SUPREME COURT OF NEW JERSEY
DOCKET NO. 085028 (A-51-20)

HAMID HARRIS,
Plaintiff-Respondent,
v.

CITY OF NEWARK, NEWARK POLICE DEPARTMENT, DETECTIVE DONALD STABILE, POLICE OFFICER ANGEL ROMERO, JOHN 1-10, ABC PUBLIC ENTITIES 1-10, et al.,
Defendants-Petitioners.

CIVIL ACTION

On Appeal from an Interlocutory Order of the Superior Court of New Jersey, Appellate Division.

Sat Below:
Hon. Heidi Willis Currier, J.A.D.
Hon. Greta Gooden Brown, J.A.D.

BRIEF OF AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This Court is tasked with deciding whether a defendant can appeal an order denying qualified immunity on a summary judgment motion before the case has gone to trial. Because the right to an interlocutory appeal is a state matter and a procedural right, state courts hearing constitutional and civil rights claims are free to create and follow their own rules for when they should be heard. For that reason and the reasons stated below, the answer must be no.

No interest of justice is implicated in granting an interlocutory appeal here. No extraordinary circumstances or "compelling reasons" exist to justify the piecemeal litigation that would follow should an interlocutory appeal be granted. To the contrary, the judicially created doctrinal entitlement of qualified immunity must yield to the individual's constitutional and statutory rights, which this Court has a power and duty to protect, not shrink. Where the public's statutory and civil right to pursue justice after an alleged constitutional violation by a government actor (sketched out through material, albeit, disputed, facts) conflicts with a government actor's request for an additional hearing on a doctrinal immunity to avoid trial, courts should insist on the finality established by the court rules rather than privilege law enforcement impunity over accountability.

In this brief, the American Civil Liberties Union of New Jersey ("ACLU-NJ" or "Amicus") argues that New Jersey's long-standing rule disfavoring interlocutory appeals is even more applicable to interlocutory appeals denying summary judgment motions on qualified immunity requests. Reinforcing the extant rule would neither erode the central purpose of qualified immunity nor drain public funds or judicial resources. A rule change allowing such appeals would further burden New Jersey residents (particularly those bringing claims against law enforcement officials) in the midst of notoriously difficult, time intensive, and costly cases, and who have a right to advance those cases under the New Jersey Civil Rights Act ("NJCRA") and the New Jersey Constitution. Should this Court feel the need to amend the rule, such change should be referred to the Civil Practice Committee for further consideration. (Point I).

This Court need not look to the federal rules regarding the interlocutory appeals of qualified immunity denials, because the federal rules submit to the state on procedural matters. Further, the allowance of such interlocutory appeals in the federal system is explicitly tied to federal rules of appellate procedure, which are inapplicable here. (Point II).

This Court should uphold and reinforce the current rule disfavoring interlocutory review to ensure that the possibility of immunity does not trump a plaintiff's rights under the NJCRA and the State Constitution.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus accepts and incorporates the statement of facts and procedural history contained within Plaintiff-Respondent's Law Division brief and his brief in opposition to Defendants' Petition for Certification to this Court. This brief accompanies a Motion for Leave to Participate as Amicus Curiae. R. 1:13-9(e).

ARGUMENT

Defendants rely on both New Jersey law and federal jurisprudence to suggest that they should be able to immediately appeal a denial of a grant of qualified immunity. Neither body of law supports their argument.

I. INTERLOCUTORY ORDERS REQUIRE LEAVE TO APPEAL AND THE COURT RULES SHOULD NOT BE CHANGED FOR DENIALS OF QUALIFIED IMMUNITY.

Contrary to Defendants' assertion (Defendants' Reply Brief in Support of the Petition for Certification at 1), New Jersey's court rules concerning appellate procedure are crystal clear: an order that does not finally determine a cause of action, but decides an intervening matter which then requires further steps to allow the court to adjudicate the cause on the merits, is an interlocutory order. Moon v. Warren Haven Nursing Home, 182 N.J. 507, 512 (2005); see also R. 2:2-3(a). This includes orders denying summary judgment, which are not appealable as a matter of right, but only with leave of the Appellate Division. See R. 2:5–6; see also

Di Maio v. Loc. 80-A, United Packing House Workers of Am., CIO, 32 N.J. Super. 136 (App. Div. 1954).

