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Re: *State v. Jamantay Gaines*, Docket # A-001836-16

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 Pretrial Justice Reform statutes are designed to guarantee that detention is used sparingly and only after a defendant has been provided a hearing that comports with due process.

At issue in this case is an effort by the Hudson County Prosecutor's Office to disregard those due process protections 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 in order to ensure that defendants are provided due process and that the Pretrial Justice Reform statutes are honored, to prove probable cause and that detention is appropriate, the State must call a witness with some knowledge of the facts. Where, as here, the State fails to call a witness with knowledge of the case, it cannot satisfy its burden of showing - by clear and convincing evidence - that detention is appropriate.

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 Defendant in his appellate brief dated January 13, 2017.

LEGAL ARGUMENT

Defendant ably explains why due process, the Pretrial Justice Reform statutes and *Rules of Court* designed to implement those statutes all compel the State to call a witness with knowledge of the case in order to satisfy its burden of justifying detention. *Amicus* American Civil Liberties Union of New Jersey focuses in this letter brief simply on the due process concerns that attach where the State is permitted to prove that detention is justified exclusively by proffer.

I. THE STATE'S ATTEMPT TO PROVE PROBABLE CAUSE BY PROFFER VIOLATES DUE PROCESS.

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, the Legislature sought - through the Pretrial Justice Reform statutes, *N.J.S.A.* 2A:162-15, et seq. - 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. *See, e.g., N.J.S.A.* 2A:162-18a. As part of that process the State must "establish probable cause that the eligible defendant committed the predicate offense" *N.J.S.A.*

2A:162-19e(2) and must prove - by clear and convincing evidence

- that:

no amount of monetary bail, non-monetary conditions or combination of monetary bail and conditions will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process. . . .

[*N.J.S.A.* 2A:162-19e(3).]

Where, as here, the State seeks to prove probable cause by mere proffer, a defendant is denied the opportunity to test the facts upon which the State relies to detain him; such a process violates constitutional guarantees of due process. To be clear, there is no debate regarding whether the State may present hearsay testimony at a detention hearing: it certainly can. *N.J.S.A.* 2A:162-19e(1) ("The rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing"). But, even where New Jersey allows hearsay evidence in court proceedings, the Supreme Court has placed limits on its use, grounded in concerns about due process and reliability.

For example, in *State v. Engel* the New Jersey Supreme Court examined the admissibility of hearsay evidence in a hearing

regarding whether a defendant was eligible for bail.¹ 99 *N.J.* 453 (1985). While acknowledging the admissibility of hearsay evidence in that context, the Court "develop[ed] adequate standards that can guarantee that hearsay evidence proffered at a bail hearing is sufficiently reliable to constitute a reasonable substitute for the right of confrontation and an appropriate protection of the defendant's liberty." *Id.* at 467. The Court limited admissibility of codefendants' confessions at bail hearings to instances where "(1) the confession is more probative on the point for which it is offered than any other evidence that the State can procure through diligent efforts under all of the circumstances; and (2) the confession itself is sufficiently trustworthy or circumstantial corroboration of the confession renders it sufficiently trustworthy." *Id.* at 468. This is not to suggest that the same rule must be superimposed on hearsay statements offered in detention hearings; the point is much simpler: even where hearsay statements are admissible, courts must guard to ensure that the hearings utilize procedures that provide due process and ensure reliability.

¹ Under the prior bail scheme, defendants were eligible for bail unless charged with a capital crime, where the proof was evident and the presumption great. *N.J. Const.* art. I, para. 11. Thus only where a court first made the determination that a defendant was likely to be charged with a capital crime and face the death penalty, was a defendant denied release. Thus, in *Engel* the question before the Court was as similar to a detention hearing as existed prior to the effective date of the Pretrial Justice Reform Statutes.

The concerns about allowing the proof of probable cause by proffer were well-expressed by Justice Albin in a recent oral argument at the New Jersey Supreme Court. In *State v. Bacome*, the officer who observed the event at issue in the suppression hearing did not testify at the suppression hearing. 440 N.J. Super. 228, 239 (App. Div. 2015). At oral argument before the Supreme Court, Justice Albin explained why such a situation was problematic:

I know that we permit hearsay, but there comes a point where the very integrity of a suppression hearing is undermined when the officer who has the knowledge of whether there was the furtive movement or whether there was the seatbelt violation doesn't testify and you put this stranger up who was conveyed the information who is not subject to cross-examination so that the trial judge does not hear from the person who maybe did not see things correctly, can't be cross examined on lighting, on whether or not he wears eyeglasses and all the rest and it really seems to undermine some of the fundamental purposes of having a hearing itself.

[Justice Barry Albin, Oral Argument, *State v. Bacome*, November 30, 2016 (A-9-15) at 18:48-19:37, available at: <http://www.judiciary.state.nj.us/webcast/archive.html>.]

One is left to wonder whether the fundamental purposes of a detention hearing can be served where the State presents only a barebones proffer as they did in this case. In determining whether no condition or series of conditions can adequately

protect the public, prevent obstruction, and ensure the defendant's presence, courts are told to consider several factors that simply cannot be analyzed where the court is deprived of the testimony of any witness with any knowledge of the case. See, e.g., N.J.S.A. 2A:162-20a (nature and circumstances of the offense charged); N.J.S.A. 2A:162-20b (weight of the evidence against the eligible defendant, except that the court may consider the admissibility of any evidence sought to be excluded).

There is simply no evidence before the court, competent or otherwise, that explains the circumstances of the offense charged. The proffered affidavit states that Defendant was found in possession of a handgun, but says nothing about the circumstances of that arrest (for example, was defendant brandishing the weapon? Was he in a car? Was he on the street? Was he in a home? Etc.). There is also no evidence regarding whether the evidence will ultimately be excludable; knowing nothing about the circumstances of the arrest, it is impossible to speculate about whether the search in the case was constitutional. The court is even deprived of any information about whether the search in the case was conducted pursuant to a search warrant or whether it is a presumptively unreasonable warrantless search.

Despite the permissive nature of the statutes with respect to the Rules of Evidence, this Court must ensure that hearsay statements that cannot be tested and which therefore lack indicia of reliability, are not used as the exclusive evidence to justify the detention of a person before trial.

To require the production of a witness or other form of non-hearsay evidence will not transform the detention hearing into a full hearing on the merits. While the contours of detention hearings will be developed as the process moves forward, the present case is a simple one, as no evidence beyond the mere hearsay proffer was brought forth. That cannot suffice for the State to meet its burden. Simply put, for constitutional due process protections to be satisfied and for the statutory protections the legislature envisioned to have meaning, something more is required. *See generally N.J.S.A. 2A:162-19e(1)* (providing defendant with a series of due process protections for detention hearings, including the right to counsel, to testify, to present witnesses, to cross-examine witnesses and to otherwise present information).

CONCLUSION

For the foregoing reasons, this Court should reverse the Order granting the preventative detention of Defendant and remand for a hearing at which the State will bear the burden of justifying detention.



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