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VIA ELECTRONIC FILING

Supreme Court of New Jersey
R.J. Hughes Justice Complex
P.O. Box 970
Trenton, NJ 08625

Re: State v. Luis Maisonet
Supreme Ct. Dkt. No.: 083066

Honorable Chief Justice and Associate Justices:

Pursuant to Rule 2:6-2(b), please accept this letter brief in lieu of a more formal submission from amicus curiae the American Civil Liberties Union of New Jersey ("ACLU-NJ" or "Amicus") in the above-captioned matter.

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PRELIMINARY STATEMENT

Amicus curiae ACLU-NJ urges this Court to reverse the Appellate Division decision, which granted unfounded deference to the trial court's denial of Defendant's request for adjournment. In keeping with the clear holding of State v. Kates, 216 N.J. 393 (2014), denials of adjournment requests should be reviewed for structural error.

Both the trial court and the Appellate Division erred in the way they analyzed Defendant's request for an adjournment. Initially, the trial court failed to analyze the factors enumerated in State v. Ferguson, 198 N.J. Super. 395, 402 (App. Div. 1985). The court did not inquire into how long of an adjournment Defendant was requesting or whether denying the adjournment would result in identifiable prejudice to the State's case. The trial court did not engage in a discussion about whether other adjournments had been previously requested, the complexity of the case, or any other relevant factors. A review of the Ferguson factors and the trial court transcript demonstrates a total lack of analysis or reasoning.

Then, the Appellate Division erred by applying a differential standard of review to a denial of an adjournment request for counsel of choice. The Appellate Division's decision made clear that it applied a deferential standard, and that a showing of harm, or prejudice, was a prerequisite for reversal. This is the wrong

standard of review. As this Court held in Kates, and the United States Supreme Court has confirmed, the improper denial of a request for an adjournment to potentially obtain counsel of choice does not require a showing of prejudice. Therefore, the Appellate Division should have analyzed the appeal using the structural error framework. Had the Appellate Division done so, it would have found that the trial court's denial of the adjournment request was improper because it did not properly analyze the relevant factors under Ferguson, and that the conviction should be reversed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For purposes of this appeal, amicus curiae ACLU-NJ adopts the Statement of Facts and Procedural History as contained in Defendant's Appellate Division brief.

ARGUMENT

I. THE TRIAL COURT FAILED TO ENGAGE IN MEANINGFUL ANALYSIS BEFORE REJECTING DEFENDANT'S ADJOURNMENT REQUEST.

It is undisputed that "if a trial court conducts a reasoned, thoughtful analysis of the appropriate factors, it can exercise its authority to deny a request for an adjournment to obtain counsel of choice." State v. Kates, 216 N.J. 393, 396-97 (2014). If the trial court takes this approach, it "does not invoke structural error." Id. However, as the colloquy between the trial court and Defendant demonstrates, the

trial court did not conduct any "reasoned, thoughtful analysis of the appropriate factors." Id. A defendant's request for an adjournment to potentially obtain new counsel should be the beginning of a dialogue between the judge, defendant, defendant's counsel, and the prosecutor. In deciding whether an adjournment request is appropriate, during that dialogue, the trial court must consider a series of factors enumerated in State v. Ferguson:

> the length of the requested delay; whether other continuances have been requested and granted; the balanced convenience or inconvenience to the litigants, witnesses, counsel, and the court; whether the requested delay is for legitimate reasons, or whether it is dilatory, purposeful, or contrived; whether the defendant has other competent counsel prepared to try the case, including the consideration of whether the other counsel was retained as lead or associate counsel; whether denying the continuance will result in identifiable prejudice to defendant's case, and if so, whether this prejudice is of a material or substantial nature; the complexity of the case; and other relevant factors which may appear in the context of any particular case.
>
> [State v. Ferguson, 198 N.J. Super. 395, 402 (App. Div. 1985) (quoting United States v. Burton, 584 F.2d 485, 490-491 (D.C. Cir. 1978).]

The State contends that the trial judge considered the above factors in denying the adjournment request. Sbr 1-2; 5-6.[1] However, the record demonstrates that the

[1] Sbr refers to the State's Appellate Division brief dated January 10, 2019.

judge ignored most of the relevant factors. The colloquy in relevant part is set forth below:

> DEFENDANT: Then I ask for a postponement so I can go back and call family members so they – they can get some – to see if they can get some money together and I can get me a private lawyer.
>
> THE COURT: Okay.
>
> DEFENDANT: Because I will not go to trial with Ms. Weigel.
>
> THE COURT: Okay. How –
>
> DEFENDANT: I respect her. I admire her very much. I have nothing against her, but I cannot go to trial with Ms. Weigel.
>
> THE COURT: I heard – and you said all those things already. Your request is denied. We're here for trial. So you've known about this trial for a long period of time.
>
> DEFENDANT: But –
>
> THE COURT: You've known about your offer. You've known who your attorney is.
>
> DEFENDANT: Right.
>
> THE COURT: So we're going to proceed with trial today. So your request is denied.
>
> [1T 8-1 to 8-21.][2]

[2] 1T refers to the trial court transcript dated December 4, 2017.