Leave to appeal an interlocutory adjudication lies within the Appellate Division's exclusive authority as an exercise of its discretion "in the interest of justice." Edwards v. McBreen, 369 N.J. Super. 415, 420 (App. Div. 2004). Such a grant of interlocutory review is sparingly exercised. State v. Reldan, 100 N.J. 187, 205 (1985); see also Vitanza v. James, 397 N.J. Super. 516, 517 (App. Div. 2008). Where leave is granted, it must be because the possibility of some grave damage resulting from the trial court's order—not a minor injustice—exists. Brundage v. Est. of Carambio, 195 N.J. 575, 599 (2008). Appeals to this Court from interlocutory orders of the Appellate Division are only granted to "prevent irreparable injury." R. 2:2-2(a).

The spare exercise of such appeals is foundational because interlocutory appellate review runs contrary to "a strong policy against piecemeal adjudication of controversies." DiMarino v. Wishkin, 195 N.J. Super. 390, 395 (App. Div. 1984). The Appellate Division is thus tasked with evaluating "whether extraordinary circumstances are present warranting a piecemeal appeal." Edwards, 369 N.J. Super. at 420. In the absence of extraordinary circumstances or "compelling reasons" the "[i]nconvenience, expense and delay result[ing] from the

fragmentation of the trial process . . . should be avoided." DiMarino, 195 N.J. Super. at 395. As the Appellate Division noted in Parker v. City of Trenton:

> if we treat every interlocutory appeal on the merits just because it is fully briefed, there will be no adherence to the Rules, and parties will not feel there is a need to seek leave to appeal from interlocutory orders. At a time when this court struggles to decide over 7,000 appeals a year in a timely manner, it should not be presented with piecemeal litigation and should be reviewing interlocutory determinations only when they genuinely warrant pretrial review.
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> [382 N.J. Super. 454, 458 (App. Div. 2006).]

Defendants' attempt to recast the denial of qualified immunity as belonging to a universe of interlocutory orders that should be deemed final for appeal purposes should be firmly disavowed by this Court. See Defendants' Petition for Certification ("Pet. Cert.") at 9. In light of the Court Rule discussed above, this Court should unequivocally establish that interlocutory orders denying qualified immunity on summary judgment motions are not automatically appealable as of right. See, e.g., Turner v. Giles, 264 Ga. 812, 812–13 (1994) ("It is a legislative function to establish the jurisdictional requirements for the appealability of cases. The appellate courts have heretofore given due consideration to the finality requirement which otherwise serves as a statutory limitation on direct appealability . . . . The direct appealability of interlocutory orders remains the exception rather than the rule." (citations omitted)); Klindtworth v. Burkett, 477

N.W.2d 176, 183 (N.D. 1991) (holding that "a denial of a motion for summary judgment based on qualified immunity and statutory immunity . . . is not appealable"); Ohio Civ. Serv. Emps. Ass'n v. Moritz, 529 N.E.2d 1290 (Ohio Ct. App. 1987) (refusing to follow federal procedural rules and holding that trial court denial of an immunity defense on summary judgment is not appealable); Noyola v. Flores, 740 S.W.2d 493 (Tex. App. 1987) (following state law and refusing to permit an interlocutory appeal of a trial court decision denying a motion for summary judgment on immunity grounds; rejecting the argument that the state rule permitting appeals "when allowed by law" applies to appeals "allowed by federal law").

A. There Are No Legitimate Reasons For New Jersey Courts to Carve Out Exceptions for Interlocutory Appeals of Qualified Immunity Denials.

In light of the claims brought here pursuant to state statutes and state constitutional law, denying interlocutory appeals of denials of qualified immunity on summary judgment motions does not require a carve out or exception. The current proscription assists the courts in strengthening the broad constitutional protections enshrined in Art. I., Section 7 of the New Jersey Constitution and provides important tools for New Jerseyans seeking to hold government officials in general—and law enforcement in particular—accountable for misconduct or wrongdoing under the NJCRA.

