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Re: *State v. Fabian Frater, et al.*, Docket # AM-000286-18

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.

TABLE OF CONTENTS

Preliminary Statement

In the twenty-five months since the effective date of the Criminal Justice Reform Act (CJRA), appellate courts in New Jersey have developed a robust jurisprudence regarding detention hearings. Trial courts – and those who practice there – have received guidance regarding discovery, the role of witnesses, the impact of presumptions, and the determination of the propriety of detention. In that same period there has been far less litigation regarding the speedy trial impact of the CJRA. At least two outstanding questions are presented in this appeal.

First, to justify an extension of the deadline for an indictment, must the State show a threat to public safety beyond that which was necessary to detain the defendant(s) in the first place? Second, in a case where the State has asked the court to take notice of the sophistication and length of the underlying investigation, may the court take the State at its word and, therefore, demand a prompt indictment? Both questions must be answered in the affirmative.

Statement of Facts

Amicus American Civil Liberties Union of New Jersey (ACLU-NJ) adopts the Statement of Facts contained in the State's brief in support of Leave to Appeal, adding the following:

At a detention hearing on December 11, 2018, the State argued for the detention of Defendants Fabian Frater and Marshea

Anthony. 1T; 2T.[1] As part of its presentation to the court, the State made clear that the investigation that gave rise to the arrest of Frater and Anthony was long running and sophisticated. 1T23:14-23:17. Specifically, the State explained that, in the months immediately preceding the detention hearing, it had utilized investigative techniques including: wiretaps (1T23:21-23; 1T28:5-11); pole cameras (1T23:23; 1T35:14-17; 1T36:3-14); extensive social media monitoring (1T23:25-24:3; 1T48:8-50:4); physical surveillance (1T24:7-9; 1T50:17-21); cellphone location data (1T35:14-17); and physical evidence recovered after an executed search warrant. 1T37:20-24. In short, the State convinced the trial court that on the question of probable cause it had easily met its burden. 2T67:4-8.

Statement of Procedural History

Amicus adopts the Statement of Facts contained in the State's brief in support of Leave to Appeal, adding the following:

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[1]1T refers to the first volume of the transcript from December 11, 2018 (included in Frater's appendix at Dff38-101);
2T refers to the second volume of the transcript from December 11, 2018 (included in Frater's appendix at Dff102-210);
3T refers to the transcript from January 23, 2019;
PBr refers to the State's brief in support of Leave to Appeal;
PTBr refers to the State's trial court brief, dated January 9, 2019.
Dff refers to Frater's Appendix before this Court.
Sa refers to the State's Appendix.

On January 9, 2019, the State sought a 45-day extension of its deadline to indict the defendants. Dff 1-18. Two weeks later, Hon. Adam E. Jacobs, J.S.C. denied the State's motion. Sa 1-2. On February 5, 2019, the Court granted the State permission to file an emergent appeal. Sa 11

Amicus ACLU-NJ files this brief along with a motion to appear as amicus curiae.

Argument

I. The trial court properly exercised its discretion to deny the state's application to extent the period within which it must obtain an indictment.

Pursuant to *N.J.S.A.* 2A:162-22(a)(1)(a) and *R.* 3:25-4(b), a court may allocate up to 45 additional days for the State to bring an indictment if the State satisfies a two-part test: 1) there exists a substantial and unjustifiable risk to public safety or the administration of justice, such that no conditions could address the risk; and 2) failure to proceed within the ordinary timeframe was not caused by the prosecutor's unreasonable delay. *N.J.S.A.* 2A:162-22(a)(1)(a). The State cannot meet its burden here.

A. The State must show a risk to public safety beyond that which is required for detention.

Amicus ACLU-NJ takes no position on whether defendants in this case pose a sufficiently acute risk to public safety to satisfy the first requirement. The trial court made clear that it

was not focused on this question. 3T17:22-18:7. But, the State's perception of what it needed to demonstrate is sufficiently dangerous to require a response, even if the State could have ultimately satisfied its burden as to the first inquiry.

