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June 9, 2024

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LETTER BRIEF SUPPORTING DEFENDANT-APPELLANT'S MOTION FOR LEAVE TO APPEAL

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.
INDICTMENT NO. HUD-22-12-1430

	:	**CRIMINAL ACTION**
STATE OF NEW JERSEY, Plaintiff-Respondent,	:	On Appeal From an Interlocutory Order of the Superior Court of New
v.	:	Jersey, Law Division, Hudson County.
KEGWIN CLARKE, Defendant-Appellant.	:	Sat Below: Hon. John A. Young, Jr., J.S.C.

DEFENDANT IS CONFINED IN NEW YORK

Honorable Judges:

This letter is submitted in lieu of a formal brief pursuant to Rule 2:6-2(b).

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[1] The interrelated procedural history and facts are presented together for clarity.

INDEX TO APPENDIX

[2] Pursuant to Rule 2:6(a)(2), this brief and other trial-level materials are appended because the trial court relied on their contents in rendering its decision.

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

TRANSCRIPTS

PRELIMINARY STATEMENT

Justice delayed is justice denied. Defendant Kegwin Clarke has appeared by video from Riker's Island for over a year, since his arrest in Bayonne on local and related New York charges. During Mr. Clarke's confinement in New York, the State presented his New Jersey case to a grand jury, obtained an indictment, moved his arraignment, and participated in a dozen court appearances. Yet, when it was time to litigate a constitutional issue in Mr. Clarke's case, the State and the trial court blocked Mr. Clarke's access to courts. The Hon. John A. Young, Jr., J.S.C. ruled that Mr. Clarke may not challenge the evidence in his case while confined in New York: because the State now objects to him appearing remotely and because he cannot voluntarily waive his appearance. That decision is contrary to the law, relies on inappropriate analysis, and is inconsistent with the record developed before the trial court (including a detailed affidavit by Mr. Clarke and the trial court's voir dire of him on the issue of waiving his appearance). That decision is also a manifest injustice, having halted all litigation in Mr. Clarke's case amidst his invocation of his right to a speedy trial. These issues of constitutional magnitude affect Mr. Clarke and countless other litigants who legitimately must appear remotely for certain proceedings.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant Kegwin Clarke was arrested on February 5, 2022, when local police agencies executed a search warrant at his Bayonne home as part of a New York City homicide investigation. (Dma 3, 14) The police recovered a handgun, ammunition, and suspected CDS. (Dma 3) Mr. Clarke was charged, respectively, via Complaints W-2022-000059-0901 and W-2022-00060-0901 for that contraband and for being a fugitive on homicide charges filed in New York. (Dma 14) The State moved to detain Mr. Clarke, and the Hon. Carlo A. Abad, J.S.C. denied that motion on February 14, 2023. (Dma 3, 14) Mr. Clarke was then extradited to New York to face the homicide charges and remanded there. (Dma 3, 14) He remains incarcerated at Riker's Island. (Dma 33)

The State did not bring the New Jersey charges to grand jury for nearly a year. (Dma 2, 14, 37) On December 8, 2022, a grand jury handed up Indictment HUD-22-12-01430. (Dma 2, 14, 37) It charges Mr. Clarke with: third-degree Possession of CDS with Intent to Manufacture, Distribute, or Dispense, in violation of N.J.S.A. 2C:35-5(a)(1) (Count I); second-degree Possession of a Firearm while Committing a CDS Crime, in violation of N.J.S.A. 2C:39-4.1(a) (Count II); fourth-degree Possession of Prohibited Ammunition, in violation of N.J.S.A. 2C:39-3(j) (Count III); third-degree Receiving Stolen Property, in

violation of N.J.S.A. 2C:20-7(a) (Count IV); second-degree Possession of a Firearm while Committing a CDS Crime, in violation of N.J.S.A. 2C:39-4.1(a) (Count V); and fourth-degree Possession of Prohibited Ammunition, in violation of N.J.S.A. 2C:39-3(j) (Count VI). (Dma 40-42)

The Hon. John A. Young, Jr., J.S.C. arraigned Mr. Clarke via video link from Riker's Island on February 13, 2023. (Dma 4, 31) Mr. Clarke appeared from Riker's Island via video link for nearly a dozen court dates held between May 2023 and May 2024. (Dma 14, 33) On November 7, 2023, Mr. Clarke moved to suppress all evidence obtained during the search warrant execution on the grounds that the police impermissibly did not knock and announce before entering. (Dma 2, 11-21) Initially, the State consented to the motion being decided on the papers. (Dma 29) However, after the Defense brief was filed, the State requested an evidentiary hearing. (Dma 29) The trial court granted that request. (Dma 2-3)

When counsel appeared on December 13, 2023, to schedule the hearing, Judge Young *sua sponte* raised concern about Mr. Clarke appearing by video. (1T 3:11-11:19) On January 12, 2024, Judge Young heard argument on that issue and ordered briefing. (2T 3:1-14:18) The parties filed briefs in February 2024, and Judge Young heard oral argument on April 23, 2024. (Dma 22-32, 36-38)

Prior to that argument, the Defense submitted an affidavit from Mr. Clarke articulating his desire to waive his physical appearance at any evidentiary hearing held on his suppression motion, as well as his understanding of the rights and interests involved. (Dma 33-35) Judge Young conducted a voir dire of Mr. Clarke on this issue—under oath and via video link—during the April 23, 2024, oral argument held. (Dma 3; 3T 4:24-10:2)

On May 21, 2024, the trial court issued an opinion and order denying Mr. Clarke the opportunity to either appear virtually or waive his appearance altogether at any evidentiary hearing. (Dma 1-10) That order has halted litigation in this case, and this motion for leave to appeal now follows.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN REFUSING TO CONDUCT AN EVIDENTIARY HEARING BECAUSE MR. CLARKE IS CONFINED IN NEW YORK. (Dma 1-54)

The trial court abused its discretion by rejecting Mr. Clarke's application to appear virtually or, in the alternative, waive his appearance at any evidentiary hearing scheduled on his suppression motion. That manifestly unjust decision violates Mr. Clarke's constitutional rights, is unsupported by the record, has

halted Mr. Clarke's ability to contest his New Jersey charges, and prejudices his ability to robustly defend himself in New York. Reversal is required to protect Mr. Clarke's rights as he has intelligently and voluntarily asserted them.