To this point, this Court's ruling in Moon is instructive. Moon involved conflicting decisions as to whether the filing of an untimely Tort Claims Notice pursuant to N.J.S.A. 59:8-9 was appealable as of right under Rule 2:2-3. In ultimately holding that a plaintiff's motion to file a late notice of claim under the Tort Claims Act was interlocutory and not appealable as of right, this Court underscored the general precepts against interlocutory appeals (not disposing of all issues and avoiding piecemeal litigation), and, in addition, explicitly cited the importance of disallowing such appeals in order to adequately defend public interests. Specifically, it noted:

> one of the fundamental underlying postulates of our present judicial system [is] that a judicial system better serves the public interest by uninterrupted trials than would be the case if final dispositions were suspended pending appellate review of intermediate action in the cause. We [thus] favor . . . the strong public interest in favor of a single and complete trial with a single and complete review . . . .
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> [Moon, 182 N.J. at 510–11.]

"[P]rolonged litigation is inimical to the public interest," the Court continued. The Court then explained the grave consequences of delay: "[t]he postponement of discovery, motion practice, and trial may allow witnesses' memories to fade and evidence to be lost, compromising a fair adjudication on the merits." Id. at 514. Additionally, "[i]t would also contravene our public policy disfavoring delay in a claimant's ability to pursue an action against a public entity. Moreover, the

taxpayers of New Jersey would bear the increased financial burden that inevitably accompanies extended litigation." Id. at 513-514 (emphasis added).

While the instant matter concerns qualified immunity and not the Tort Claims Act, the same concerns emerge and the Court's last point is of particular interest here. As will be described in further detail below, interlocutory appeals of qualified immunity denials undermine New Jerseyans' public interest in obtaining accountability from government officials when they violate their constitutional rights. Further, such delays would undermine the truth seeking function of trials by using a delay to undermine the integrity of evidence while increasing litigation costs for all parties. Accordingly, this Court should heed its own concerns and disallow the practice entirely.

B. Interlocutory Appeals of Qualified Immunity Denials Undermine the Court's Ability to Strengthen and Uphold Broad Constitutional Protections When Violations by Government Officials Occur.

Even though the qualified immunity defense generally tracks federal standards, because the New Jersey Constitution affords broader protections for its residents than the federal Constitution, certain protections of qualified immunity—a judicially created doctrine with no constitutional basis—must yield to the civil rights and liberties New Jersey's constitution provides.

The legal doctrine of qualified immunity, first crafted by the United States Supreme Court in Pierson v. Ray, 386 U.S. 547 (1967), allows state actors to make

"reasonable" mistakes (of law, fact, and otherwise) in "good faith" while in the line of duty without fear of a lawsuit to ensure that suitable state actors are not dissuaded from public service. Over the span of five decades, however, qualified immunity has expanded to become a near impenetrable shield against the consequences of civil rights violations by law enforcement and other government actors. Today, a grant of qualified immunity too often sidesteps the rule of law and ignores blatant constitutional violations while essentially legitimizing and protecting the misconduct of state actors, a legal reality the nation has been forced to grapple with and deeply re-examine over the past year.[1]

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[1] Criticism of and opposition to the qualified immunity doctrine—across political ideology and party lines—has become deafening, from the U.S. Supreme Court to Congress and from state (including New Jersey) to municipal legislatures. See e.g. Hoggard v. Rhodes, 141 S. Ct. 2421 (2021) (Thomas, dissenting) ("As I have noted before, our qualified immunity jurisprudence stands on shaky ground . . . the one-size-fits-all doctrine is . . . an odd fit for many cases because the same test applies to officers who exercise a wide range of responsibilities and functions . . . our analysis is [not] grounded in the common-law backdrop against which Congress enacted [§ 1983] . . . Instead, we have 'substitute[d] our own policy preferences for the mandates of Congress' by conjuring up blanket immunity and then fail[ing] to justify our enacted policy." (citations omitted)); Jamison v. McClendon, 476 F. Supp. 3d 386, 391–92 (S.D. Miss. 2020) ("The Constitution says everyone is entitled to equal protection of the law – even at the hands of law enforcement. Over the decades, however, judges have invented a legal doctrine to protect law enforcement officers from having to face any consequences for wrongdoing. The doctrine is called 'qualified immunity.' . . . Tragically, thousands have died at the hands of law enforcement over the years, and the death toll continues to rise. Countless more have suffered from other forms of abuse and misconduct by police. Qualified immunity has served as a shield for these officers, protecting them from accountability . . . But let us not be fooled by legal jargon. Immunity is not exoneration. And the harm in this

