



New Jersey

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 Supervising Attorney

973-854-1714
ashalom@aclu-nj.org

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

Re: *State v. K.S.*, Docket # AM-000246-18

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.

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Preliminary Statement

The trial court and the State have spent significant time explaining that continuity of government counsel – that is, the interest in having the same assistant prosecutor handle a case from beginning to end – can theoretically serve as a rationale to impose “excludable time” that delays a defendant’s statutory right to a speedy trial. There should be little debate about such a proposition: it certainly can. But the court below failed to apply the clear limiting language of the Court Rule, which plainly does not allow such a calculation as a matter of routine.

No one could reasonably argue that the Legislature or the Supreme Court intended to force assistant prosecutors who had developed meaningful relationships with victims to jettison their cases because other trial obligations, and the laws of physics, prevent them from trying multiple cases at the same time. At the same time, neither the Criminal Justice Reform Act (CJRA) nor the Court Rules designed to implement it envision the award of excludable time in every case for which the assistant prosecutor has a conflict. This Court need not determine where to draw the line because in this case the prosecutor had only the most limited

contacts with the victim and provided absolutely no other particularized reason why another prosecutor could not be prepared to try the case on the scheduled date.

To prevent abuse of the excludable time provisions that would render the statutory speedy trial provisions virtually meaningless, the Court must require particularized, significant justifications for treating continuity of government counsel as a basis for excludable time.

Statement of Facts

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

The State sought excludable time to allow Assistant Prosecutor Michael Burke to try the cases against Defendant. PA2.¹ Burke was in the midst of a trial in another case involving a detained defendant for whom the speedy trial deadline was approaching. *Id.* Burke had not represented the State in the present

¹ PA refers to the State's Appendix provided to the Court on the Emergent Motion for Leave to Appeal; PBr refers to the State's brief in support of Leave to Appeal; 1T refers to the transcript from January 2, 2019.

case from its inception; instead the case was transferred to him after indictment. 1T21:11-18.

Though Burke contended that his office had “maintained and fostered a relationship” (1T23:6-7) with the victim, he acknowledged that he, personally, had only met the victim one time. 1T30:21-31:6. Indeed, the only meeting was not a long one: they met in a nearby courtroom when the victim appeared as a defendant in an unrelated case. 1T30:2-5. Burke discussed his office’s *general* policy of handling “victims very closely[,]” explaining that they “try to, basically, form relationships from – from the jump and moving forward.” 1T22:18-21. But he provided no indication of any efforts he had made to foster a relationship with the victim; indeed, the State did not dispute defense counsel’s contention that the victim “has had no contact with the State in several months[, h]ad no recollection of meeting with anyone from the [prosecutor’s] office[, w]as not interest in going forward[, and] has no known relationship with this Prosecutor[.]” 1T28:14-18.

Statement of Procedural History

Amicus adopts the Statement of Procedural History contained in Defendant's brief in support of Leave to Appeal, adding the following:

On January 18, 2019, Defendant sought leave to appeal; four days later the State filed an answer in which it agreed that the Court should hear the case. On January 23, 2019, the Court granted leave to appeal, ordered supplemental briefing, and set the case for oral argument. Amicus files this brief along with a motion for leave to participate as amicus curiae.

Argument

The State and the trial court contend that there are two questions to be answered: first, can continuity of government counsel constitute good cause; and, second, did the court act within its discretion in awarding 24 days of excludable time. PA2; PBr 1. That analysis skips a critical step and, as a result, suggests that the trial court's determination about whether to award excludable time is entitled to deference where, in fact, de novo review is required.

Under the CJRA, "[t]he question of whether a particular period or motion is excludable . . . is a question of law that

appellate courts review de novo.” *State v. Forchion*, 451 N.J. Super. 474, 481 (App. Div. 2017). A deferential standard of review applies only to the fact finding concerning the *amount* of excludable time. *Id.* Here, the court engaged in three stages of legal analysis before determining how much time to exclude from the speedy trial calculation: can continuity of counsel ever constitute good cause? when can continuity of counsel justify the entry of an excludable time order? did the State meet the standard necessary to enter an order? Each of those legal questions is subject to de novo review. Only if this Court determines that the trial court properly answered those questions, does its determination of how much time to exclude from calculations under N.J.S.A. 2A:162-22b(1)(1) receive deferential review.