A. The trial court abused its discretion denying Mr. Clarke the ability to continue appearing by video link for the evidentiary hearing held on his suppression motion. (Dma 1-54)

This voluntariness of Mr. Clarke's waiver of his appearance is moot if this Court finds the trial court abused its discretion by denying Mr. Clarke the ability to appear remotely. Judge Young found that Mr. Clarke could not appear remotely because "[t]he Chief Justice's Directive indicates that evidentiary hearings, like the one in this case, can only be held virtually upon the consent of the parties" and because "[t]he State indicated in their correspondence of April 19, 2024, that they do not consent to the hearing being conducted virtually." (Dma 7) (citing Supreme Court's October 27, 2022, Order Concerning the Future of Court Operations – Updates to In-Person and Virtual Court Events) (hereinafter, "the Directive") (Dma 43-48) This finding was an abuse of discretion for two reasons.

First, the evidentiary hearing on Mr. Clarke's motion would not be remote; only Mr. Clarke would be remote. The police witness(es), attorneys, Judge, court clerk, and other involved persons would all appear in-person. The questioning and the use of exhibits would be live and in person. The trial court would be able to

make credibility determinations in-person, just inches away from any witnesses. The remote nature of Mr. Clarke's own appearance would not render the hearing itself a remote proceeding. While the trial court has broad discretion to control the courtroom and proceedings, the exercise of that control is subject to the abuse of discretion of standard. State v. Pinkston, 233 N.J. 495, 511 (2018); State v. Jones, 232 N.J. 308, 311 (2018). That discretion was abused here where the decision to forbid Mr. Clarke from appearing remotely relied on an inapplicable basis (the Directive) and inappropriate factors. See State v. S.N., 231 N.J. 497, 500 (2018) (A trial court abuses its discretion "…by failing to consider all relevant factors, or by making a clear error in judgment").

Second, even if this evidentiary hearing is considered a remote proceeding, it was still an abuse of discretion to not permit the hearing to continue because of the State's objection. It is unclear what justifiable interest the State has in refusing to permit this evidentiary hearing—one which the State belatedly requested. Mr. Clarke's physical presence in the courtroom has no cognizable impact for the State. The State may not call Mr. Clarke as a witness. Moreover, Mr. Clarke expressed an understanding of the practical and technical limitations of appearing remotely and waived any appeal based on those limitations. (Dma 33-35) The State's objection was unreasonable under these circumstances, and it was an

abuse of discretion for the trial court to honor that unreasonable objection.

In an unpublished decision, this Court reached that exact conclusion: holding that it was an abuse of the trial court's discretion to honor the State's objection to a juvenile defendant and his parent appearing remotely at trial when they lacked the financial resources to attend in-person from out of state. State in Int. of T.W., No. A-1698-22, 2023 WL 6117953, at *5 (App. Div. Sept. 19, 2023), leave to appeal denied, 255 N.J. 481 (2023).[3] The same reasoning applies here. Mr. Clarke sought to appear remotely for reasons beyond his control, and the State has no legitimate interest in opposing that request. Given Mr. Clarke's successful history of appearing by video link from Riker's Island for over a year—having already testified that way during the trial court's voir dire of him—and the judiciary's experience over the last few years with hybrid operations, it was an abuse of discretion to forbid his remote attendance at any evidentiary hearing.

B. The trial court abused its discretion concluding that Mr. Clarke's highly informed waiver of appearance was offered involuntarily. (Dma 1-39)

In the alternative, it was reversible error to forbid Mr. Clarke from waiving

[3] Pursuant to Rule 1:36-3, counsel does not know of any contrary authority and cites this non-binding opinion because it is the only other known decision on this issue. The opinion is provided for Court and for opposing counsel. (Dma 49-54)

his appearance at the evidentiary hearing. A suppression hearing is a critical stage of the proceedings which Mr. Clarke has a right to attend under the Sixth and Fourteenth Amendments and Article 1, Para. 10 of the New Jersey Constitution. State v. Robertson, 333 N.J. Super. 499, 508 (App. Div. 2000); Snyder v. Massachusetts, 291 U.S. 97 (1934); State v. Whaley, 168 N.J. 94, 99–100 (2001); see Christopher Bello, Annotation, Right Of Accused To Be Present At Suppression Hearing Or At Other Hearing Or Conference Between Court and Attorneys Concerning Evidentiary Questions, 23 A.L.R. 4th 955 (1983). This right is derived from the right to be present at trial. Robertson, 333 N.J. Super. at 509-10 (Rule 3:16(b), which pertains to waivers of appearance at trial, also applies to suppression hearings). However, the "right to be present at a criminal trial belongs to no one other than the defendant." State v. Ingram, 196 N.J. 23, 45 (2008). It may, therefore, be waived by a defendant. State v. Morton, 155 N.J. 383, 434-36 ("The constitutional nature of this right, however, does not preclude its waiver") (citations omitted).

The court rules articulate when a waiver is appropriate. Rule 3:16(b) permits a defendant to waive his presence at trial if: (a) he expressly waives that right in writing or verbally on the record; or (b) his conduct evidences a knowing, voluntary, and unjustified absence. That rule also applies to suppression hearings.