Accordingly, protecting the substantive and procedural rights of plaintiffs in civil rights cases where qualified immunity has been raised and not the defendants' desire to avoid litigation should be of utmost importance. Allowing interlocutory appeals where no other party would be allowed them without leave and welcoming the resultant piecemeal litigation undermines the substantial rights of plaintiffs.[2] This is particularly true in light of the facts here.

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case to one man sheds light on the harm done to the nation by this manufactured doctrine. As the Fourth Circuit concluded, 'This has to stop.'"); S. 3730 (2021); George Floyd Justice in Policing Act, H.R.1280, 117th Cong. (2021); Ending Qualified Immunity Act, H.R.7085, 116th Cong. (2020); Cary Aspinwall & Simone Weichselbaum, Colorado Tries New Way To Punish Rogue Cops, THE MARSHALL PROJECT (Dec. 18, 2020), https://www.themarshallproject.org/2020/12/18/colorado-tries-new-way-to-punish-rogue-cops; Equal Justice Initiative, New Mexico Ends Qualified Immunity for Abusive Police (Apr. 9, 2021), https://eji.org/news/new-mexico-ends-qualified-immunity-for-abusive-police/; Jeffery C. Mays & Ashley Southall, It May Soon Be Easier to Sue the N.Y.P.D. for Misconduct, N.Y. Times (June 23, 2021), https://www.nytimes.com/2021/03/25/nyregion/nyc-qualified-immunity-police-reform.html.

[2] While the Appellate Division has granted defendants leave to appeal an interlocutory order denying their motion for summary judgment based upon qualified immunity, those instances mostly involve the resolution of novel issues of law. See e.g., Gormley v. Wood-El, 422 N.J. Super. 426, 429 (App. Div. 2011), aff'd in part, rev'd in part, 218 N.J. 72, (2014) (applying the "conscious shocking" test to a state-created danger claim asserted by plaintiff alleging a substantive due process violation); Radiation Data, Inc. v. N.J. Dep't of Env't Prot., 456 N.J. Super. 550, 554–55 (App. Div. 2018) (whether a government agency violated "clearly established" equal protection and due process rights by pursuing a regulatory enforcement action); Brown v. City of Bordentown, 348 N.J. Super. 143, 147 (App. Div. 2002) ("The appeals, despite the procedural irregularities, present several discrete legal issues which are amenable to and require resolution at this time."); Maudsley v. State, 357 N.J. Super. 560, 586 (App. Div. 2003) (issue of first impression as to whether a spouse's claim for loss of consortium is

Detective Stabile obtained an arrest warrant for Mr. Harris on January 8, 2015—charging that Mr. Harris was responsible for a robbery—based on facts that were simply indefensible. The arrest was premised on a weak identification from an eyewitness (P000013[3]) and was later tainted by Stabile showing the eyewitness a still from a nearby surveillance video prior to conducting a photo array. (P000014). As the trial court put it, "a reasonable officer in Stabile's position would not have believed, based on the available evidence, that plaintiff committed the January 2015 robberies." (P000023).

Law enforcement officials are, of course, entitled to seek qualified immunity when civil rights and constitutional violations are alleged against them. However, the arrest in question has already been determined by the trial court to be "suspect," "irrational," "not based in fact," and "questionable," (P000024, P000026), while Detective Stabile's testimony regarding the arrest was found to be "incredible" and "grossly inconsistent with other evidence." (P000038). Unabashed, Defendants ask this Court to break with long-established court rules to have another opportunity to argue for an undeserved immunity. In light of this

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cognizable under § 1983); Morillo v. Torres, 222 N.J. 104, 120 (2015) (issue of first impression as to whether it was objectively reasonable to charge plaintiff with unlawful possession of a handgun pursuant to N.J.S.A. 2C:39–5(b)(1)). Such is not the case here.

