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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO.

STATE OF NEW JERSEY

Plaintiff,

NOTICE OF MOTION FOR EMERGENT  
RELIEF FROM THE TRIAL COURT'S  
BAIL ORDER

v.

CHRISTOPHER [REDACTED]  
Defendant.

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To: Marlene Lynch Ford, Esq., Prosecutor  
By: Michael Weatherstone, Esq., Assistant Prosecutor  
Office of the Ocean County Prosecutor  
119 Hooper Avenue, P.O. Box 2191  
Toms River, New Jersey 08754-2191

PLEASE TAKE NOTICE that the undersigned hereby moves before the Superior Court of New Jersey, Appellate Division, for emergent relief from the January 4, 2013 Order of the trial court below denying the Motion for a Bail Modification. In support of this application for emergent relief, the undersigned will rely upon the enclosed letter brief and the transcripts of the November 30, 2012 and January 4, 2013 proceedings before the trial court.

By:   
Frederick P. Sisto, Esq.

DATED: January 14, 2013

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January 14, 2013

By: Frederick P. Sisto, Esq.  
Counsel for Christopher [REDACTED]  
Of Counsel and on the Letter Brief

## LETTER BRIEF IN SUPPORT OF MOTION FOR LEAVE TO APPEAL ON EMERGENT BASIS

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

App. Div. Docket # A-\_\_\_\_\_-\_\_\_\_\_  
Prosecutor Case # 12-10-4202

STATE OF NEW JERSEY,

CRIMINAL ACTION

Plaintiff-Respondent,

v.

CHRISTOPHER [REDACTED]

Defendant-Appellant.

On Emergent Appeal From  
An Order of the Superior  
Court, Criminal Division,  
Ocean County

Sat Below:  
Hon. Francis Hodgson, J.S.C.

DEFENDANT IS CONFINED

Your Honors:

This letter brief is submitted in lieu of a formal brief, pursuant to R. 2:6-2(b), in support of the above-captioned defendant-appellant's motion for emergent leave to appeal from an Order entered by the Honorable Francis Hodgson, J.S.C., denying the defendant-appellant's motion for a bail modification.

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## PROCEDURAL HISTORY

Defendant Christopher [REDACTED] stands accused of one count of first-degree robbery and one count of second-degree burglary.

(Da 1)<sup>1</sup>. The offenses are said to have occurred on September 20, 2012. (Da 1). A warrant for [REDACTED]'s arrest was issued by the Toms River Municipal Court, with bail set by the Honorable Francis Hodgson, J.S.C., on October 17, 2012. (Da 1). The warrant was executed on November 9, 2012. (1T 3:16-19)<sup>2</sup>.

[REDACTED]'s bail remains set at "\$250,000 cash only." (Da 7).

A bail motion was heard and denied on November 30, 2012. (1T). A second bail motion was heard and denied on January 4, 2013. (2T). The denial of these bail motions is the basis for [REDACTED]'s request for emergent relief.<sup>3</sup>

An application for emergent relief was filed before the Honorable Carmen H. Alvarez, J.A.D., On January 14, 2013, and granted that day. Upshur's legal brief and supporting papers are to be filed by 5 pm on January 15, before the Honorable Carmen Alvarez, J.A.D., and Honorable Alexander Waugh, J.A.D.

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<sup>1</sup> Da - Defendant's Appendix to this brief.

<sup>2</sup> 1T - Bail Hearing Transcript dated November 30, 2012.

2T - Bail Hearing Transcript dated January 4, 2013 (adopting and incorporating the arguments made at the first bail hearing at 2T 3:14-16).

<sup>3</sup> Emergent relief was not pursued after the first bail hearing because this writer was told by the State that additional charges against [REDACTED] might be forthcoming. No additional charges have been filed.

## STATEMENT OF FACTS

The trial court set bail with a "cash only" restriction despite the following facts. [REDACTED] did not have two other indictable cases pending at the time of his arrest. (Da 2; 1T 6:13-14). He has a pending theft charge and no prior record of adjudications or convictions. (Da 2; 1T. 14-15).

He was not on parole at the time of his arrest. (Da 2; 1T 6:16-17). [REDACTED] is not charged with a crime committed against a person protected from him by a restraining order. (Da 1). The "cash only" requirement was not imposed on the codefendant facing the same charges, despite the fact that he was presumptively eligible for it. (Da 1; 1T 6:6-10).

