and the potentially incriminating "essential facts" the claimant is required to plead under the Iowa statute is even more acute. *See Wohlstrom*, 884 P.3d at 691 (citing Joint Explanatory Statement of Titles II and III, 124 Cong. Rec. 17647 (1978)).

statutes to be penal in nature, thereby undermining one of the key distinctions noted by the *Aronson* court as distinguishing civil from criminal forfeiture." J. Bradley Horn, *The Reach of Iowa's Civil Forfeiture Statute: How Far Is Too Far?*, 42 Drake L. Rev. 661, 685 (1993)(citing *In re Property Seized from Kaster*, 454 N.W.2d 876, 877 (Iowa 1990)). In addition, *Aronson* was decided prior to *Flowers*, which established that a traditionally penal constitutional protection—the exclusionary rule—applies in forfeiture proceedings despite the fact that they are civil in nature, again undermining the distinction made in *Aronson*. *In re Flowers*, 474 N.W.2d at 548. Moreover, assertion of an inference from a Fifth Amendment privilege assertion is a different matter from application of the exclusionary rule for search and seizure violations. Because *Aronson* is both distinguishable and of questionable validity, the lower court's reliance on it was misplaced, and Claimant is entitled to have his suppression claim heard.

II. DID CLAIMAINT SUFFER AN UNCONSTITUTIONAL PENALTY FOR EXERCISING HIS RIGHT TO CHALLENGE THE SEARCH AND SEIZURE AND ARGUE FOR APPLICATION OF THE EXCLUSIONARY RULE IN FORFEITURE PROCEEDINGS WHEN THE DISTRICT COURT SUMMARILY DISMISSED HIS CLAIM TO THE PROPERTY AND FORFEITURED THE PROPERTY TO THE STATE BECAUSE OF HIS OBJECTION TO PROVIDING TESTIMONIAL DETAILS WITHOUT FIRST ADDRESSING THE MOTION TO SUPPRESS?

A. Preservation of Error.

Claimants presented arguments on the Fifth Amendment privilege at the hearing on the Motion to Suppress and in subsequent briefing to the court. (A35-40); (A100-106). In such arguments, Claimants asserted that refusing to address the motion to suppress would force them to choose whether to plead testimonial matters in the Answer, or exercise their Fifth Amendment right and suffer an automatic forfeiture. *Id.* Claimants asserted this would be an unconstitutional penalty. *Id.* The lower court evidently construed this argument as a de facto assertion of the Fifth Amendment, and declared:

> Without meeting the procedural requirements of 809A.13(4), the claimant is not entitled to a forfeiture hearing, and evidentiary questions are rendered moot. Therefore, in accordance with Iowa Code § 809A.16(3), the property claimed to be owned by Claimant is hereby forfeited to the state and the motion to suppress is denied.

(A147). Claimant Herrera appeals this automatic forfeiture of his property.

B. Standard of Review.

The court's review of forfeiture proceedings is for correction of errors at law. *In re Young*, 780 N.W.2d 726, 727 (Iowa 2010). However, to the extent Claimant raises constitutional issues, the court's review is de novo. *Id.* Thus, the questions such as whether the dismissal of the claim constituted an unconstitutional penalty, are reviewed de novo.

C. Argument.

What the lower court did in this case—declining an accommodation and simultaneously declaring the property forfeited—constituted an automatic penalty on the Claimant. *See* A147. The Fifth Amendment grants "the right of a person to remain silent unless he chooses to speak in unfettered exercise of his own will, and to suffer no penalty for such silence." *Spevack v. Klein*, 385 U.S. 511, 514 (1967). "Penalty" is not restricted to a fine or imprisonment, but includes "any sanction which makes assertion of the Fifth Amendment privilege 'costly.'" *Id*. at 515 (citing *Griffin v. California*, 380 U.S. 609 (1965)). Exercise of the Fifth Amendment privilege is "costly" where the State threatens to impose "economic or other sanctions 'capable of forcing the self-incrimination which the Amendment forbids.'" *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984)(quoting *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977)). Being compelled to give testimony or to lose rights in forfeited property can be considered an economic sanction. *U.S. v. Kordel*, 397 U.S. 1, 14 (1970)("The Court of Appeals was correct in stating that the Government may not use the evidence against a defendant in a criminal case *which has been coerced from him under penalty of either giving the evidence or suffering a forfeiture of his property.*")(emphasis added).