[3] "Pxxxxxx" refers to the Plaintiff's Appendix in Opposition to Defendants' Petition for Certification to Review the Decision of the Appellate Division.

Court's recent jurisprudence acknowledging and addressing the ways in which bias accrues legitimacy through the use of the law[4], this Court should deliver the full power of the State's protection to its residents, and not further expand the ambit of an anachronistic and damaging legal doctrine.[5]

Defendants' argument that "[a]llowing denials of qualified immunity to escape appellate review until the conclusion of trial, will significantly erode the purpose of the immunity, which is the right not to stand trial", (Pet. Cert. at 6) disregards the fact that the right to not stand trial must first be proven and thus earned. Baskin v. Martinez, 243 N.J. 112, 133, cert. denied, 141 S. Ct. 956, 208 L. Ed. 2d 494 (2020) (noting that on a summary judgment motion and viewing the evidence in the light most favorable to the plaintiff requires accepting plaintiff's account of events). Such proof was not provided here.

Defendants' assertion that interlocutory orders denying qualified immunity should be appealable as of right to prevent the waste of public funds and the disruption of government services fails to recognize the important interests served when courts deny a grant of qualified immunity. (Pet. Cert. at 6). As a procedural matter, allowing automatic appeals of interlocutory orders denying qualified

[4] See State v. Andujar, ___ N.J. ___ (2021); State v. Garcia, 245 N.J. 412 (2021).

[5] Although the Essex County Prosecutor later administratively dismissed the robbery charge against Mr. Harris, the dismissal occurred after Mr. Harris spent several days in the Essex County Jail. Such harms cannot be cured. They should, however, be provided full latitude for redress.

immunity "risks additional and possibly unnecessary work for appellate courts, since an immediate appeal may be on a less developed record, and a ruling there may be moot in light of what might happen at trial." Michael E. Solimine, Are Interlocutory Qualified Immunity Appeals Lawful?, 94 Notre Dame L. Rev. 169, 175 (2019).

With regard to public funds, a 2018 review by the Asbury Park Press of more than 30,000 pages of public records revealed that New Jersey governments across the state, from the smallest towns to some of the largest cities, have spent more than $42 million in the past decade to cover-up deaths, physical abuses and sexual misconduct at the hands of bad or rogue police officers.[6] If the cost of defending police officers accused of misconduct in litigation, both trial and appellate, matches the cost paid out (with public funds) by New Jersey governments in various settlements for police officers' violations of New Jerseyans' constitutional rights across the state, there are much larger problems to be solved than the question of appellate review. Put differently, even with qualified immunity protection, government bodies pay out huge sums of taxpayer money because of bad police behavior. Making it harder to get recompense from police

[6] Andrew Ford, Kala Kachmar & Paul D'Ambrosio, Dead, beaten, abused: New Jersey fails to stop police brutality, Asbury Park Press (Dec. 15, 2019), https://www.app.com/in-depth/news/investigations/watchdog/shield/2018/01/22/nj-police-brutality-cases-secret-settlements/109479668/.

departments does not solve the problem of bad policing, it merely forces some New Jerseyans—those victimized by misconduct and brutality—to bear the entire cost. One hopes that if government entities are forced to pay the true cost of police misconduct and violence, they will be better incentivized to prevent it.

Further, empirical evidence suggests that permission to grant appeals of qualified immunity denials likely increases the cost and delays associated with civil rights litigation, while not actually serving the doctrine's express purpose of shielding government officials from the burdens of unnecessary litigation. See Joanna C. Schwartz, How Qualified Immunity Fails, 127 Yale L. J. 2, 50-51 (2017). Indeed, a survey of federal district court decisions showed that while the qualified immunity defense is frequently raised in motions to dismiss or on summary judgment, the rate of granting of those motions is low. Id. at 36-37. When denials of motions on immunity grounds are appealed, more denials are affirmed or appeals withdrawn than are reversed. Id. at 40-41. Because "the time and money spent briefing and arguing interlocutory appeals may in fact exceed the time and money saved in the relatively few reversals on interlocutory appeal" the study concludes "[i]t is far from clear that interlocutory appeals shield defendants from litigation burdens[.]" Id. at 75.