The State has not presented this case to the grand jury and has not provided the defense with any discovery other than a copy of the one page complaint. (1T 5:1-5; Da 1). The bail survey relied upon by the trial court indicates that [REDACTED]'s mental health is good. (1T 7:7; Da 4).

[REDACTED] and his family are lifelong residents of Mercer County, New Jersey. (1T. 4:14-17; Da 5). These family members include his mother, father, brother, and four-year-old child, along with the mother of his child, and his girlfriend. (Da 5).

[REDACTED] is a high school graduate. (Da 5; 1T 4:21.) He earns a living in the construction field as a roofer. (Da 4; 1T

4:21-22.) His girlfriend Barbara [REDACTED]'s certification vouches for [REDACTED]'s reliability and ties to the community. (Da 6; 1T 4:18-20). Her sworn statement also details the financial and medical hardships that his incarceration has caused her. (1T 3:9-15).

After the foregoing facts were presented to the trial court, it ruled that:

"the charges are very serious, involving an armed home invasion where the occupants were allegedly restrained with zip-ties while their house was ransacked and robbed. The defendant does have some ties to the community; has a history of unemployment; and has some criminal history with the pending theft. I'm satisfied under the circumstances, given the very serious nature of these charges, the bail is appropriate as set and I'm not going to change it." (1T 7:8-17; 2T 4:4-9).

LEGAL ARGUMENT

- I. THE "CASH ONLY" REQUIREMENT SHOULD BE STRUCK FROM ██████████'S BAIL BECAUSE IT IS AN UNNECESSARY SURETY, AS EVIDENCED BY THE FACT THAT HE DOES NOT MEET ANY OF THE CRITERION ESTABLISHING A "CASH ONLY" PRESUMPTION UNDER N.J.S.A. 2A:162-12.

Our courts embrace a long-standing policy against unnecessary sureties. R. 3:26-1(a). There shall be a presumption in favor of the posting of full United States currency cash bail to the exclusion of other forms of bail when a defendant is charged with first degree robbery and:

- (1) has two other indictable cases pending at the time of the arrest; or
- (2) has two prior convictions for a first or second degree crime or for a violation of 2C:35-7 or any combination thereof; or
- (3) has one prior conviction for murder, aggravated manslaughter, aggravated sexual assault, kidnapping or bail jumping; or
- (4) was on parole at the time of the arrest; or
- (5) was subject to a temporary or permanent restraining order issued pursuant to the provisions of the "Prevention of Domestic Violence Act of 1991", was charged with a crime committed against a person protected under that order, and either: (a) is charged with commission of a domestic violence crime that resulted in serious bodily injury to the victim; or (b) has at least one prior conviction for a crime or offense involving domestic violence against the same victim or has previously violated a final restraining order protecting the same victim, unless the court finds on the record that another form of bail will ensure the defendant's presence in court when required. N.J.S.A. 2A:162-12(c).

Nothing in N.J.S.A. 2A:162-12 is intended to preclude a court from releasing a person on the person's own recognizance when the court determines that such person is deserving. N.J.S.A. 2A:162-12(e).

None of the five criterion for a "cash only" bail are met here. (1T 6:10-13). With regard to the first factor, [REDACTED] did not have two other indictable cases pending at the time of his arrest. (Da 1; 1T 6:13-14). Regarding factors two and three, he has no prior convictions, let alone two prior convictions for a first or second degree crime. (Da 2; 1T 6:14-16). With regard to factor four, he was not on parole at the time of his arrest. (Da 2; 1T 6:16-17). Lastly, he is not charged with a crime committed against a person protected from him by a restraining order. (Da 2).

The "cash only" requirement was not imposed on the codefendant facing the same charges, despite the fact that he was presumptively eligible for it. (Da 1; 1T 6:6-10). This lack of parity in the bail conditions between codefendants is particularly disturbing where the onerous "cash only" restriction is imposed on the codefendant with no prior record [REDACTED] and not imposed on the codefendant with the significant prior record. Our justice system is supposed to embrace a continuing institutional commitment to achieving greater



uniformity and parity. State v. Pillot, 115 N.J. 558, 576 (1989) (addressing sentencing uniformity and parity).