The State contends that the question of whether defendants pose "a substantial and unjustifiable risk" had "already been made by the [detention] court." PTBr 10. According to the State, the fact that various detention judges determined that no condition or series of conditions would protect the public is sufficient to end the examination. *Id.* at 11.

Such a construction requires an absurd reading of the CJRA. The speedy trial provisions of the CJRA only apply to defendants who have been detained. *N.J.S.A.* 2A:162-22(a).[2] No defendant can be detained unless a court has already found that no condition or series of conditions would adequately serve the purposes of the CJRA. *N.J.S.A.* 2A:162-18(a)(1). The speedy trial portion of the CJRA extends the deadline for indictment if the court finds: "a substantial and unjustifiable risk to the safety of any other

[2] The statute applies to those people who are incarcerated because they are unable to post bail. But, as a result of Attorney General policies generally forbidding prosecutors from seeking money bail, particularly when it will result in detention (AG Directive 2016-6 v3.0, *Modification of Directive Establishing Interim Policies, Practices and Procedures to Implement Criminal Justice Reform Pursuant to P.L. 2015, c. 31*. at page 62), there are no people currently held for want of money bail.

person or the community or the obstruction of the criminal justice process . . . so that no appropriate conditions for the eligible defendant's release could reasonably address that risk." *N.J.S.A.* 2A:162-22(a). That requirement must mean *something*.

The State's view – that a finding that justifies detention also justifies an extension of the speedy trial rule – renders the language "substantial and unjustifiable risk" surplusage.[3] It is axiomatic that "[i]nterpretations that render the Legislature's words mere surplusage are disfavored." *In re Commitment of J.M.B.*, 197 N.J. 563, 573 (2009).

Whatever the phrase "substantial and unjustifiable risk to the safety of any other person or the community" in *N.J.S.A.* 2A:162-22(a) means, it must mean something different than "the protection of the safety of any other person or the community" in *N.J.S.A.* 2A:162-18(a)(1). *See DePascale v. State*, 211 N.J. 40, 73-74 (2012) (Patterson, J., dissenting) (citing Norman J. Singer & J.D. Shambie Singer, 2A Sutherland Statutory Construction § 46:6, at 250-52 (7th ed. 2007) ("[W]hen the legislature uses certain

[3] It is true that, theoretically, a person can be detained simply because of an elevated risk of nonappearance. *N.J.S.A.* 2A:162-22(a)(1). So, one could argue that *N.J.S.A.* 2A:162-22(a) simply seeks to protect that small (perhaps non-existent) group of defendants from extensions of the indictment deadline. But it is illogical to assume the Legislature would use several sentences to achieve that purpose rather than the phrase "other than those detained exclusively based on the risk of non-appearance."

language in one part of the statute and different language in another, the court assumes different meanings were intended.").

Even if the court requires a greater showing than was made here, however, the State *might* be able to shoulder its burden on the first requirement. On the second part of the test, the State certainly cannot meet its burden – it made virtually no showing.

B. The State's arguments about the strength of its proofs and the sophistication of the investigation that justified detention are relevant to determinations of excludable time.

In at least one of the detention hearings in this case, the State detailed a long-running and sophisticated investigation. *See generally* 1T23:14-24:17. The State made clear – in December of 2018 – that it easily cleared the hurdle of probable cause that is required for detention. *N.J.S.A.* 2A:162-19(e)(2). Grand juries require the same standard of probable cause to return an indictment. *State v. Ingram*, 230 N.J. 190, 213-214 (2017). That is why a grand jury indictment obviates the need for a showing of probable cause in detention hearings. *Id.* (citing *N.J.S.A.* 2A:162-19(e)(2)).

It is well known that in order "[t]o demonstrate probable cause, the State must [only] show the police had a 'well grounded suspicion that a crime ha[d] been . . . committed,' and that the defendant committed the offense." *Id.* (quoting *State v. Gibson*, 218 N.J. 277, 292 (2014) (in turn quoting *State v. Sullivan*, 169

N.J. 204, 211 (2001)). Grand juries require "less evidence than is needed to convict at trial[.]" *Id.* (quoting *State v. Brown*, 205 N.J. 133, 144 (2011)).