A Constitutional violation occurs where a penalty imposed is automatic, or imposed as a direct result of the assertion of the Fifth Amendment. *See Murphy*,

465 U.S. at 438-39 (no violation because "revocation [of probation] was not automatic" after Defendant asserted privilege; Defendant still must be afforded hearing and court still must find probable cause). When the Claimant objected to answering the testimonial matters contained in Iowa Code § 809A.13(4)(d), the property was forfeited as a direct result. (A147). By raising the objection, the Claimant "lost his ability to intervene in the proceedings, virtually assuring a forfeiture." *Wohlstrom*, 884 P.2d at 689. Claimant's failure to plead the testimonial specifications supplied the sole basis for the prosecuting attorney to seek an uncontested order of forfeiture in this matter. *See* Iowa Code § 809A.16(3). This constituted an automatic economic sanction imposed upon the Claimant.

1. The Lower Court Erred By Failing to Follow the Procedure Set Forth in Iowa Code § 809A.16, Instead Automatically Declaring the Property Forfeited.

After court struck the Claimant's answer based on the objection, which the court evidently construed as an assertion of the Fifth Amendment, the finding of forfeiture was virtually automatic. Even if Claimant's answer was lacking, the Iowa Code still provides a procedure to be followed in order to declare the property forfeited. *See* Iowa Code § 809A.16(3). But rather than follow this procedure, the lower court automatically dismissed the Claimant's answer and forfeited the property. This operates as further evidence of the error of the district court and unconstitutional penalty imposed upon the Claimant.

Iowa Code § 809A.16(3) provides the appropriate procedure where a proper answer is not filed, stating:

> [I]f a proper answer is not timely filed in response to a complaint, the prosecuting attorney may apply for an order of forfeiture and an allocation of forfeited property pursuant to section 809A.17. Under such circumstance and upon a determination by the court that the state's written application established the court's jurisdiction, the giving of proper notice, and facts sufficient to show probable cause for forfeiture, the court shall order the property forfeited to the State.

Iowa Code § 809A.16. Here, the county attorney did not provide a written application for an order of forfeiture or allocation of property pursuant to the code. Further, nowhere in the lower court's ruling did the court set forth the findings required by the statute, including "a determination . . . that the state's written application established the court's jurisdiction, the giving of proper notice, and facts sufficient to show probable cause for forfeiture." *Id.* Instead, the lower court's ruling was bereft of these findings, merely striking the Claimant's answer, and automatically declaring the property forfeited. (A147).

The dismissal of the answer, and simultaneous forfeiture, came as a direct result of the court's interpretation of Claimant's assertion of the Fifth Amendment. Indeed, the ruling does not set forth any other basis for the forfeiture apart from the dismissal. *Id.* Where the timing of sanction coincides with the claim of the privilege, the court may infer an "intent to punish [the Claimant] for exercising his constitutional right." *See State v. Washington*, 832 N.W.2d 650, 662 (Iowa

2013)(Defendant's refusal to answer judge's questions cause judge to impose 250 hours of community service). Thus, Claimant's assertion of the Fifth Amendment was penalized by an automatic forfeiture of the property.

2. The Court's Automatic Dismissal of Claimant's Claim by Striking the Complaint Was Too Costly of a Penalty.

Further, by striking the answer for what the court construed as an assertion of the Fifth Amendment, the court essentially imposed an automatic dismissal; any finding of probable cause was essentially a foregone conclusion at that point. After striking a claimant's answer, the State must only present only minimal evidence of "jurisdiction, notice, and probable cause" as grounds for forfeiting the property. Iowa Code § 809A.16(3). Because "no one [is] present to challenge the State's case and petitioner ha[s] no chance to prove a forfeiture exception under [Chapter 809A], this proceeding [is] essentially *ex parte*." *Wohlstrom*, 884 P.3d at 689. Ex parte proceedings afford "little or no protection to the innocent owner," as the State is not required to offer evidence of innocent ownership or any defenses a Claimant may have. *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 55 (1993). Thus, striking the Answer after and denying Claimant the right to participate in an adversarial proceeding to contest the forfeiture was "analogous to dismissing a cause of action." *Wohlstrom*, 884 P.3d at 690.