By way of example, the "cash only" restriction on a \$250,000 bail makes the bail even more burdensome than a \$2.5 million bail. It is common knowledge that an individual held on a \$2.5 million bail can secure his release by agreeing to provide a bail bondsman ten percent of the total (\$250,000) through a payment plan. (1T 6:25 - 7:1). See Schilb v. Kuebel, 404 U.S. 357, 359 (1971). [REDACTED]'s bail is more onerous than a \$2.5 million bail because he is required to post \$250,000 without a payment plan option. Moreover, the "cash only" stipulation precludes him from posting property in lieu of the enormous dollar figure. (2T. 3:20-25). Under these circumstances, the "cash only" restriction creates an unnecessary surety and unnecessary detention<sup>4</sup> in violation of R. 3:26-1(a).

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<sup>4</sup> [REDACTED] has confirmed that he will be able to secure his release through a bondsman if the "cash only" restriction is lifted.

II. THE \$250,000 BAIL SHOULD BE SUBSTANTIALLY REDUCED BECAUSE IT IS EXCESSIVE AND THEREFORE VIOLATIVE OF ARTICLE I, PARAGRAPH TWELVE OF THE NEW JERSEY CONSTITUTION.

Excessive bail shall not be required. N.J. Const. art. I, para. 12. A number of factors must be considered in fixing a bail figure. State v. Johnson, 61 N.J. 351, 364 (1972).

First to be considered is the seriousness of the crime charged, the apparent likelihood of conviction, and the extent of the punishment prescribed by the Legislature. Id. Second, courts are to consider the defendant's criminal record and previous record on bail. Id. at 364-65. Third, courts are to consider his reputation and mental condition. Id. at 365. The fourth consideration is the length of his residence in the community. Id. The fifth consideration is his family ties and relationships. Id. The sixth factor to consider is his employment status, record of employment, and his financial condition. Id. Seventh, courts are to consider the identity of responsible members of the community who would vouch for the defendant's reliability. Id. The eighth consideration is any other factor indicative of the defendant's mode of life, ties to the community, or bearing on the risk of failure to appear. Id.

Although those elements should be considered, trial courts should not lose constitutional perspective. Id. The amount of bail should not be excessive -- even though the controlling test

is not the defendant's financial capacity. Johnson, at 365. His indigence also requires consideration. Id.

An excessive bail requirement should not be utilized as a means of confining the accused until trial. Id. In reaching the amount of bail, the constitutional right to bail and the presumption of innocence cannot be overlooked. Id.

Regarding the first Johnson factor, [REDACTED] is facing a first-degree robbery charge.<sup>5</sup> (Da 2). However, the seriousness of the charge is already accounted for in the bail schedules recommending a relatively high \$100,000 to \$250,000 range for first-degree robberies. New Jersey Judiciary Bail Schedules, 2C:15-1 (2009).

Aside from imposing an undue "cash only" restriction, the trial court also set bail at \$250,000, the highest recommended figure. When combined with the undue "cash only" restriction, [REDACTED] is required to produce 10 times the amount of money he would be required to post if he were not confined by the "cash

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<sup>5</sup> The complaint also lists a second-degree burglary charge. That charge is not addressed separately because it would likely merge with the more serious first-degree robbery upon conviction. In State v. Mirault, 92 N.J. 492, 495 n.1 (1983) the Court noted without disapproval that the trial court merged a second-degree burglary with a first-degree robbery on the basis that, having been sentenced for the first-degree robbery, the defendant had already been sentenced "on that confrontation." The complaint here indicates that the alleged first-degree robbery and second degree burglary are part and parcel to the same confrontation. Since [REDACTED] would not be exposed to an aggregated sentence if convicted of the two charges, he should not be exposed to an aggregated bail figure. (1T 2:21 - 3:3).

only" restriction. [REDACTED] is required to produce 25 times the amount required if his bail was set at \$100,000, the appropriate low end of the recommended range.<sup>6</sup>

As to the apparent likelihood of conviction, it is impossible to assess because the case is pre-indictment and the State has not provided the defense with anything other than the one page complaint. (1T 5:1-5; Da 1). While there is no requirement to provide pre-indictment discovery, the fact that the State has not turned over any materials gives rise to the inference that there are significant issues with the proofs against [REDACTED], a young man who professes his innocence.

With respect to the second Johnson factor, [REDACTED] has no record of adjudications or convictions. (Da 2; 1T. 5:15-17). In setting bail, courts tend to give great weight to an inmate's prior record of convictions and failures to appear in court. (1T 5:12-14.) Therefore, great weight should be given to [REDACTED]'s lack of convictions and the fact that he has never failed to appear in court. (Da 2; 1T 5:12-17.)