Robertson, 333 N.J. Super. at 509-10 ("Because the [suppression] hearing here involved oral testimony on material issues of fact of which defendant had personal knowledge, we hold that the waiver provisions of R. 3:16(b) apply…"). N.J. Court Rule 3:16(a) also permits excusing a defendant from any pre-trial court date where there is good cause. The same analysis applies to waivers requested at other critical stages of a criminal case. See State v. Tedesco, 214 N.J. 177, 194–95 (2013) (at sentencing); Morton, 155 N.J. at 434-37 (at hearings in a capital case); Whaley, 168 N.J. 94 (discussing waivers across critical stages of criminal cases).

Our Supreme Court has offered guidance in applying Rule 3:16(b). Courts should consider: (1) if a waiver is voluntary, knowing, and made competently with the advice of counsel; (2) if a waiver is tendered in good faith or offered to procure an impermissible advantage; and (3) the circumstances of the case, the gravity of the crime, the State's position, the existence of a highly charged emotional atmosphere, and any specific reasons justifying a defendant's waiver. Tedesco, 214 N.J. at 194-95 (citing State v. Dunne, 124 N.J. 303, 317 (1991)).

Here, the trial court denied Mr. Clarke's application to appear virtually or, alternatively, to waive his appearance, despite finding that Mr. Clarke "was competent, fully understood the rights he was waiving, and sought to do so in good faith." (Dma 9) Notwithstanding those findings, Judge Young denied Mr.

Clarke's application because of two answers he gave during the voir dire concerning his affidavit: (i) that Mr. Clarke would have preferred to be present in person for any hearing if he were instead incarcerated at the Hudson County Jail and able to be produced for court in-person in the normal course; and (ii) that Mr. Clarke was, among other motivations, making this application because suppressing the evidence gathered in New Jersey may benefit his interests in his New York case. (Dma 9) Based on those responses, Judge Young concluded:

> This suggests that Defendant is seeking to waive his appearance based on factors that are out of his control, and the decision of whether or not to be present has been taken out of his hands. The inability to secure his appearance is not only influencing his decision, it is making the decision for him. This court finds that Defendant's waiver of his appearance at the evidentiary hearing was coerced by other factors outside of his control, and therefore is not being made voluntarily.

(Dma 9)

The trial court's decision should be reversed because these conclusions fail to account for the totality of the circumstances surrounding Mr. Clarke's waiver and because they rely on improper definitions of coercion and voluntariness. Further, these concerns need not have been implicated at all if the trial court had allowed Mr. Clarke to appear remotely.

First, Judge Young's conclusion that Mr. Clarke's request for a waiver relies on "factors outside of his control" (Dma 9) is not supported by the record

and ignores the totality of the circumstances surrounding his application. The trial court's assessment of a waiver must consider the "totality of the facts." Morton, 155 N.J. at 441 (citing State v. Cooper, 151 N.J. 326, 355 (1997); Rule 3:16(b)). While Mr. Clarke candidly acknowledged that he likely would not seek to waive his appearance or appear remotely if he were incarcerated at the Hudson County Jail, his application does not rely on that factor.

In his affidavit, Mr. Clarke articulated a full understanding of the circumstances surrounding the pending suppression motion and the effects that appearing remotely or waiving his appearance would have on his ability to participate. (Dma 33-35) He also invoked his right to a speedy trial and the speedy disposition of the substantive motions in his case,[4] acknowledging that, in doing so, he was waiving his countervailing right to be physically present for any evidentiary hearing. (Dma 33-35) Mr. Clarke acknowledged that he understood that he could wait to have this case adjudicated after being sentenced or released

[4] Mr. Clarke's speedy trial right attached when he was arrested. State v. Fulford, 349 N.J. Super. 183, 190 (App. Div. 2002). A trial judge may order dismissal where there is an "unreasonable delay in the disposition of an indictment." R. 3:25-3. That decision should be based on the length of any delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant from the delay. State v. Cappadona, 127 N.J. Super. 555, 558 (App. Div. 1974), certif. den. 165 N.J. 604 (1974), cert. den. 419 U.S. 1034 (1975); Barker v. Wingo, 407 U.S. 514 (1972).

by New York—and indicated that is not what he wants. (Dma 33-35) Mr. Clarke affirmed that he discussed these rights and the effects of not being physically present with counsel. (Dma 33-35) And Mr. Clarke further affirmed that he does "not feel coerced or without other options in making this request; that "it reflects [his] considered judgment and preference," his "own free will," and his true beliefs; and that "[n]o threats or promises [were] made to [him] in exchange for" signing his affidavit. (Dma 33-35)

The scope of Mr. Clarke's understanding of his application remained clear throughout Judge Young's voir dire of him on these issues. Mr. Clarke testified under oath that: he could hear the proceedings; he understood that he has the right to be physically present for any evidentiary hearing; he recognizes he lacks the present ability to be produced in person for such a hearing; he knows the New Jersey matter could be held in abeyance until the disposition of the New York case and he could be brought to Hudson County at that time; he understands he gives up the opportunity to consult with counsel or propose cross-examination questions during testimony at a hearing by waiving his physical appearance; he reviewed with counsel every one of the statements in the affidavit, had the opportunity to ask questions about them, and was able to adjust them based on his preferences; he stands by the statements in his affidavit and wishes to waive his

physical appearance at any hearing on the suppression motion; and this counseled decision reflects what he believes is in his best interests. (3T 4:24-10:2)

It is among the totality of all of these circumstances that Mr. Clarke acknowledged that he may not have made this application if he were incarcerated in Hudson County and that one factor he considered is his belief that adjudicating this motion may serve his interests in his New York case. (3T 6:6-17) It was an abuse of discretion for the trial court to find that these two circumstances alone render Mr. Clarke's request involuntary. When viewed in the context of Mr. Clarke's other responses, there is no support for finding that Mr. Clarke's request is based entirely, primarily, or even significantly on those isolated factors. The trial court's conclusion that Mr. Clarke "is seeking to waive his appearance based on factors that are out of his control, and the decision of whether or not to be present has been taken out of his hands" (Dma 9) ignores the totality of the circumstances and gives undue weight to those responses. A trial court abuses its discretion "…by failing to consider all relevant factors, or by making a clear error in judgment." S.N., 231 N.J. at 500. That standard is met here.

