



FOUNDATION

P.O. Box 32159
Newark, NJ 07102
Tel: 973-642-2086
Fax: 973-642-6523
info@aclu-nj.org
www.aclu-nj.org

ALEXANDER SHALOM
Senior Staff Attorney
973-854-1714
ashalom@aclu-nj.org

January 17, 2017

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

Re: *State v. Habeeb Robinson*, Docket # AM-02994-16T2

Honorable Judges of the Appellate Division:

Pursuant to *Rule 2:6-2(b)*, kindly accept this letter-brief on behalf of *Amicus Curiae* American Civil Liberties Union of New Jersey.

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PRELIMINARY STATEMENT

To detain a person before an adjudication of guilt is exceptional and raises serious due process concerns. Recently, the New Jersey Legislature adopted a pretrial justice scheme that allows for such detention in limited circumstances and subject to meaningful due process protections. The New Jersey Supreme Court promulgated *Rules* that ensure that those protections are consistent with United States Supreme Court precedent that guarantees that defendants receive sufficient due process.

At issue in this case is an effort by the Essex County Prosecutor's Office to disregard those *Rules* and the important due process protections they provide and to convert detention hearings into rubberstamps without meaningful adversarial testing. To be sure, detention hearings are neither mini-trials nor opportunities to obtain limitless discovery. But also to be sure, the *Rules* require limited discovery, including the specific discovery at issue here. Unless meaningful discovery is provided, the *Rules* will be frustrated and constitutional rights jeopardized.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For purposes of this brief, *Amicus* American Civil Liberties Union of New Jersey adopts the Statement of Facts and Procedural

History set forth by the State in its Motion for Leave to Appeal letter brief dated January 11, 2017.

LEGAL ARGUMENT

Defendant ably explains why due process, the pretrial justice reform statute, the plain language of R. 3:4-2(c)(1)(B), canons of construction of that *Rule*, the rulemaking record surrounding that *Rule*, and federal and D.C. practice (on which our new bail system is based) and case law all compel the Court to order the State to provide statements and reports in its possession that relate to the detention application. *Amicus* American Civil Liberties Union of New Jersey therefore focuses in this letter brief on the troubling consequences of a contrary conclusion.

I. THE STATE'S INTERPRETATION OF R. 3:4-2(C)(1)(B) WOULD LEAD TO ABSURD RESULTS AND DEPRIVE COURTS OF NECESSARY INFORMATION.

It is axiomatic that "[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno v. United States*, 481 U.S. 739, 755 (1987). In New Jersey both the Legislature and the Supreme Court have sought - through the pretrial justice statutes, *N.J.S.A.* 2A:162-15, et seq., and *Rules of Court*, respectively - to ensure that the exception is, indeed, carefully limited. Those limitations circumscribe not only the categories of cases in which detention may be sought (*see, e.g.,*

N.J.S.A. 2A:162-19a), but also the process through which a defendant may be detained.

New Jersey Rules of Court address the conduct of detention hearings. Specifically, the *Rules* provide that "if the prosecutor is seeking pretrial detention, the prosecutor shall provide the defendant with all statements or reports in its possession relating to the pretrial detention application." *R.* 3:4-2(c)(1)(B). Additionally, "[a]ll exculpatory evidence must be disclosed." *Id.*

As explained by Defendant, evidence that relates to the pretrial detention application includes evidence that is necessary to test the "reliability and accuracy of the evidence relied on by the State, namely the identification of the defendant by the eyewitnesses." *Dbr* at 19.¹ The present matter is a quintessential case where discovery as required in the *Rule* is required to provide meaningful adversarial testing and to allow the court to properly determine whether detention is appropriate. Here, in a barebones affidavit, the investigating detective explained that two witnesses identified Defendant as a shooter in a homicide. According to the Preliminary Law Enforcement Incident Report (PLEIR), the incident was captured

¹ *Dbr* refers to Defendant's letter brief in opposition to Leave to Appeal dated January 13, 2017. *Sbr* refers to the State's letter brief in support of Leave to Appeal dated January 11, 2017.

on a surveillance camera. The State should therefore turn over incident reports related to the identification and the surveillance video which depicts the incident at issue.

The State, however, proposes an alternate reading of the phrase "relating to the pretrial detention application." The State contends that "information that relates to the pretrial detention application" is limited to "the evidence the State will use against the defendant in support of detention - and any exculpatory evidence required under *Brady*²." Sbr at 15. To get to this interpretation, the State relies on a faulty syllogism. The State explains that: both the State and the Defendant have an interest in a prompt detention hearing; it is impractical in such a hearing to require discovery commensurate with "the full-scale preparation and investigation . . . [of] a criminal trial"; therefore, the State contends, the only option is to provide the scant information it proposes. *Id.* But the *Rules* set forth a workable middle ground: the State need not turn over *all* discovery; it must only turn over discovery related to the pretrial detention application. In other words, where evidence

²The reference here is to *Brady v. Maryland*, 373 U.S. 83 (1963). The State takes too limited a view of that which is required by R. 3:4-2. The *Rule* requires the provision of "[a]ll exculpatory evidence." R. 3:4-2(c)(1)(B). *Brady*, of course, requires less: only exculpatory evidence "material either to guilt or to punishment," must be disclosed. *Brady*, 373 U.S. at 87.

bears on a fact upon which the State relies, it must be disclosed to defense counsel prior to the detention hearing.