During this short conversation, there was no discussion of any of the relevant factors before the judge announced his decision to deny the adjournment. The only "analysis" to be found is the court's statement that Defendant knew about the trial date, his offer, and who his attorney was for a long time. This statement could arguably inform the factor of "whether defendant has other competent counsel prepared to try the case[,]" although such an affirmative finding is not enough on its own to deny Defendant's request for adjournment. State v. Kates, 426 N.J. Super. 32, 46 (App. Div. 2012) ("the availability of 'other competent counsel,' a factor in the analysis, is no substitute by itself for the constitutional right to choose counsel"). Courts still abuse their discretion when they consider one appropriate factor, but fail to consider others. See, e.g., State v. C.W., 449 N.J. Super. 231, 255 (App. Div. 2017) ("While the concept is difficult to define with precision, an appellate court may find an abuse of discretion when a decision rest[s] on an impermissible basis or was based upon a consideration of irrelevant or inappropriate factors." (internal quotations omitted)). The trial court did not ask Defendant any questions at all during the colloquy, offered Defendant very little time to verbalize his request, and made findings on barely any of the relevant factors. Because the record was so sparse, the Appellate Division had very little to review as it sought to determine whether the trial court's denial was appropriate. Therefore, any finding made by the

trial court that Defendant's request was improper was merely conclusory and did not deserve deference from the Appellate Division, or this Court.

The result here is dictated by Kates. The question in Kates was whether the trial court's denial of defendant's request for a continuance to hire private counsel was a summary denial that amounted to error and required a new trial. In that case, the defendant had concerns that his public defender would be deployed overseas during his trial, and that having a different attorney represent him halfway through his trial would not be fair. The colloquy in relevant part follows:

> MR. KLAVENS: Mr. Kates is stating that, you know, the instruction is fine because the jury will look favorable towards the attorney, but not necessarily favorable towards him. He indicates that he's working now and that if he is, rather than have me as his attorney being removed during the middle of the trial, he's requesting a postponement so he can hire his own attorney. Is that right?
>
> MR. KATES: Yeah.
>
> THE COURT: That's – I understand that request. I'm denying that request. We are going to proceed with the trial today.
>
> [Kates, 426 N.J. Super. at 41.]

On appeal, this Court explained that there may well have been good reasons to deny the defendant's request for a continuance based on the Ferguson factors. But, because "no analysis was conducted[,]" a new trial was required. Kates, 216 N.J. at 397. The Court did not contend that "a lengthy factual inquiry [wa]s required, but

the summary denial of defendant's request, with no consideration of the governing standard, amount[ed] to error and require[d] a new trial." Id. The same is true here, where the trial court conducted no analysis.

A. The Trial Court Should be Required to Perform the Analysis on Record.

In Kates, this Court clarified "that only if a trial court summarily denies an adjournment to retain private counsel without considering the relevant factors, or abuses its discretion in the way it analyzes those factors, can a deprivation of the right to choice of counsel be found. Structural error is not triggered otherwise." Id. Here, the trial court did not consider the relevant factors at all. However, even if the Court believes that the trial court did consider the factors, the court below nonetheless abused its discretion in the way it evaluated the factors by not performing the analysis on the record.

The record documenting the period between the request for adjournment and the trial court's summary denial is sparse because the trial court neither probed Defendant's reasons for requesting the adjournment nor elicited facts that would help analyze the factors required by Ferguson.[3] Indeed, reading the list of Ferguson

[3] It is unfair to require that a defendant know what a judge must consider in conjunction with an adjournment request. It should be the judge's responsibility to ask the appropriate questions of defendant in order to fully flesh out the factors needed to perform the analysis required by Ferguson. Because the court should have more knowledge of the legal standard than a defendant who is seeking new counsel, who is effectively proceeding pro se, it makes sense to assign the obligation to the

factors would take longer than reading the colloquy from adjournment request to summary dismissal.