Moreover, the prospective cost of litigating through extensive delays resulting from interlocutory appeals may preclude plaintiffs with valid claims from

ever suing. Id. at 50-51. The strategic use of the interlocutory appeal to dispute qualified immunity denials thus undermines the power of the courts to address civil rights harms to the public. While defendants are empowered to avoid accountability for their violations of civil and constitutional rights (again, immunity is not exoneration), plaintiffs who seek redress or simple fairness are forced into an appellate process that defendants are not entitled to enjoy in any other context. This combination does little but further adulterate confidence in the legal process with individuals whose trust and belief in law enforcement is already extremely tenuous.

Where a grant of qualified immunity has been denied on a summary judgment motion, the immediate inquiry ends until the trial concludes.[7] A demand for qualified immunity is not an extraordinary circumstance and a desire to avoid trial not an irreparable injury sufficient to justify review of an issue on an interlocutory basis. Equipped with the authority to deny the interlocutory review of

[7] As this Court noted: "we hold that the issue of qualified immunity is to be determined by the trial judge. That means the judge must decide whether probable cause existed, and if not, whether the executive official could reasonably have believed in its existence. Where historical or foundational facts that are critical to those determinations are disputed, the jury should decide those disputed facts on special interrogatories. The jury's role 'should be restricted to the who-what-when-where-why type of historical fact issues.' Based on the jury's factual findings, the trial judge must then make the legal determination of whether qualified immunity exists. Schneider v. Simonini, 163 N.J. 336, 359 (2000) (citations omitted) (emphasis added).

qualified immunity denials and the duty to protect New Jerseyans' expansive constitutional rights, particularly where searches and seizures are involved, this Court should ensure that plaintiffs asserting constitutional violations that survive summary judgment motions are provided with the broadest latitude to have those claims heard, and not diminished through jigsaw puzzle litigation abetted by permissive interlocutory appeals.[8]

II. EVEN WITH THE FEDERAL STANDARD AS A GUIDE, AN INTERLOCUTORY APPEAL OF A QUALIFIED IMMUNITY DENIAL MUST STILL BE DENIED.

As noted above, this case can be resolved relying exclusively on state law principles. After all, no "federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state", including those regulating the appeal of interlocutory orders. Johnson v. Fankell, 520 U.S. 911, 916 (1997). Defendants suggest that federal law provides a proper lens through which to view the question before the Court. (Pet. Cert. at 8). While a qualified immunity defense raised in state court generally tracks federal standards, the State Constitution provides broader protections for New Jersey residents than

[8] Should additional policy questions remain unresolved by finding such appeals to be in violation of the court rules, the Court should follow the criteria set forth in Moon and "[refer the matter] to our Civil Practice Committee for further consideration." Moon, 182 N.J. at 515. In rare instances where a defendant shows that the interests of justice demand review, Rule 2:2-3(a) provides for it. Defendants have not shown this standard to be unworkable or that they deserve treatment different from any other defendant seeking to avoid trial.

the United States Constitution, making a federal lens an imperfect one.[9]

Should the Court choose to turn to federal cases for guidance, there still remains no right to interlocutory review in cases like this one. The federal jurisprudence provides several areas where interlocutory appeals of qualified immunity denials are clearly disfavored, particularly when they come into conflict with the State's own provisions.

Historically, in § 1983 litigation, the federal analogue to the NJCRA, decisions denying motions for summary judgment are generally appealable when they involve qualified immunity or other immunities from suit. In 1985, the Supreme Court first held that interlocutory appeals of pretrial qualified immunity rulings may be taken pursuant to the "collateral order" rule of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

In Mitchell, an antiwar protester sued a former Attorney General and others who had allegedly violated the protester's rights under the Fourth Amendment, by

[9] The New Jersey Supreme Court has consistently interpreted the protections of Article I, Paragraph 7 of the State Constitution more expansively than those afforded by Federal Courts under the Fourth Amendment of the United States Constitution. State v. Alston, 88 N.J. 211, 226 (1981) ("[b]ecause we find that these recent decisions of the Supreme Court provide persons with inadequate protection against unreasonable searches and seizures, we respectfully part company with the Supreme Court's view of standing and construe Article I, paragraph 7 of our State Constitution to afford greater protection.").