Even to the extent Mr. Clarke's decision considered those two factors, the trial court made "a clear error in judgment" (id.) in denying the application. The fact of the matter is that Mr. Clarke is not incarcerated in Hudson County; he is

confined at Riker's Island. There is nothing inappropriate, problematic, or coercive about him recognizing as much when weighing his options and choosing which rights he wishes to assert (and which rights he wishes to intelligently waive). If he were incarcerated at the Hudson County Jail, this application may be moot. But the record lacks any evidence that this factor coerced Mr. Clarke or overbore his will. Mr. Clarke is an intelligent, clear-minded man who weighed his interests with the advice of counsel. That all precludes the trial court's findings of coercion and involuntariness. Likewise, Mr. Clarke's belief that a favorable suppression ruling may serve his interests in his related New York case is reasonable. The interrelatedness of these cases is something which Mr. Clarke is entitled to consider. Even if one case ultimately does not impact the other, that does not make this factor an irrational, implausible, or a coercive influence.

Second, the trial court's decision relies on improper interpretations of coercion and voluntariness. "To be sufficient, the waiver of a fundamental constitutional right must be given intelligently and voluntarily." Morton, 155 N.J. at 440 (citing Miranda v. Arizona, 384 U.S. 436, 444 (1966) (additional citations omitted)). That is why, when a defendant seeks to waive his right to be present, courts must assure he knows "the implications of a waiver of the right to be present" by questioning him about its "nature and consequences." Id. at 440-41.

The fact that Mr. Clarke cannot be transported to Hudson County at this time[5] does not negate the voluntariness of his waiver. That is because nothing about that limitation forces Mr. Clarke's hand or prevents him from understanding his decision. He is exercising a preference between available options: to waive his physical appearance as his suppression hearing or to have his case held in abeyance until he can be physically produced. The existence of that choice is the hallmark of voluntariness. The absence of a third option—to be produced in person at this time—does not make Mr. Clarke's decision between his available options involuntary. Rather, in denying Mr. Clarke's application to waive his appearance, it is the trial court that limits Mr. Clarke's agency surrounding the exercise of his constitutional rights. That is the hallmark of involuntariness.

Judge Young's voluntariness analysis considered how that term is defined in the contexts of consent searches, guilty pleas, and custodial statements. (Dma 8-9) In the consent search context, the trial court found "[a] consent search is considered 'voluntary' when it is free of coercion and with knowledge of the right to refuse consent." (Dma 8) (citing State v. Hladun, 234 N.J. Super. 518, 521

[5] Mr. Clarke is not eligible for temporarily transfer of his custody to New Jersey under the Interstate Agreement on Detainers. That is because he is remanded pre-trial in New York and is not currently serving a sentence there. See N.J.S.A. 10A:31-30.2 *et seq* (the agreement applies to inmates serving a sentence in another state).

(App. Div. 1989) (internal citation omitted)); see State v. Hagans, 233 N.J. 30, 39 (2018) ("The lynchpin to voluntary consent 'is whether a person has knowingly waived [her] right to refuse to consent to the search'") (brackets in original) (quoting State v. Domicz, 188 N.J. 285, 308 (2006)). Like someone who agrees to a consent search after the right to refuse is explained, Mr. Clarke makes a voluntary choice because he understands he need not waive his appearance. The trial court's opinion does not explain in what way Mr. Clarke lacks knowledge of his right to not consent to waiving his appearance. Mr. Clarke's preference to advance his New Jersey case and belief that doing so serves his global interests are not evidence of coercion or involuntariness under the consent search standard.

As Judge Young found, a guilty plea is voluntary if it is not coerced, not the result of any threats or inducements, and is made with an understanding of the charges and consequences of the plea. (Dma 8-9) (citing State v. Smullen, 118 N.J. 408, 415 (1990)). Mr. Clarke's application easily satisfies that voluntariness standard as well. Mr. Clarke's decision is motivated by his own assessment of his best interests. He has demonstrated a clear understanding of the rights, interests, and practical limitations involved. Criminal defendants are often frustrated with the particular plea bargain offered to them and instead long for a different charge, a lower sentencing recommendation, or even the outright dismissal of their case.

However, that desire for an unavailable third option does not render involuntary a defendant's decision to accept the plea bargain on the table. The same is true here. Mr. Clarke may prefer if he were not detained in New York, but he remains capable of voluntarily waiving his right to be present.

In the context of a custodial statement, voluntariness requires only that the "the police did not overbear the will of the defendant." State v. Hreha, 217 N.J. 368, 383 (2014) (citing State v. Galloway, 133 N.J. 631, 654 (1993)). For the purposes of the Fifth Amendment, voluntariness is only lacking where there is compulsion arising from the police's use of physical force, threats, or promises sufficient to overbear a defendant's will (Bram v. United States, 168 U.S. 532 (1897)) or where "persistent, lengthy and repeated" interrogation over many days rises to a comparable level of compulsion (Ziang Sung Wan v. United States, 266 U.S. 1 (1924)). Nothing here plausibly overbears Mr. Clarke's will, amounts to the use or threat of physical force, or manifests that degree of compulsion.