Although courts need not engage in protracted considerations of adjournment requests, trial judges should be required to perform the required analysis on the record. This requirement would provide for far easier review of the record on appeal. This case provides the perfect example of why such a requirement is important. Here, the Appellate Division had to decide whether the trial court abused its discretion in denying Defendant's adjournment request without the benefit of the lower court's thinking. In the absence of a record, reviewing courts should not seek to divine justifications for denials of requests for time to hire alternate counsel. This Court has noted that, in a variety of contexts, requiring the decision maker to articulate the basis for the exercise of discretion has a salutary cautionary effect against unthoughtful, mechanical or rote consideration, and permits meaningful appellate review. See, e.g., State in re V.A., 212 N.J. 1, 8-9 (2012) ("Cursory or conclusory statements as justification for waiver will not suffice to allow the court to perform its review under the abuse of discretion standard because such statements provide no meaningful explanation of the prosecutor's reasoning.").

court. See, e.g., Boryszewski v. Burke, 380 N.J. Super. 361, 376 (App. Div. 2005) (discussing allocation of burden of proof to the party in the best position to present evidence).

There are cases where an adjournment request only serves to delay a trial. While the trial court may be able to instantly know that the request is dilatory and should be denied, it still must run the analysis and populate the record with the results of the analysis for ease of appellate review.

B. The Trial Court Should Not Arbitrarily Elevate Expediency Over the Protection of Individual Constitutional Rights.

It is undisputed that a trial court enjoys broad discretion to control its calendar. See Ferguson 198 N.J. Super. at 402 ("When a defendant applies for an adjournment to enable him to substitute counsel, the trial court must strike a balance between its inherent and necessary right to control its own calendar and the public's interest in the orderly administration of justice, on the one hand, and the defendant's constitutional right to obtain counsel of his own choice, on the other"). "That discretion, however, cannot be exercised in an arbitrary manner." State v. Miller, 216 N.J. 40, 82 (2013) (Albin, J., dissenting). As discussed above, the trial court did not analyze the Ferguson factors at all, therefore it could not have weighed the need for an adjournment against the need to control its calendar, because it did not make the threshold findings under Ferguson to decide whether an adjournment request was appropriate.

Both the United States and New Jersey Constitutions "grant to an accused the right to have the assistance of counsel", which includes "the right to secure counsel of his own choice." Jacobson v. Jacobson, 151 N.J. Super. 62, 67 (App. Div. 1977);

United States v. Gonzalez-Lopez, 548 U.S. 140, 147-48 (2006) (counsel of choice is the "root meaning of the constitutional guarantee" of the Sixth Amendment). In this case, the trial judge elevated the need to control the calendar over the need to protect fundamental individual rights by summarily denying an adjournment request that most likely would have resulted in a small delay to the trial schedule. Based on Defendant's request, one of two outcomes was likely[4] if the court had granted the adjournment request: 1) Defendant speaks to his family, who inform him that they do not have the funds to retain a private attorney, and 2) Defendant's family gathers the money to hire private counsel, and the suppression hearing is delayed by a few days or weeks. Both of these potential scenarios result in a short delay and do not greatly inconvenience the court or the State. "When balancing a short delay in the start of trial against defendant's legitimate ability to present a viable defense, … the integrity of the criminal process must prevail over [any] administrative disruption." Miller, 214 N.J. at 82 (Albin, J., dissenting) (citing State v. Bellamy, 329 N.J. Super. 371, 378 (App. Div. 2000)). Again, there was no explicit finding that the adjournment would cause much of an administrative disruption, because the court never inquired into the requested length of the delay.

[4] Of course, a third option is possible. The adjournment could last months to allow new counsel to prepare for the trial. However, if, after analysis of the Ferguson factors, the court determined that substitution of counsel would unduly delay the trial, it could deny the request for a new attorney. No such analysis was done here.

In United States v. Sellers, the Seventh Circuit held that the district court's failure to inquire into the potential length of a continuance was "a failure to actually balance the right to choice of counsel against the needs of fairness, and suggests that the district court unreasonably viewed any delay as unacceptable." Sellers, 645 F.3d 830, 837 (7th Cir. 2011); United States v. Williams, 576 F.3d 385, 390 (7th Cir. 2009) ("The failure to inquire how long the defense needs to prepare suggests that the district court unreasonably considered any delay unacceptable: That sort of rigidity can only be characterized as arbitrary."). In this case, the trial court never once asked Defendant how long of an adjournment he was requesting, which indicates that it did not run the proper analysis. Therefore, the trial court's decision was arbitrary and should not be given deference. See, e.g., General Motors Corp. v. Harry Brown's, LLC, 563 F.3d 312, 316 (8th Cir. 2009); In re Wells Fargo Home Mortgage Overtime Pay Litigation, 571 F.3d 953, 957 (9th Cir. 2009); Coon v. Grenier, 867 F.2d 73, 78 (1st Cir. 1989) (all holding that failure to consider a relevant factor constitutes an abuse of discretion).