authorizing a warrantless wiretap for purposes of "national security" which intercepted certain conversations between the protester and other people. The Court held, inter alia, that the district court's denial of a claim of qualified immunity, to the extent that it turned on an issue of law, was an appealable final judgment. Citing Cohen, the Mitchell court held that denying a defendant's summary judgment motion was an immediately appealable "collateral order" (i.e., a "final decision") under 28 U.S.C.A. § 1291, if the order (1) conclusively determined the disputed question, (2) resolved an important issue completely separate from the merits of the action, and (3) was effectively unreviewable on appeal from the final judgment. Johnson v. Jones, 515 U.S. 304, 304 (1995).

A. The Collateral Order Doctrine is Inapplicable Here.

While Mitchell holds that under the collateral order doctrine, a District Court's denial of a claim of qualified immunity is an appealable "final decision" within the meaning of § 1291 to the extent that the denial turns on an issue of law, the "collateral order doctrine is not a matter of constitutional necessity and, in accord with principles of federalism, is not binding on the states." State v. Nemes, 405 N.J. Super. 102, 104 (App. Div. 2008) (emphasis added) (citing Paul v. People, 105 P.3d 628, 631 (Colo. 2005)).

If that was not clear, the Court limited the availability of interlocutory appeals on the Federal level in its decision in Johnson v. Fankell. There, the Court

noted that the term "final decision", as adopted in Mitchell, was specific to the language of 28 U.S.C. § 1291, a statutory provision specifically detailing the jurisdiction of Federal appellate courts. As the Court explained:

> While some States have adopted a similar 'collateral order' exception when construing their jurisdictional statutes, we have never suggested that federal law compelled them to do so. Indeed, a number of States employ collateral order doctrines that reject the limitations this Court has placed on § 1291 . . . But that is clearly a choice for that court to make, not one that we have any authority to command.
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> [Johnson v. Fankell, 520 U.S. at 916–18.]

In New Jersey, no collateral order doctrine exists. Paired with the reality that, in New Jersey, "leave to appeal is . . . granted only to consider a fundamental claim which could infect a trial and would otherwise be irremediable in the ordinary course" (State v. Alfano, 305 N.J. Super. 178, 190 (App. Div. 1997)), Defendants' assertion that "federal law allows Detective Stabile to appeal an interlocutory denial of qualified immunity as of right because of the nature of that immunity ('the collateral order doctrine')" is simply incorrect. (Pet. Cert. at 4).

B. Even if the Collateral Order Doctrine was Applicable, Qualified Immunity Denials on Summary Judgment Would Fail the Second Prong of the Cohen Test.

A denial of summary judgment often includes a determination that there are controverted issues of material fact. The United States Supreme Court has made clear that:

> [D]eterminations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly 'separable' from the plaintiff's claim, and hence there is no 'final decision' under Cohen and Mitchell.
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> [Behrens v. Pelletier, 516 U.S. 299, 313 (1996).]

This appeal would not resolve an issue separate from the merits; the determination of the qualified immunity grant stems from the same issues as the merits of the case: whether there was probable cause for arrest. Defendants' appeal to the collateral order doctrine as justification for their interlocutory appeal is wrongly placed. Pet. Cert. at 4.

As noted above, New Jersey Courts have not formally adopted the federal "collateral order" doctrine and they should not do so now. Mitchell's carve out for interlocutory appeals was circumscribed by the Court's ruling in Johnson v. Jones. There, the Court held that "a defendant, entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." Jones, 515 U.S. at 319, 320. Because virtually all denials of summary judgment based on qualified immunity require a trial court's determination that genuine issues of material fact are in dispute, an application of

the language of Jones would result in a rejection of appellate jurisdiction whenever the trial court articulated this basis for denial of qualified immunity.[10]

As the Ninth Circuit put it:

[10] This is precisely the analytical framework federal courts around the country have deployed time and time again. See, e.g., Sawyers v. Norton, 962 F.3d 1270, 1286 (10th Cir. 2020) ("Because the officers attack the district court's factual determinations regarding deliberate indifference, we lack jurisdiction to consider their challenge to the first prong of qualified immunity on interlocutory review.") (emphasis added); Norton v. Rodrigues, 955 F.3d 176, 186–87 (1st Cir. 2020) (concluding that because defendant's characterization of facts "directly conflicts" with plaintiff's on appeal, court lacked jurisdiction); Koh v. Ustich, 933 F.3d 836, 848 (7th Cir. 2019), cert. denied, 140 S. Ct. 935, 205 L. Ed. 2d 523 (2020) (declining appellate jurisdiction after carefully analyzing purportedly legal arguments and finding them premised on not fully crediting the district court's factual determinations); Ramirez v. Escajeda, 921 F.3d 497, 501 (5th Cir. 2019) (no jurisdiction where appeal simply questions credibility and plausibility of facts pleaded in complaint); Riggs v. Gibbs, 923 F.3d 518 (8th Cir. 2019) (finding no jurisdiction because defendants' appeal was premised on disputing whether plaintiff offered sufficient evidence to create disputes of fact germane to whether defendants' warrantless search was reasonable); Jacobs v. Alam, 915 F.3d 1028 (6th Cir. 2019) (no jurisdiction where defendants dispute plaintiff's version of events in shooting); Foster v. City of Indio, 908 F.3d 1204, 1213 (9th Cir. 2018) (concluding that defendant "challenges the sufficiency of the plaintiffs' evidence" and "argues that plaintiffs will not be able to prove at trial that he shot an unarmed suspect in the back without any provocation in violation of the Fourth and Fourteenth Amendments" which is an evidentiary sufficiency claim that does not properly invoke appellate jurisdiction); Jones v. Clark, 630 F.3d 677, 680 (7th Cir. 2011) ("In a collateral-order appeal like this one, where the defendants say that they accept the plaintiff's version of the facts, we will take them at their word and consider their legal arguments in that light. If, however, we detect a back-door effort to contest the facts, we will reject it and dismiss the appeal for want of jurisdiction. By the same token, an appeal from a denial of qualified immunity cannot be used as an early way to test the sufficiency of the evidence to reach the trier of fact. In such a case, where there really is no legal question, we will dismiss the appeal for lack of jurisdiction.")

> In an interlocutory appeal challenging the denial of qualified immunity, we must construe the facts in the light most favorable to the plaintiff . . . . Notwithstanding this clear rule, [defendant] asks us at several key junctures to credit his version of the facts and to assume that a jury would resolve factual disputes in his favor. This we are not permitted to do.
>
> [Orn v. City of Tacoma, 949 F.3d 1167, 1171 (9th Cir. 2020).]

This Court should not permit it either. Where, as here, the appealing defendant does not concede the plaintiff's version of facts for purposes of the appeal, and argues that on his version of facts qualified immunity is warranted as a matter of law, appellate courts should decline leave.[11]

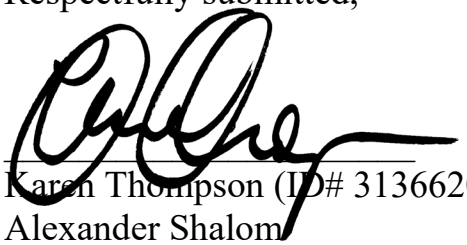
CONCLUSION

[11] While, typically, the raising of the defense of qualified immunity is a legal question for the court to be raised and resolved long before trial, a denial of qualified immunity on a summary judgment motion shifts the legal question (was a constitutional right violated?) to a factual determination for a jury (whether the constitutional violation was "objectively reasonable" based on the disputed facts). See Morillo, 222 N.J. at 117, 119. As the Court explained in Morillo:

> Procedurally, the issue of qualified immunity is one that ordinarily should be decided well before trial, and a summary judgment motion is an appropriate vehicle for deciding that threshold question of immunity when raised. The issue is one for the court to determine. That said, if 'historical or foundational facts' that are material to deciding that issue are disputed, 'the jury should decide those . . . facts on special interrogatories'; but, the jury's role is limited to 'the who-what-when-where-why type of' fact issues[.] (citations omitted).
>
> [Id. (citations omitted).]

For all the reasons stated above, this Court should find that a trial court order denying qualified immunity under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2 is an interlocutory order that is not immediately appealable to the Appellate Division as of right.

Respectfully submitted,



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