Courts have recognized dismissal as a sanction for invoking the privilege is too costly. *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1088 (5th

Cir. 1979)("When plaintiff's silence is constitutionally guaranteed, dismissal is appropriate only where other, less burdensome, remedies would be an ineffective means of preventing unfairness to defendant"); *Campbell v. Gerrans*, 592 F.2d 1054, 1058 (9th Cir. 1979)("In light of Supreme Court decisions on the Fifth Amendment privilege, a plea based on this privilege . . . in a civil case cannot be characterized as 'willful default' resulting in dismissal."). In such cases, dismissal is inappropriate where there are other, less severe remedies to protect a Claimant's Fifth Amendment privilege. *Id.* Here, a less severe remedy would have been letting Claimant be heard on the Motion to Suppress prior to requiring him to disclose testimonial matters.

Further, normally in civil cases only an inference is permissible from a Claimant's refusal to testify, not an outright dismissal of the claim. *Craig Foster Ford, Inc.*, 562 N.W.2d at 623-24 (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)). If the inference had been used, at the forfeiture proceeding on the merits one piece of evidence the State could have put forth is that Claimant had asserted the privilege, and the court could draw an adverse inference from such. *Id.*; *see also People v. $1,124,905 U.S. Currency and One 1988 Chevrolet Astro Van*, 685 N.E.2d 1370, 1391-92 (Ill. 1997)(Freeman, J., dissenting). Notwithstanding this fact, here, the lower court drew much more than an inference from the assertion of

the privilege: upon finding Claimant's answer should be struck for refusing to plead testimonial matters, the property was automatically declared forfeited.

Finally, that Claimant's claim was dismissed—and his property forfeited—without the benefit of participation in an adversarial proceeding on the merits is particularly troubling in the context of forfeiture, where the State has a "direct pecuniary interest in the outcome of the proceeding." *James Daniel Good Real Property*, 510 U.S. at 55-56 (citing *Harmelin v. Michigan*, 501 U.S. 957, 979 n. 9 (1991))("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit."); *All Assets*, 971 F.3d at 905 (stating the court "continue[d] to be enormously troubled" by ex parte forfeiture proceedings and their potential interferences with Due Process). Iowa law enforcement officers are "not oblivious to the monetary gains the broad state forfeiture statute allows." Horn, *The Reach of Iowa's Civil Forfeiture Statute: How Far Is Too Far?*, 42 Drake L. Rev. at 678-79 (explaining that officers advocated for Governor Branstad to veto an amendment to the bill that would narrow the forfeiture statute and therefore cost the department for equipment and other needs). Indeed, on April 15, 2015, the Des Moines Register reported that law enforcement agencies had seized over $43 million dollars in assets over the past six years. Jason Clayworth and Grant Rodgers, *Iowa Forfeiture: A 'System of Legal Thievery?"*, Des Moines Register (Apr. 4, 2015), *available at*

http://www.desmoinesregister.com/story/news/investigations/2015/03/28/iowa-forfeiture-system-legal-thievery/70600856/. Because of the direct pecuniary gain the State stands to incur, the importance of an adversarial proceeding is heightened, and makes the penalty of dismissal and forfeiture particularly harsh.

III. IS A CLAIMANT ENTITLED TO ATTORNEY'S FEES AS A PREVAILING PARTY UNDER IOWA CODE § 809a.12(7) BOTH AT THE TRIAL COURT LEVEL AND ON APPEAL WHERE THAT CLAIMANT HAD TO LITIGATE HIS CLAIM TO THE PROPERTY FOR SIX MONTHS AND WAS FORCED TO MAKE NUMEROUS FILINGS AND MOTIONS BEFORE THE STATE FINALLY WITHDREW ITS CLAIM TO THE PROPERTY?