Judge Young also noted that "[a] statement is considered voluntarily made when it is a product of essentially free and unconstrained choice by the maker." (Dma 9) (citing State v. P.Z., 152 N.J. 86, 113 (1997). Mr. Clarke's request is voluntary under even this looser definition of voluntariness. His affidavit and testimony make clear that his request is the product of his own choice. While that

choice accounts for external factors and practical realities, those features do not make it either unfree or unduly constrained. Criminal defendants make pragmatic choices between available options. By way of analogy in the context of a custodial statement, arrestees may remain silent, answer questions with a lawyer present, or waive those rights and answer questions without a lawyer present. However, if an arrestee requests a lawyer, the police may then opt to forego questioning—and the arrestee's opportunity to give a statement. The arrestee may ultimately choose between waiving her rights or making no statement at all.

Voluntariness is a shield that protects the accused against the harshest and most insidious forms of external control. Its use as a barrier to Mr. Clarke's well-reasoned invocation of his own constitutional rights distorts it into a sword which it was never meant to be. The trial court's conclusion that Mr. Clarke's waiver was coerced or involuntary is, therefore, an abuse of discretion requiring reversal.

POINT II

LEAVE TO APPEAL IS NECESSARY AND IN THE INTERESTS OF JUSTICE BECAUSE THIS CASE WILL BE QUAGMIRED AT AN INDEFINITE STANDSTILL WITHOUT IMMEDIATE APPELLATE REVIEW. (Dma 1-48)

Rule 2:2-4 allows the Appellate Division to grant leave to appeal from an interlocutory order when it is in the interests of justice. An appellate court

will exercise its discretion to grant leave to appeal "where there is some showing of merit and justice calls for . . . interference in the cause" and "where some grave damage or injustice may be caused by the order below" or the appellate court's action "will terminate the litigation and thus very substantially conserve the time and expense of the litigants and the courts." Romano v. Maglio, 41 N.J. Super. 561, 568 (App. Div.), certif. denied, 22 N.J. 574 (1956), cert. denied, 53 U.S. 923 (1957).

Immediate appellate review is necessary here. Mr. Clarke has participated in his case from New York for well over a year. He lives with the daily stress of being indicted on these charges. See State v. Hogan, 144 N.J. 216, 236 (1996) (describing the "devastating personal and professional impact of being indicted, and noting that later acquittal often fails to alleviate such impact") (citing United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979)). He has asserted his right to a speedy trial and the disposition of substantive motions in his case while witnesses' memories remain comparatively fresh. There is no timeline for when his serious New York matter will be resolved, and the suppression of evidence in New Jersey may very well serve his interests in New York. At a minimum, the successful disposition of the New Jersey case may have major implications for Mr. Clarke's liberty and his ability to obtain a new bail hearing in New York.

It is also noteworthy that the State only requested an evidentiary hearing—after originally agreeing to proceed on the papers—after receiving the Defense brief on the suppression motion. That change in position is inconsistent with the interests of justice, fair play, and the efficient administration of the courts. Should this Court deny Defendant's motion for leave to appeal, the prosecution of this case will be entirely halted. Mr. Clarke would have to live with this indictment hanging over him until he is either released or imprisoned in New York. The ensuing pressure to accept a guilty plea simply because he cannot have his constitutional motion heard in a timely fashion is unacceptable in a just system. Finally, these issues are particularly likely to recur in a society now so accustomed to hybrid and remote proceedings.

Justice delayed is justice denied.

CONCLUSION

Therefore, Defendant's motion for leave to appeal should be granted.

Respectfully submitted,

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Attorney for Defendant-Appellant

BY: */s/ David Cory Altman*_____
DAVID CORY ALTMAN
Assistant Deputy Public Defender

IN THE MATTER OF WEST WINDSOR TOWNSHIP, **RESPONDENT.**	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-003109-22 T4 Civil Action Sat below: Hon. Robert T. Lougy, A.J.S.C. Docket No. MER-L-1561-15

BRIEF AND APPENDIX OF RESPONDENT FAIR SHARE HOUSING CENTER

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Resubmitted Date: October 19, 2023

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PRELIMINARY STATEMENT

This case involves a fundamental principle of implementing Mount Laurel's constitutional mandate —fairness to the low and moderate income residents of New Jersey. Proposals for new housing under municipal fair share plans must not only be truly realistic, they also must be implemented so that new affordable units are integrated into the surrounding community. This integration requirement is particularly critical in inclusionary developments, where for nearly 30 years, COAH's substantive rules have demanded that affordable units have the same design standards and access to essential amenities as market rate units.

Yet, AvalonBay Communities Inc. ("Respondent") has sought to reject this rule. Their proposed housing development would require the occupants of affordable units to live in bedrooms without windows. Meanwhile, almost no occupant of the project's market rate units would have this burden. In essence, the Respondents seek to make direct access to air and sunlight from bedrooms an amenity for only those people who can afford it. By doing so, it also limits the ability of tenants with Housing Choice Vouchers, which is a predominant way that tens of thousands of very-low- income tenants in New Jersey access affordable housing, to live in the development. This is clearly inconsistent with the aims of Mount Laurel, and this court should reject it.

FACTUAL AND LEGAL BACKGROUND[1]

The Supreme Court has designated Fair Share Housing Center ("FSHC") as an interested party in all declaratory judgment actions resulting from its decision in In re N.J.A.C. 5:96 and 5:97, 221 N.J. 1 (2015) ("Mount Laurel IV"), which resulted from a motion to enforce litigant's rights brought by FSHC. FSHC has participated in over 300 such actions statewide.