In this case, however, the trial court misapplied the catch-all provision of *R. 3:25-4(i)(12)* in a case where there existed no compelling or particularized reason why another prosecutor could not have handled the case in Burke’s place. That error – a determination of whether or not excludable time applies, rather than a question of how much should apply – must be reviewed de novo.

I. Although continuity of government counsel may constitute good cause to exclude time under the speedy trial provisions of the CJRA, to trigger excludable time, the State must show a particularized reason why the case cannot be transferred to another assistant prosecutor.

It takes little creativity to imagine a case where refusing to provide excludable time when an assigned prosecutor is unavailable would create grave injustices and run counter to the goals of the CJRA, its enabling rules, and common sense. The State could establish good cause to exclude time in a complex case, where a prosecutor had expended significant effort familiarizing herself with a voluminous record or establishing a rapport with critical witnesses. In those kinds of cases, the CJRA clearly would not mandate release of a defendant because the prosecutor developed an unavoidable conflict – personal or professional.

But basic tenants of statutory construction also make clear that in order to justify the issuance of excludable time, the State must show more than a conflict: it must show both that the conflict is unavoidable *and* that there are particularized reasons why another assistant prosecutor cannot assume responsibility for the case. Put differently, there must be a specific reason why the particular prosecutor must remain assigned to the case and why it

cannot be tried at the assigned time, prior to the expiration of deadlines set by the CJRA.

The CJRA does not explicitly reference continuity of counsel as a justification for excludable time. PA5. But the CJRA contains a “catch-all” provision, which allows for the exclusion of time from the speedy trial calculation for non-enumerated reasons where there exists “good cause.” *Id.* (citing N.J.S.A. 2A:162-22b(1)(1)). The term “good cause” is not defined within the statute.

Like the CJRA, the federal Speedy Trial Act (STA) of 1974 contains a catch-all provision. Rather than allowing extensions for good cause, the STA looks to whether excludable time meets the “ends of justice.” 18 U.S.C. § 1361(h)(7)(A). Judges are told to consider, among other questions, whether failure to grant a continuance would unreasonably deny the Government continuity of counsel. 18 U.S.C. § 1361(h)(7)(B)(4). In other words, although reference to continuity of counsel exists in the catch-all provision, the STA explicitly acknowledges it as a valid basis for excluding time.

When drafting the CRJA, the New Jersey Legislature included categories of events that “shall” trigger excludable time. *N.J.S.A.*

2A:162-22b(1)(a)-(k). The Legislature did not include any reference to continuity of counsel in any of those sections. The trial court found inapplicable the canon of statutory construction that provides that the express mention of one thing excludes all others. PA10. It contended that the existence of a catch-all renders the rule “simply inapplicable.” *Id.* (citing *Commonwealth v. Chester*, 101 A.3d 56, 63 (Pa. 2014)). But that analysis misunderstands the import of the principle. Surely no one suggests that the canon renders the catch-all provision meaningless. *See* DBr 9-10 (Defendant acknowledging that there exist instances where continuity of government counsel can constitute “good cause” to order excludable time). At the same time, the trial court’s reading makes the specific bases for excludable time found in *N.J.S.A.* 2A:162-22b(1)(a)-(k) useless. If the Legislature intended for a trial court to merely determine where it thought excludable time should apply, lawmakers would not have had to list the eleven specific circumstances where excludable time shall apply. Likewise, had the Legislature intended the CJRA to function exactly like the STA, it would have simply replicated the language of the federal statute.

Were there any debate regarding the breadth of the catch-all provision of the statute, the Supreme Court resolved it with the adoption of *R. 3:25-4(i)(12)*. That rule makes totally plain that the catch-all provision must be construed narrowly. At a minimum the rule must mean that the catch all should not subsume any entire category of events that could have existed as a standalone rationale for excludable time. To achieve a limiting construction, courts should only find that good cause exists to award excludable time for the purpose of ensuring continuity of government counsel when the State demonstrates both that the conflict is unavoidable and that there exist particular reasons why the prosecutor cannot be replaced.