A. Preservation of Error.

Counsel, on behalf of Claimant Rodriguez, filed an application for attorney fees and attorney fee affidavit on February 29, 2016 on the grounds that Claimant Rodriguez was a prevailing party under Iowa Code 809A.12(7). (A156); (A158). Therein, counsel verified that legal work amounted to $8,232.30 and expenses amounted to $724.66 on behalf of Rodriguez. *Id.* He also verified that the amount of work would have been the same had counsel only represented Rodriguez, rather than both Rodriguez and Herrera, because the suppression issues were part of the same factual scenario and legal backdrop. *Id.* Counsel reiterated this at the hearing on the motion. (A173-190). Despite this, the district court denied the motion for attorney fees. (A191-193). Claimant Rodriguez appeals this holding.

B. Standard of Review.

A district court's forfeiture determination, and the subsequent award of attorney's fees, is reviewed for errors at law. *In re Prop. Seized from McIntyre*, 550 N.W.2d 457, 459 (Iowa 1996). Additionally, at law review is applied to questions of statutory interpretation under the forfeiture statute. *In re Mirzai*, 810 N.W.2d 25, *3 (Iowa App. 2011)(unpublished)(citing *State v. Allen*, 708 N.W.2d 361, 365 (Iowa 2006). Thus, to the extent Claimant raises issues concerning the meaning of prevailing party, this would be reviewed for errors at law.

C. Argument.

Iowa Code § 809A.12(7) provides, "The agency or political subdivision bringing the forfeiture action shall pay the reasonable attorney's fees and costs, as determined by the court, incurred by a claimant who prevails on a claim for exemption in a proceeding under this chapter." On Feb. 29, 2016, pursuant to this section, a claim for attorney's fees was filed on behalf of Fernando Rodriguez. Claimant Rodriguez had been seeking return of the vehicle since Sept. 18, 2015, when counsel sent an email to the county attorney inquiring about return of the vehicle and asserting an innocent owner position. (A75). Following a long, arduous procedural posture (including various claims made on behalf of Rodriguez individually as well as both Rodriguez *and* Herrera), the State gave informal notice to the court it was withdrawing the forfeiture claim with respect to Rodriguez, and

an order for return of the vehicle was entered on February 23, 2015. (A154). Because Claimant Rodriguez was the prevailing party, he is entitled to attorney fees at the district under Iowa Code 809A.12(7). Further, should the Claimants prevail on appeal, appellate attorney's fees should also be awarded.

1. Claimant Rodriguez is Entitled to Attorney's Fees For the District Court Proceedings Under Iowa Code 809A.12(7).

Iowa Code § 809A.12(7) is clear: a Claimant who prevails upon assertion of an exemption is entitled to attorney's fees. Because the legislature's decision to include a specific fee-shifting provision in Iowa's Forfeiture Reform Act, courts have viewed this provision liberally in order to effectuate "the intent of the legislature to reduce the financial hurdle faced by an 'innocent owner' who wishes to challenge the State's seizure of their property for forfeiture." *In re Mirzai*, 810 N.W.2d 25, *6 (Iowa App. 2011)(unpublished). The lower court, however, denied attorney's fees on behalf of Claimant Rodriguez, despite the clarity of the Code on this matter. It did so primarily on two grounds: (1) When a claim and motion to suppress were filed on behalf of Rodriguez, "the State did not object to the return of the vehicle," and (2) all of the attorney's fees claimed were on behalf of Herrera. (A192). However, the lower court's findings on both these points were in error.

A. After having to fight for the property's return for six months, Claimant Rodriguez was a prevailing party under the statute when the State acquiesced to his innocent owner claim.

First, the court's understanding that Claimant Rodriguez was not a "prevailing party" under Iowa Code § 809A.12 because "the State did not object to the return of the vehicle," is false, both legally and factually. Legally, even though the State *eventually* withdrew its claim to the property, this does not negate Claimant's prevailing party status. Iowa has recognized the federal definition of prevailing party, which states that a party has prevailed "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Dutcher v. Randall Foods*, 546 N.W.2d 889, 895 (Iowa 1996)(citing *Farrar v. Hobby*, 506 U.S. 103, 109 (1992)). A party need not prevail on every issue, so long as he obtains some of the legal relief sought, in order to be considered the prevailing party. *See Farrar*, 506 U.S. at 109; *see also Branstad v. State ex rel., Nat. Res. Commn.*, 864 N.W.2d 553 (Iowa App. 2015)("[A] party need not have prevailed on every issue, or every asserted defense, in order to be considered a prevailing party.") *vacated sub nom. on other grounds by Branstad v. State ex. rel Nat. Resource Commn.*, 871 N.W.2d 291 (Iowa 2015)(the Iowa Supreme Court vacated based on an exception and declined to address defining "prevailing party").