FSHC actively participated in the trial court declaratory judgment action filed by West Windsor Township as a result of Mt. Laurel IV. Following a methodology trial, the court issued an order on March 8, 2018, which established the Township's affordable housing obligations for the Third and Prior Rounds. FSHC Ra2[2]. On October 9, 2018, FSHC reached a settlement with the Township, which adopted the fair share obligations set forth by the trial court's decision. Pa36. On October 30, 2018, FSHC and West Windsor stipulated to correcting two minor errors contained in the original executed settlement. FSHC Ra5. On January 10, 2019, after conducting a fairness hearing on November 27 and 28, 2018, the court ruled that the corrected settlement agreement represented a realistic opportunity for the development

[1] The procedural and factual history are combined as the relevant facts are contained in the procedural history and no facts are in dispute in this matter.
[2] Because FSHC and AvalonBay Communities, Inc. are both Respondents in this appeal, citations in this brief to FSHC's appendix are preceded by the clarifying term, "FSHC."

of affordable housing in the Township. Pa46. On July 2, 2019, the court issued a Final Judgment of Compliance and Repose. Pa52.

As a part of the settlement, FSHC and West Windsor agreed to a 1,500-unit Third Round (1999-2025) obligation, including the "gap present need" that accrued during the 16 years between 1999 and 2015, as well as a Prior Round Obligation of 899 units. Pa36. The Avalon Bay Redevelopment Area, in which the Respondent's project is located, is a key compliance mechanism included in West Windsor's Housing Element and Fair Share Plan to help the Township satisfy its Third Round obligations. Pa34. The Respondent participated in the above declaratory judgment action as an Intervenor/Defendant and entered into a redeveloper's agreement with the Township. The implementation of that agreement became an explicit provision of the FSHC settlement agreement. Pa38. Initially, it was anticipated that the Respondent's project would yield 132 affordable units in an inclusionary development. Pa35. Later, it amended its plans to include an additional 68 housing units with a 25 percent set-aside, resulting in an anticipated total of 149 affordable housing units.[3] Pa57-58. Ninety-nine of the units are expected

[3] This project is also eligible for 99 rental bonus credits, which will result in a total of 248 affordable housing credits.

to be family rental units, which are the subject of this matter and incorporate the disputed windowless design. Pa58; Pa84.

The present issue arose from a Motion to Enforce Litigant's rights filed by the Respondents on October 14, 2022, through which it sought the appointment of a special master to help expedite and approve their application for the Avalon Bay Redevelopment Area affordable housing development. FSHC Ra7. At that time, FSHC became aware that the Respondent's application with West Windsor included plans to construct family rental units containing windowless bedrooms. This design choice would almost exclusively affect the affordable units in the development. Only a small fraction of the proposed market rate units would contain bedrooms without windows. FSHC Ra3; Pa84.

On December 2, 2022, the trial court held an oral argument on the above motion. During the argument, the parties suggested that they might be willing to stipulate to the appointment of some neutral third party to oversee the Respondent's application. 1T42-22-24.[4] As a result, on January 5, 2023, the trial court held a case management conference. At the conference, it became clear that the parties were no longer in agreement and the windowless

[4] "1T" refers to the transcript of the hearing on December 2, 2022; "2T" refers to the transcript of the hearing on April 28, 2023.

apartment issue remained unresolved. The same day, the trial court issued a scheduling order requesting that the parties submit supplemental briefing on the issue of the appointment of a special master as well as on whether the Respondent was legally permitted to construct units with windowless bedrooms. FSHC Ra12. FSHC indicated to the trial court at this conference that it was concerned that the windowless bedrooms disproportionately affected the affordable units, and in the court's same January 5, 2023 order, it invited FSHC to submit papers on this issue.

As outlined by the Appellant in their most recently filed brief, on February 24, 2023, West Windsor filed a Motion for Declaratory Judgement with respect to the Respondent's treatment of windowless bedrooms in the affordable units. Pa1-3. It then revised and re-filed their brief in support of the motion on March 23, 2023 to add key arguments regarding housing quality standards for Section 8 housing choice voucher eligibility. Respondent filed opposition to the motion on April 18, 2023, to which Appellant responded on April 24, 2023. FSHC filed a brief in support of Appellant's motion with respect to the windowless affordable bedrooms on April 20, 2023. Oral argument was heard on April 28, 2023. On May 1, 2023, the trial court dismissed the Appellant's application, effectively denying its motion. Pa4. The

Appellant timely filed its Notice of Appeal on June 14, 2023. Pa29-32. FSHC timely filed its Notice of Appeal in the matter on June 15, 2023.

LEGAL ARGUMENT

Fair Share Housing Center joins in the arguments advanced by the Appellant, West Windsor Township, in support of their request that this court reverse the decision of the trial court and remand with an order that there be parity in the treatment of affordable and market rate units with respect to windows in bedrooms. In addition, FSHC wishes to reiterate and highlight the following points.

I. THE DECISION TO CONSTRUCT WINDOWLESS BEDROOMS ALMOST EXCLUSIVELY IN AFFORDABLE HOUSING UNITS IS INCONSISTENT WITH MOUNT LAUREL

The Appellant is rightly opposed to an inclusionary development that treats affordable units less favorably than market rate units. For decades, the New Jersey Supreme Court has recognized a constitutional guarantee that municipalities across the state must provide lower- income people a realistic opportunity of access to affordable housing. See, e.g., Mount Laurel IV, 221 N.J. at 4; S. Burlington Cty. NAACP v. Mount Laurel, 92 N.J. 158, 222 (1983) (Mount Laurel II); S. Burlington Cty. NAACP v. Mount Laurel, 67 N.J. 151, 174 (1975) ("Mount Laurel I"). In Mount Laurel II, the Supreme Court made

clear that the "basic justification for *Mount Laurel*" is that "government be as fair to the poor as it is to the rich in the provision of housing opportunities." Mount Laurel II 92 N.J. at 191-192. Although this fairness mandate speaks to a governmental obligation, it is predicated on the assumption that developers will ultimately provide "decent housing" that will not lock the poor in "urban slums." Id. at 171-172.