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<sup>6</sup> As noted above, down payment and promise to make regular payments totaling ten percent of the total bail is a common agreement between a defendant and bail bondsman. Kuebel, at 359. If the "cash only" restriction is lifted, he can secure his release on the \$250,000 bail by making a down payment to a bondsman and agreeing to make payments totaling \$25,000, as opposed to being required to post a quarter of a million dollars all at once. He could secure his release on a \$100,000 bail by making a down payment to a bondsman and agreeing to make payments totaling \$10,000.

Regarding the third Johnson factor, the uniform defendant intake forms (bail survey) which were reviewed by the trial court indicate that [REDACTED]'s mental health is good. (1T 7:7; Da 4). This factor demonstrates that he presents no danger to himself or the community.

With respect to the fourth and fifth Johnson factors, [REDACTED]'s ties to the community are very strong. He and his family are lifelong residents of Mercer County, New Jersey. (1T. 4:14-17). These family members include his mother, father, brother, and four-year-old child, along with the mother of his child, and his girlfriend. (Da 5).

With reference to the sixth Johnson factor, [REDACTED] is a high school graduate. (Da 5; 1T 4:21.) He earns a living in the construction field and as a roofer.<sup>7</sup> (Da 4; 1T 4:21-22.)

As to the seventh and eighth Johnson factors, Barbara [REDACTED]'s certification provides additional support for Upshur's reliability and strong ties to the community. The sworn statement also details the financial and medical hardships that his incarceration has caused her. (Da 6; 1T 3:9-15; 1T 4:18-19).

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<sup>7</sup> While the intake forms indicate that he works "on and off" as a roofer, his modest salary should weigh in favor of a bail reduction since courts are to consider indigence in setting a bail that ensures appearance as opposed to ensuring pre-trial incarceration. Johnson, at 365.

Notwithstanding the analysis above, the trial court limited its analysis to a focus on the serious nature of the allegations, ruling that:

"the charges are very serious, involving an armed home invasion where the occupants were allegedly restrained with zip-ties while the house was ransacked and robbed. The defendant does have some ties to the community; has a history of unemployment; and has some criminal history with the pending theft. I'm satisfied under the circumstances, given the very serious nature of these charges, the bail is appropriate as set and I'm not going to change it." (1T 7:8-17; 2T 4:4-9).

If this appeal is not granted, [REDACTED] will suffer irreparable harm. Every day that he is confined by a bail that is intended to keep him detained as opposed to a bail intended to ensure his appearance is another day that he is unduly deprived of his liberty. Each day that he is detained represents another day that he is hindered in his ability to assist with his defense. Our Supreme Court recognizes:

"[the]strong indication revealed by studies that an accused who has been detained in jail between his arraignment and the final adjudication of his case is more likely to receive a criminal conviction or jail sentence than an accused who has been free on bail. Rankin, The Effect of Pretrial Detention, 39 N.Y.U.L.Rev. 641 (1964). The correlation between the pre-trial status (jail or bail) and the severity of the sentence after conviction has been described as 'extraordinary,' the jailed defendant being two or three times more likely to receive a prison sentence. Foote, The Coming Constitutional Crisis in Bail, *Supra*, 113 U.Pa.L.Rev. at 960." Johnson, at 361 n.6.

If [REDACTED] continues to be denied a reasonable bail he will


not be able to secure his freedom. Therefore, he will not be able to speak to exculpatory witnesses. These witnesses would be less likely to speak to an unknown attorney or investigator than one of their peers. Even if [REDACTED] could locate exculpatory witnesses and convince them to visit him at the county jail, he will not be able to speak to them without their conversations being monitored by jail personnel.

This emergent application is the only potential check on the trial judge's abuse of discretion. If [REDACTED] is acquitted, the bail issue will be moot because he will be released after serving a significant period of incarceration, a period of his life which he can never get back. If Upshur is convicted, the bail issue will be moot because bail is customarily revoked following conviction on first or second degree charges. State v. Ceylan, 352 N.J. Super. 139, 141 (App. Div. 2002). In the latter case, we will be left to wonder whether the conviction was due to the merits or due to the pre-trial detention that hindered his defense. Thus, Appellate intervention is necessary if [REDACTED]'s constitutional rights are to have any practical meaning.

CONCLUSION

In light of the foregoing, [REDACTED] urges this Court to strike the "cash only" restriction and to set bail at the suggested figure of \$100,000. In the alternative, he requests a directed remand to the trial court to re-evaluate the bail figure in light of the proffered evidence and case law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'F. Sisto', written in a cursive style.

Frederick P. Sisto, Esq.