Additionally, it is well-established that voluntary dismissals operate to grant "prevailing party" status for the non-dismissing party for purposes of attorney's fees. *In re Marriage of Roerig*, 503 N.W.2d 620, 622 (Iowa App. 1993) ("It is well established that statutory or contractual provisions providing for an award of attorney's fees to the prevailing party in litigation encompass defendants in suits which have been voluntarily dismissed.")(citations omitted). After five months of litigation, Claimant Rodriguez obtained relief on the merits: the State voluntarily withdrew the claim and the vehicle was returned to him. Therefore, Claimant Rodriguez was a prevailing party.

The claim that the State did not object to the return of the vehicle is also factually false. After counsel emailed the county attorney on September 18, 2015, the State took no action to return the vehicle, and instead used counsel's inquiry as a basis to get a search warrant to search the vehicle *a second time*. (A75); (A47, 50-56). This was true despite that in the email, counsel made the State aware that Rodriguez was an innocent owner and would be seeking attorney's fees if he was forced to litigate its return. *See id.*

The lower court also erred when it posited that it was not until December 10, 2015 that "Dean Stowers for the first time on behalf of Rodriguez filed an actual claim for return on property seeking a return on the 1999 Ford Expedition." (A191). In fact, an application for a prompt probable cause hearing had been filed

over 2 months earlier on behalf of Rodriguez on Sept. 23, 2015, asserting a claim to the property. (A1-2). Moreover, Claimant Rodriguez had served an additional claim for return of property—with the title certifying him as owner attached—on the county attorney and seizing agency under the Iowa Code § 809A.11 on Sept. 25, 2015. (A29). Iowa Code § 809A.11 provides:

> 1. Only an owner of or interest holder in property seized for forfeiture may file a claim, and shall do so in the manner provided in this section. The claim shall be mailed to the seizing agency and to the prosecuting attorney by restricted certified mail or other service which indicates the date on which the claim was received by the seizing agency and prosecuting attorney . . . .

Iowa Code § 809A.11. Nowhere in this section does the Code require that the Claimant file this document *with the court*. The Claimant filed the claim with the court on December 10, 2015 for the court's ease of reference. Thus, since Sept. 23, 2015, Rodriguez, through his attorney, has been adjudicating his claim to the vehicle; the State did not immediately returned the vehicle once the claim was on file.

The court also claimed that once a motion to suppress was filed on behalf Rodriguez, the State returned the vehicle without dispute. However, the first motion to suppress, filed on Nov. 19, 2015, was filed on behalf of *both* claimants, as argument at the hearing and briefing indicated. (A36-39, 73-74); (A100-101, 133-137)(mentioning claims to property on behalf of Rodriguez and making arguments on his behalf). It is true that on February 18, 2016, a motion to suppress

was filed solely on behalf of Rodriguez, but this was merely out of an abundance of caution by counsel. (A152-153). Counsel also filed, on behalf of Rodriguez, a motion to expand the court's ruling on the prior motion to suppress. (A149-151). However, it is worth noting that throughout all these proceedings—even in the face of arguments during the hearing and briefing on the first motion to suppress that were made on behalf of Claimant Rodriguez—the State refused to give back the vehicle, even when the other property was returned.

When the court finally entered an order on Feb. 23, 2016, for the return of Claimant Rodriguez's vehicle, it was only after *five months*, and numerous filings, made on behalf of Rodriguez since his claim was first served upon the State on Sept. 25, 2015. (A154). The State had communicated *ex parte* with the judge to secure the vehicle's release, evidently acquiescing to the innocent ownership position Rodriguez had continuously maintained. (A163-172). Indeed, no hearing was held on that motion, because the State did not object. (A154).