This principle of fairness in the treatment of affordable housing has been a consistent feature of Mount Laurel compliance. In Mount Laurel IV, the Supreme Court transferred jurisdiction for Mount Laurel matters from the Council on Affordable Housing ("COAH") to the trial courts, but made clear that judges may, "utilize…discretion when assessing a town's [fair share] plan," and draw from the portions of the Prior and Third Round COAH rules that had not been invalidated by the NJ Appellate Division. Mount Laurel IV 221 N.J. at 30. For more than twenty years, these COAH rules required that affordable housing units be fully integrated with market rate housing and contain substantially the same features and amenities. COAH's Prior Round rules required that:

- Inclusionary developments must build affordable housing units in time with the construction of market rate units and, "integrat[e] the low and

moderate income units with the market units." N.J.A.C. 5:93-5.6(d) and (f).

- Low- and moderate-income units in inclusionary developments must "utilize the same heating source as market units within the inclusionary development." N.J.A.C. 5:93-7.4(f).

COAH's Third Round rules contained the same requirements. N.J.A.C. 5:97-6.4(d), (f), (g). In addition, the rules required that:

- Affordable units must comply with the Uniform Housing Affordability Controls ("UHAC"). N.J.A.C. 5:97-6.4(i); N.J.A.C. 5:80-26.1 et seq.
- Affordable units must have, "access to all community amenities available to market-rate units and subsidized in whole by association fees." N.J.A.C. 5:97-6.4(g). The Respondent's seek to make access to fresh air and sunlight an amenity that would be almost exclusively available to market rate unit residents, which would clearly violate COAH's substantive rules.
- COAH's official 2010 guidance document interpreting UHAC explicitly noted that, "COAH does recommend…that the affordable housing units be identical to the market-rate units within the same development."[5]

[5] NJ Council On Affordable Housing (COAH), Understanding UHAC- A Guide to the Uniform Housing Affordability Controls for Administrators of

Although the Respondent has compliant construction phasing with respect to its affordable housing units, it clearly fails to meet the overall integration requirements and recommendation that affordable units have identical design features to market rate units. Even though, to our knowledge, the issue of windowless bedrooms is not one that COAH ever faced, COAH clearly expressed a preference for the equal treatment of affordable units. Consistent with the discretion to given to judges in Mount Laurel IV to implement the Mount Laurel doctrine and evaluate compliance with COAH's rules, the court should find that the Respondent's treatment of affordable units is inconsistent with the intent of the rules.

Moreover, the design feature that differs here is a fundamental and substantial one. Occupants of the affordable units would be afforded less access to fresh air and sunlight than occupants of market rate units. If the rental housing market viewed bedrooms without windows as a neutral design choice, one would expect the Respondent's project to offer such bedrooms in its market rate units. Yet, with only minor exceptions, the Respondent does not. The effect is discriminatory towards low- and moderate-income residents of the development, and the court should not permit it.

Affordable Housing, 34 (2010), https://www.nj.gov/dca/services/lps/hss/admin_files/uhac/2006uhacmanual.pdf

II. THE RESPONDENT'S PLAN TO ASSIGN WINDOWLESS BEDROOMS ALMOST EXCLUSIVELY TO AFFORDABLE UNITS WOULD UNDERMINE THE FAIRNESS OF THE SETTLEMENT AGREEMENT.

West Windsor's settlement agreement with FSHC as well as its Housing Element and Fair Share plan make specifically and unmistakably clear that it entered into a binding agreement to zone for and expedite the development of family affordable units via the Respondent's project. The Respondent must implement this plan in a way that is fair and reasonable to low and moderate income households.

It is well established that "[c]ourts have the power to approve a settlement in an exclusionary case, provided certain procedures are followed to ensure that the interests of low and moderate income households are adequately protected." Toll Bros., Inc. v. Twp. of W. Windsor, 334 N.J. Super. 77, 94 (App. Div. 2000). "Such settlements have been recognized and tacitly approved by both the Legislature and the Court." Ibid. (citing N.J.S.A. 52:27d-322; Hills Dev. Co. v. Bernards, 103 N.J. 1, 64 (1986)); see also East/West Venture v. Borough of Fort Lee, 286 N.J. Super. 311, 328 (App. Div. 1996) ("We conclude that a trial judge may approve a settlement of Mount Laurel litigation after a 'fairness' hearing to the extent the judge is satisfied that the settlement adequately protects the interests of lower-income persons on whose behalf the affordable units proposed by the settlement are to be built.").

One of the primary rationales behind permitting municipalities to settle their Mount Laurel litigation is the expectation that "the proposed settlement will result in the expeditious construction of a signification number of lower income housing units." East/West Venture, 286 N.J. Super. at 335 (quoting Morris Cnty. Fair Hous. Council v. Boonton Twp., 197 N.J. Super. 359, 372 (Law Div. 1984)). The fairness of the proposed housing is reviewed in consideration of sound land use practices as well as Mount Laurel II and COAH's regulations. Id.

In this matter, the trial court approved West Windsor's settlement agreement after finding that it meets the required fairness standards for lower-income households. If a developer such as the Respondent can later build affordable housing that is inadequate and denies its residents, but not the residents of market rate units, access to fresh and air sunlight, it undermines, if not destroys, the basis for approving the agreement in the first place.