The first requirement – that the conflict is unavoidable – relies on common sense. Certainly a detained defendant should not wither in jail because a prosecutor wants to try a less urgent case or to go on vacation. By the same token, courts should not limit consideration of unavoidable conflicts to those caused by trial obligations. An illness or a death in the family should certainly qualify as an unavoidable conflict. But that alone is insufficient to satisfy the narrow construction obligation imposed by the *Rule*.

Where conflicts can be anticipated – like most court obligations and some planned personal conflicts – a different assistant prosecutor can sometimes be assigned to try the case. Indeed, with enough time to prepare, the State must show some particularized reason why substitution is impractical. The reasons that could justify the use of excludable time instead of a new assistant prosecutor might include: that the prosecutor has particular expertise that others lack; that the prosecutor has developed a significant relationship with witnesses; that discovery is voluminous and the original prosecutor has invested substantial time familiarizing herself with it; or that the original prosecutor has handled significant pretrial motions. The less notice the State has about a conflict, the easier it would be to show the infeasibility of substitution. Put simply, at a minimum, the State must show a case-specific reason why it would be unfair to ask a new prosecutor to take the case.

Contrary to the State’s suggestion, that principle does not treat assistant prosecutors as “automatons” (PBr 17), force prosecutors to violate ethical obligations (PBr 13), or encroach on the authority of the County Prosecutor to control staffing in his

office. PBr 18. Taking the justifications put forward by the State in inverse order: To be clear, there never exists an obligation for a prosecutor to reassign a case to a different assistant. Rather, the State cannot benefit from the award of excludable time unless it *cannot* reassign the case. And, of course, if a prosecutor has insufficient time to prepare a case she cannot be ethically asked to proceed. R.P.C. 1.1(a). But the State cannot simply rely on that general principle; instead, it must explain why there exists inadequate time for a new prosecutor to get up to speed. Courts have asked defense attorneys to try cases with only days to prepare. *See State v. Miller*, 216 N.J. 40, 70-71 (2013) (finding no due process violation in situation where defense attorney was told to try case for which he only had four days to prepare but suggesting that a delay of a few hours would have been advisable). Amicus does not endorse rushed preparation such as that, but notes that there was almost a month between the time Defendant signed the pretrial memorandum (12/3/18) and the scheduled trial date (1/2/19).

The State acknowledges that substituting assistant prosecutors “may be possible in a select number of uncomplicated cases” but

contends that this is not such a case. PBr 17. The State notes that “typically, in the time leading up to the trial, the assigned Assistant Prosecutor becomes intimately familiar with the case’s facts and potential legal issues, and develops relationships with witnesses and, most importantly, victims.” *Id.* That may be true, but what happens “typically” is not evidence about what happened in a particular case. The record is devoid of any evidence that Burke had spent any time – other than a brief in-court meeting with the victim – becoming acquainted with the facts, legal issues, or witnesses.

CONCLUSION

If a court is able to grant excludable time without any particularized justification, the catch-all provision of *N.J.S.A.* 2A:162-22 would, indeed, catch all. The Legislature’s decision – contrary to the federal STA – to not include continuity of government counsel as an explicit justification for excludable time makes clear that such an award should be the exception not the rule. *Rule* 3:25-4(i)(12) is even more explicit: the catch-all provision must be narrowly construed.

Because the award of excludable time in this case – where the State established that the conflict was unavoidable, but not that Burke needed to stay on the case – would require a broad construction of the catch all, the Court must reverse the grant of excludable time.²

Respectfully submitted,



Alexander Shalom (021162004)
Jeanne LoCicero
American Civil Liberties Union
of New Jersey Foundation
89 Market Street, 7th Floor
P.O. Box 32159
Newark, New Jersey 07102
(973) 854-1714

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² Amicus notes that by the time this case can be decided by this Court the trial will likely have come and gone. As the Supreme Court explained in *State v. Mercedes*, 233 N.J. 152, 169 (2018) and *State v. Pinkston*, 233 N.J. 495, 503 (2018), given the importance of understanding the functioning of the CJRA at this early stage of its existence, the Court should nonetheless determine the propriety of the grant of excludable time.