One would think the State's fight for the vehicle would end after the vehicle was returned, but that would be incorrect. Subsequent to the order for return of the vehicle, the State filed a motion to "reopen" the case, concluding the vehicle had only been given back due to an illusory plea agreement. (A160-162). Counsel for Rodriguez presented evidence that nowhere in any communication was there evidence of such a plea. (A163-172). The State then quickly dropped that position,

and settled on an alternate argument that it pursued at the hearing: that Claimant Rodriguez was not the prevailing party and not entitled to attorney fees. (A175; A192).

The factual history of the case amply demonstrates that the State continuously battled for the vehicle from September until March—for six months. It is not the case that the State "did not object to the return of the vehicle"; in fact, the State objected repeatedly, even after the vehicle was returned. In light of this contentious, adversarial factual history, Claimant Rodriguez can be viewed only as a "prevailing party." Therefore, he is entitled to attorney's fees under the Code. Iowa Code § 809A.12(7).

B. Substantial work by counsel was done on behalf of Claimant Rodriguez at the district court.

Second, the court's assertion that "every cent of attorney's fees requested by Mr. Stowers is attributed to his representation of Herrera," is also verifiably false. Numerous filings and communications were done *solely* pertaining to Rodriguez. (A1-2); (A25-27)(note the subject line: Rodriguez); (A28-31); (A149-151); (A152-153); (A163-172).

Even filings and hearings on behalf of *both* Herrera and Rodriguez contained arguments pertaining specifically to Rodriguez's interest in the vehicle. (A47, 50-56)(questioning based on legal argument on behalf of Rodriguez that suspicions about Rodriguez hiring an attorney caused State to seek second search warrant);

(A100-101, 133-137) (argument based on Rodriguez's petition under Iowa Code § 809A.11 and argument based on counsel's email on behalf of Rodriguez for the return of the vehicle and subsequent search thereof pursuant to a faulty warrant). Further, they arose out of the same factual circumstances and presented many of the same issues as would have been asserted if counsel had *only* represented Rodriguez, which counsel verified in his affidavit. (A158). Therefore, attorney's fees on behalf of Rodriguez in the amount of $8,232.30 should be paid under Iowa Code § 809A.12(7) for the proceedings at the district court.

On a final note, it is of no consequence that Claimant Rodriguez, throughout these proceedings, was seeking return of a low value item, as the State suggested at the hearing. (A186). That has no effect on his prevailing party status. *See* Iowa Code § 809A.12(7) (failing to mention property value anywhere). Although it may seem inequitable to have the State pay attorney fees that exceed the value of the item, the State chose to pursue the claim for six months despite being notified at the outset of the suit via email that Claimant would be seeking attorney fees. (A75). At the hearing on the motion, counsel for Claimant stated:

> **Mr. Stowers:** Now, the value of the vehicle, it is the same [ ] value of the vehicle when they sat out on a course of action for many months to try and forfeit it and to try and deprive my client of the return of the vehicle. Now, had they analyzed this originally, they could have said, well, we can eliminate our risk on the whole attorney fee issue by simply returning the vehicle because it is not worth it, which is kind of the argument I put to them originally, and then they went ahead and plowed forward. And on the eve of the hearing, they did what they did,

> which was to withdraw their objection to returning it. And it may be that they feel bad about what they did in that regard, but it is not really—doesn't change what occurred. And you know, I just think my client is entitled to some attorney's fees for trying to get his vehicle back. That's all.

(A189). The fact is that the State chose to fight for a low value property item for over six months in a contentious legal battle against the rightful innocent owner of the property. The owner should not bear the brunt cost of the State's decision to do so.

2. Claimants Are Entitled to Appellate Attorney Fees as "Prevailing Parties" Under Iowa Code § 809A.12(7).

Claimants also request that the court award appellate attorney's fees under Iowa Code § 809A.12(7). Iowa Code 809A.12(7) provides that the "agency or subdivision bringing the forfeiture action shall pay the reasonable attorney fees and costs . . . by a claimant who prevails on a claim for exemption in a proceeding under this chapter." Iowa Code 809A.12(7). The language of the statute in no way limits recovery to fees occurred at the trial court level, and indeed the use of the broad phrase "a proceeding" implies that a claimant at any stage or proceeding of litigation, even the appellate level, shall have attorney's fees paid.