Furthermore, although the trial court found that the fairness obligation resides with the Township, not the Respondent, the court should reject this. Pa27. It is of course well recognized that Mount Laurel leaves some of the implementation of municipal fair share plans up to the "legislative" process. East/West Venture 286 N.J. Super at 330. It also does not concern itself with, "how [the municipality] meets its affordable housing obligation…, [or] how

the municipality zones or rezones property within its boundaries." Livingston Builders, Inc. v. Twp. of Livingston, 309 N.J. Super. 370, 381 (App. Div. 1998). However, the Respondent's decision to burden affordable units with windowless bedrooms is not an issue that West Windsor could remedy with zoning or related inducements. Rather, the decision represents an unnecessary design and affordability control choice, which would unfairly allocate access to fresh air and sunlight (which the Respondent would make amenities) and place the project in direct conflict with COAH's regulations. This is clearly distinguishable from the matters of municipal master plan amendments and zoning density that were at issue in Livingston Builders, and it could not be easily safe guarded by the local legislative process. Accordingly, this represents an issue which the courts must remedy.

Moreover, since the Respondent has a Redeveloper's Agreement with West Windsor that was explicitly referenced in the FSHC settlement presented at the fairness hearing, the Respondent's agreement to build well-designed, decent affordable housing that conforms to COAH's regulation was a vital component of the court's fairness review and determination, one which the Respondent should be required to fulfill.

III. WINDOWLESS BEDROOMS CONFLICT WITH THE HOUSING QUALITY STANDARDS FOR SECTION 8 AS WELL AS FEDERAL LAW.

FSHC supports and joins in West Windsor's arguments concerning the conflict between windowless bedrooms and the housing quality standards required by the Section 8 Housing Choice Voucher Program. Housing Choice Vouchers are a common method of making rental housing more affordable. With Mount Laurel units, Housing Choice Vouchers ("HCV") open up options for families who are generally very-low-income to access housing. Our Legislature has recognized the ability of families to use Housing Choice Vouchers as an important public policy by including the source of income used for housing as a protected class pursuant to the Law Against Discrimination ("LAD"). N.J.S.A. §10:5-9.1.

In order for individuals with Section 8 vouchers to occupy a rental housing unit, the unit must undergo an initial inspection, as well as a reinspection at least every other year. 24 CFR 982.405(c). The rental housing unit must meet various housing quality requirements, most notably, "[t]here must be at least one window in the living room and in each sleeping room." 24 CFR 982.401(f)(2)(i). Although The U.S. Department of Housing and Urban Development ("HUD") may approve some variations from these requirements that apply standards in local housing codes, "HUD will not approve any acceptability criteria variation if HUD believes that such variation is likely to adversely affect the health or safety of participant families." 24 CFR

982.401(a)(4)(iv). The only variations it will approve must either, "meet or exceed the performance requirements; or significantly expand affordable housing opportunities for families assisted under the program." 24 CFR 982.401(a)(4)(iii).

It is clear that the rental units with windowless bedrooms in the Respondent's development would not meet HUD's housing quality standards without HUD approving a variation from those standards. Such an approval would be unlikely. Even if the affordable units with windowless bedrooms meet local building code standards, HUD has made the availability of natural light in each sleeping room an explicit priority for health and safety. And windowless bedrooms likely do not exceed the performance standards because the requirement to have a window in each sleeping room is one of those standards.

Moreover, vouchers have rent caps, and especially in affluent areas such as West Windsor, it is extremely unlikely that a tenant with a voucher could afford rents in the Respondent's market rate units that contain bedrooms with windows. For example, in neighboring Princeton, Avalon Bay's development website advertises two-bedroom apartments starting at $4,353 a month.[6] The

[6] Avalon Communities, Avalon Princeton, (Apr. 20, 2023, 5:01 PM), https://www.avaloncommunities.com/new-jersey/princeton-apartments/avalon-princeton/#community- apartments.

"fair market rent" that a voucher holder is permitted to use in Mercer County is $1,998 per month.[7] Thus, unless the new apartments in West Windsor cost less than half what those in Princeton cost, which seems highly unlikely, voucher holders could not simply live in market-rate apartments.

Because AvalonBay's proposal would disproportionately prohibit voucher holders from living in its development, who are themselves a protected class under state law, and because voucher holders are more likely to be members of other state and federal protected classes covered by both the LAD and the federal Fair Housing Act, see 42 U.S.C. 3604(b), the proposal raises serious antidiscrimination concerns. In Mount Laurel I, the NJ Supreme Court recognized that "exclusionary zoning practices are…often motivated by fear of and prejudices against other social, economic, and racial groups." Mount Laurel I, 67 N.J. at 196. Accordingly, a major effect of the remedial structure of Mount Laurel compliance is that it widely serves individuals who are within various state and federally protected classes. These are the same individuals who will be adversely affected by the Respondent's decision to

[7] FY 2024 Fair Market Rent Documentation System, The FY 2024 Trenton, NJ MSA FMRs for All Bedroom Sizes, (Oct. 2, 2023, 10:53 PM), https://www.huduser.gov/portal/datasets/fmr/fmrs/FY2024_code/2024summary.odn.

create largely different standards for their affordable housing than for their market rate housing. The court should declare this practice unlawful.

CONCLUSION

For the foregoing reasons, the court should find that it is incompatible with Mount Laurel's constitutional mandate and other similar antidiscrimination laws for the burden of living in windowless bedrooms to fall almost exclusively on the state's poorest residents. FSHC respectfully requests that the court reverse the decision of the lower court and remand with an order that there must be parity in the treatment of market rate units and affordable units such that the Respondent's windowless bedroom design has an equal proportionate effect on both.

Respectfully Resubmitted,

FAIR SHARE HOUSING CENTER
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Resubmitted dated: October 19, 2023