To adopt the State's cramped interpretation of the *Rule* would lead to results that deprive defendants of due process. A few examples are illustrative.

First, imagine two cases involving identifications, but that occur under vastly different circumstances. In each case the witness selects the defendant from the same photographic array and in each case the witness indicates the same level of certainty about the identification. But, in one case the witness explains that she has 20-20 vision, stood ten feet from the shooter, was in a well-lighted hallway, having just returned from a late night study session at a friend's house. In the other case, the witness was not wearing the glasses she usually wears, was 100 feet from the shooting, and was at the end of a dark alley, having just returned home from a night of drinking at a bar. The State's conception of its obligation under R. 3:4-2(c)(1)(B) would treat the two cases identically; New Jersey's eyewitness identification jurisprudence recognizes significant differences between those two identifications. *State v. Henderson*, 208 N.J. 208, 264-65 (2011) (distance, lighting, and intoxication are all relevant factors in assessing eyewitness identification). Yet that meaningful information would be withheld from both the defense and from the judge. The court

would thus be unable to assess the strength of the identification of the Defendant, and the resultant strength or weakness of the State's case for detention, despite the fact that such issues are among those that judges may consider in determining whether any condition or set of conditions will satisfy the purposes of the pretrial justice statutes. *N.J.S.A. 2A:162-20b* ("the court may take into account information concerning . . . [t]he weight of the evidence against the eligible defendant"). Judges cannot employ their statutorily-authorized discretion if the facts they are entitled to consider are withheld from them by the State.

Next, imagine a murder case that turns on eyewitness identification. In that case, two witnesses both identify the defendant as the shooter. On its face - and, indeed, in a probable cause affidavit containing the hearsay statements of the investigating detective - the case against the defendant appears to be a strong one. Under the State's theory, the State need only provide the defendant with the probable cause affidavit. The State would, for example, not need to disclose evidence which showed that the arrays used highly suggestive procedures. If five photographs in the array depicted Caucasian men, and one photograph - that of the suspect - depicted an African American man, the identification would be plainly unduly

suggestive.³ *United States v. Wade*, 388 U.S. 218, 233 (1967). But, under the State's theory, Defendant would not be entitled to that information. Likewise, if Defendant's photograph was the only color picture among a group of black and white photographs, or if Defendant was the only person in the array wearing distinctive clothing, the State contends it need not disclose that fact, despite the virtual certainty that such a procedure would be deemed unduly suggestive. *Id.* The admissibility of the identification is among the issues that judges are told to consider in evaluating whether any condition or set of conditions can adequately protect the public, prevent obstruction of justice and ensure the defendant's presence when required. *N.J.S.A. 2A:162-20b* ("the court may take into account information concerning . . . the admissibility of any evidence sought to be excluded").

Simply put, if the phrase "relating to the pretrial detention application" is interpreted to mean only the evidence that the State will use against the defendant in support of detention, as the State proposes, courts will be unable to evaluate critical aspects of the identification procedure, as they are required to under *N.J.S.A. 2A:162-20*. To allow a

³ While such an example is plainly suggestive, it is arguably not exculpatory. At least in less extreme cases, it is only when a problematic array is subjected to adversarial testing that its exculpatory nature becomes apparent.

defendant to be detained before an adjudication of guilt while denying him access to information that undermines the strength of the very facts upon which the State relies for his detention jeopardizes due process rights foundational to our criminal justice process.

II. THE STATE'S READING OF ITS DISCOVERY OBLIGATION IGNORES DIFFERENCES BETWEEN THE RULE GOVERNING DISCOVERY WHERE THE STATE SEEKS DETENTION AND WHERE IT DOES NOT.

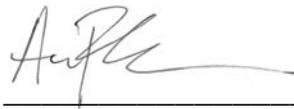
Further evidence that the State has proffered a mistaken interpretation of its discovery obligation in detention procedures can be found by comparing R. 3:4-2(c)(1)(A) with R. 3:4-2(c)(1)(B). Where the State does not move to detain a defendant pretrial, it is only compelled to "provide the defendant with a copy of any available preliminary law enforcement incident report concerning the offense and any material used to establish probable cause." R. 3:4-2(c)(1)(A). In other words, it can choose the facts upon which it will rely to establish probable cause and it must only provide the defendant with discovery establishing those facts. That is exactly what the State seeks to provide here.

However, where the State seeks detention, it must "provide the defendant with all statements or reports in its possession relating to the pretrial detention application." 3:4-2(c)(1)(B). The State seeks to interpret the language of subsection (B) to create only the obligations of subsection (A). Such an

interpretation is contrary to canons of construction which make clear that courts must "avoid an interpretation that renders words in a statute surplusage. In short, words make a difference. We must assume that the Legislature purposely included every word, and we must strive to give every word its logical effect." *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419, 440-41 (2013) (internal citation omitted). That rule of construction is no less applicable to *Court Rules* than it is to statutes: The Supreme Court, like the Legislature, must be assumed to have acted with purpose when it included different language in subsection (A) than it did in subsection (B). Simply put, where the State seeks detention, it requires something more.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial judge's decision and require the State to provide all reports relating to the identification procedure and the video surveillance footage that captured the homicide that served as the basis for the identification.



Alexander Shalom (021162004)
Edward L. Barocas
Jeanne LoCicero
American Civil Liberties Union
of New Jersey Foundation
89 Market Street, 7th Floor
P.O. Box 32159
Newark, New Jersey 07102
(973) 642-2086

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