II. THE APPELLATE DIVISION FAILED TO ANALYZE THE ADJOURNMENT DENIAL FOR STRUCTURAL ERROR, AS REQUIRED BY KATES.

A. Where Structural Error Exists, Reviewing Courts Owe Trial Courts No Deference.

According to the Appellate Division's opinion, "a decision on whether or not to grant a continuance to a defendant looking to change counsel is reviewed under a

deferential standard." State v. Maisonet, 2019 N.J. Super. Unpub. LEXIS 1246 (App. Div. 2019), slip op. at 7. The court explained that "the exercise of discretion to grant or deny an adjournment will not constitute reversible error unless it is demonstrated the abuse of discretion caused a defendant a manifest wrong or injury." Id. But, in a case where structural error is implicated, abuse of discretion is not the proper standard of review because the structural error inhibits reviewing courts' ability to determine whether any error can be deemed harmless. See Gonzalez-Lopez, 548 U.S. at 151 (explaining how it is nearly impossible to determine the effect of wrongful denial of choice of counsel); Arizona v. Fulminante, 499 U.S. 279, 309 (1991) ("These are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards."); Kates, 216 N.J. at 395-96. The Appellate Division's insistence that prejudice be proven misapplies decisions of both the United States and New Jersey Supreme Courts, and fails to acknowledge that denials of counsel of choice do not require a showing of prejudice. Appellate review of discretionary decisions about counsel of choice must be reviewed under the structural error framework, where prejudice is presumed.

As discussed above (Point 1B, supra), the right to counsel of choice is a constitutional right. The United States Supreme Court has identified two categories of constitutional errors: 1) trial errors, and 2) structural errors. A trial error is an error "which occurred during the presentation of the case to the jury, and which may

therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Fulminante, 499 U.S. at 307-8. "A structural error is a structural defect in the constitution of the trial mechanism, which defies analysis by harmless-error standard." Id. Such errors are so intrinsically harmful that they require automatic reversal notwithstanding a showing of prejudice. [5] Neder v. United States, 527 U.S. 1, 7 (1999). New Jersey Courts have also adopted this structural error framework. State v. Comacho, 218 N.J. 533, 549-50 (2014); State v. Purnell, 161 N.J. 44, 61 (1999) ("a structural error affects the legitimacy of the entire trial.")

The United States Supreme Court has only found structural error in a very limited class of cases, including the right of a non-indigent defendants to be assisted by counsel of their choice. Gonzalez-Lopez, 548 U.S. at 150 ("We have little trouble concluding that erroneous deprivation of the right to counsel of choice, 'with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as structural error.'" (citing Sullivan v. Louisiana, 508 U.S. 275, 282 (1993)). This Court has also recognized that the right to counsel of choice can implicate structural error. Kates, 216 N.J. at 395-96 ("deprivation of the right to counsel of choice is a 'structural error', so defendants who demonstrate their right

[5] In Weaver v. Massachusetts, 582 U.S. (2017), the U.S. Supreme Court clarified that structural error can require a showing of prejudice, but only in an ineffective assistance claim, which is not the claim here.

has been violated do not have to show prejudice." (citing Gonzalez-Lopez, 548 U.S. at 150)).

In this case, the trial court's summary denial of Defendant's adjournment request violated his constitutional right to choice of counsel, which has been held by this court to be a structural error requiring automatic reversal, even without proof of prejudice. Kates, 216 N.J. at 395-96.

CONCLUSION

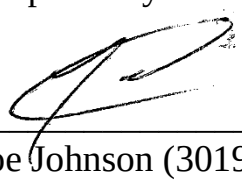
The trial court erred by summarily denying Defendant's request for adjournment without first considering the Ferguson factors. If the trial court does not analyze the factors before denying the adjournment request for choice of counsel, the result is structural error. A structural error, unlike a trial error, does not require a showing of harm or prejudice to Defendant, and results in automatic reversal.

Instead of following the structural error framework, the Appellate Division simply tried to run the analysis that the trial court did not, and determined that the factors cut against Defendant, and could plausibly justify a denial, so there was no harm to Defendant. However, this version of harmless error analysis confuses the issue, and depreciates the import of counsel of choice. The Appellate Division should have inquired into whether the trial court considered the relevant factors, and if it had not, it should have found that there was a structural error, which required automatic reversal.

The Appellate Division also erred by placing the burden of proof on the Defendant to provide the trial court with pertinent information to allow the court to analyze the Ferguson factors. The burden should be on the court to elicit the necessary information from Defendant.

For the above reasons, the decision of the Appellate Division should be reversed.

Respectfully Submitted,



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