In addition, where a statute or agreement awards attorney's fees to a "prevailing party," as Iowa Code 809A.12(7) does, Iowa courts have traditionally allowed attorney's fees to be recovered at both the trial and appellate court level. *See Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982) ("The same

rationale . . . which justifies awarding attorney fees in the trial court, also justifies awarding attorney fees in this appeal"). For example, under the mechanic's lien statute, Iowa Code § 572.32, if the person "*challenging the lien prevails*, the court should award reasonable attorney's fees." Iowa Code § 572.32 (emphasis added). In *Schaffer v. Frank Moyer Constr., Inc.*, the Iowa Supreme Court interpreted this language to permit fees at both the district court and on appeal, noting that the statute "in no way limit[ed] attorney's fees to those incurred at the district court." 628 N.W.2d 11, 23 (Iowa 2001); *see also DeBower v. County of Bremer*, 852 N.W.2d 20 (Iowa App. 2014) (allowing appellate attorney fees under 42 U.S.C. § 1988, which provides attorney fees to "*the prevailing party*")(emphasis added); *Bankers Trust Co.*, 326 N.W.2d at 278-79 (Iowa 1982)(using the same rationale to allow appellate attorney fees under a contract pursuant to Iowa Code § 625.22, which awards "reasonable attorney fee[s]" and does not limit fees to the trial court.); *Markey v. Carney*, 705 N.W.2d 13, 26-27 (Iowa 2005)(awarding appellate attorney fees under Iowa Code § 600B.25, which provides that the court "may award the *prevailing party* reasonable costs of suit, including but not limited to reasonable attorney fees.")(emphasis added); *Branstad v. State ex rel., Nat. Resources Commn.*, 864 N.W.2d 553 (Iowa App. 2015), *vacated sub. nom on other grounds*, *Branstad v. State ex. Rel Nat. Resource Commn.*, 871 N.W.2d 291 (Iowa

2015)(stating that under the forfeiture statute, "The court should also consider an award of appellate attorney's fees.").

Because Iowa Code § 809A.12(7) uses language similar to statutes that have allowed both appellate and trial court fees where a party prevails, it should be interpreted consistently with those statutes, and appellate fees should be awarded accordingly. As such, should they prevail on appeal, Claimants request that this case be remanded to district court to determine an appropriate appellate fee award. *Schaffer*, 628 N.W.2d at 23 (recognizing that it is the practice to allow the district court to determine appellate attorney fees).

CONCLUSION

The answer should have been considered sufficient under Iowa Code § 809A.13(4), or in the alternative Claimant should have been allowed to be heard on his Fourth Amendment claim prior to being forced to make testimonial statements. The district court's automatic declaration of forfeiture after dismissing Claimant's Answer did not follow statutory procedure and served as an automatic penalty in violation of the Fifth Amendment. Therefore, the forfeiture order should be vacated and the case should be remanded to the lower court for a decision on the merits of the motion to suppress.

In addition, because Claimant Rodriguez was the prevailing party on his claim, his request for attorney's fees should have been granted. Therefore, the order of the district court denying attorney's fees should be reversed.

Claimants also request appellate attorney's fees; therefore, the case should be remanded to the district court for determination of an appropriate amount.

STOWERS & SARCONE PLC
West Glen Town Center
650 S. Prairie View Drive, Suite 130
West Des Moines, IA 50266
Phone: (515) 224-7446
Fax: (515) 225-6215

By: /s/ Dean Stowers
Dean Stowers
Attorney for Claimants

CERTIFICATE OF FILING

The undersigned does hereby certify that she electronically filed Appellants' Final Brief with the Clerk of the Iowa Supreme Court by using the EDMS filing system on the 2nd day of November, 2016.

CERTIFICATE OF SERVICE

On the 2nd day of November, 2016, the undersigned party served Appellants' Final Brief on all other parties to this appeal by using the EDMS filing system.

Bridget Chambers

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 12,980 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in Times New Roman in 14 point font size.

STOWERS & SARCONE PLC
West Glen Town Center
650 South Prairie View Drive, Suite 130
West Des Moines, IA 50266
Phone: (515) 224-7446
Fax: (515) 225-6215

By: /s/ Amy Pille
Amy Pille
Legal Assistant