Notwithstanding the significant investigatory steps that had been taken prior to the detention hearings, the State contends that new leads have led to new information. 3T19:21-23:13 (describing post-detention hearing investigation, including ballistic testing of a gun, Communications Data Warrants, witness interviews, and buy-bust operations). But none of that new information is required to present to a grand jury probable cause that the charged defendants have committed the charged crimes. It may well be true that additional investigation could lead to more charges or charges against new defendants. And nothing prevents the State from pursuing those investigative options – but they cannot force a dozen defendants to whither in jail waiting for an indictment while the State seeks additional information.

There are three primary reasons why the State must be forbidden from extending the time for indictment to either perfect or expand the scope of its case. First, defendants stand at a considerable disadvantage preindictment. Although the CJRA provides for robust discovery at the detention hearing stage (*State v. Robinson*, 229 N.J. 44, 69-71 (2017)), it is not the same amount

as is due after indictment. *State v. Dickerson*, 232 N.J. 2, 27-28 (2018).

Second, were the State allowed to extend the time for indictment to investigate additional criminal activity, perhaps even regarding additional defendants, there would exist virtually no limiting principle. In almost every case there is more that law enforcement can do – and, indeed, does do – after it has sufficient evidence to charge and indict. The CJRA provides the State with significant time after indictment to prepare the case for trial. *N.J.S.A.* 2A:162-22(a)(2)(A) (providing 180 days from indictment to trial, plus excludable time); *N.J.S.A.* 2A:162-22(b)(1) (enumerating more than a dozen categories of excludable time). Where new investigation provides significant new information, the State may seek a superseding indictment, thereby tolling the speedy trial clock. *N.J.S.A.* 2A:162-22(a)(2)(B)(ii). It need not delay the indictment.

Third, and critically, courts should not proceed on bald assertions of need alone. The State contends that it needs more time and his been diligent in its investigation (SBr 12-14), but there exists no evidence that the State has followed its own policies for expediting investigative processes. *See* AG Directive 2016-6 v3.0, *Modification of Directive Establishing Interim Policies, Practices and Procedures to Implement Criminal Justice Reform Pursuant to P.L. 2015, c. 31*. at page 79 (establishing

protocol for expedited testing where speedy trial limits are implicated). Where the State seeks to extend the time required for an indictment, it must show that it has diligently made efforts to ready itself to present the case to a grand jury within the 90-day time limit contemplated by the Legislature. No such showing has been made here.

The State has undertaken a complex investigation of an alleged criminal enterprise. But when the State seeks to prosecute serious racketeering cases, it cannot use the seriousness of the charges as a rationale for its failure to proceed in a timely fashion. To hold otherwise is to create two tracks of speedy trial protections for detained defendants: 180 days to indictment for those charged with less serious crimes and 225 days for those charged with more serious crimes. The Legislature determined that 180 days was an appropriate limit in all but exceptional cases. It is true, for example, that making twelve copies of electronic discovery is time consuming (SBr 13-14); but the CJRA requires that the State be prepared to prosecute these cases after arrest with the same sophistication and commitment of resources as it devoted to the initial investigation. It is either a sophisticated, advanced-stage investigation or it is not. The State cannot have it both ways.

Conclusion

Speedy trial protections must mean something. Pretrial incarceration takes significant tolls on defendants' lives and cases. Joint Committee on Criminal Justice, *Report of the Joint Committee on Criminal Justice* at 69-71 (Mar. 10, 2014). In adopting the CJRA, the Legislature sought to balance that reality against the legitimate need of prosecutors to have sufficient time within which to prepare their cases. The Legislature – mindful of extraordinary events that can slow an indictment or a trial – created a system that allowed some flexibility. But, in order to depart from the established timeframes, the State must make meaningful showings. In this case, the State needed to show a substantial and unjustifiable risk and that the delays were not caused by the prosecutor's unreasonable delay. Although the State should have had to show more to satisfy the first prong, the court properly held that it had not met its burden on the second and, as a result, the Court should affirm the denial of the State's motion.

Respectfully submitted,

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