FREDERICK P. SISTO, ESQ.
74 BRICK BOULEVARD, SUITE 112
P.O. BOX 4442
BRICK, NJ 08723
(732) 673-5077

SUPERIOR COURT OF NEW JERSEY
OCEAN COUNTY/CRIMINAL DIVISION
CASE NO. [redacted]

STATE OF NEW JERSEY

V.

JASON [redacted]

CRIMINAL ACTION

NOTICE OF MOTION
TO RECONSIDER PRETRIAL DETENTION

PLEASE TAKE NOTICE that as soon as counsel may be heard, the undersigned attorney for the above-captioned defendant shall move before the Honorable Wendel E. Daniels, P.J.Cr., for an Order granting pretrial release. In support of this motion the defense will rely upon the attached letter brief and oral argument.

Frederick P. Sisto, Esq.

Dated: July 2, 2018

LAW OFFICE OF FREDERICK P. SISTO

74 Brick Boulevard, Suite 112
P.O. Box 4442
Brick, NJ 08723
Phone: 732-673-5077 Fax: 201-508-3393 Email: fps@fredsisto.com
CERTIFIED BY THE SUPREME COURT OF NEW JERSEY AS A CRIMINAL TRIAL ATTORNEY

July 2, 2018

Honorable Wendel E. Daniels, P.J.Cr.P.

Ocean County Justice Complex

120 Hooper Avenue

P.O. Box 2191

Toms River, New Jersey 08754

Re: State v. Jason [redacted]

Case No. [redacted]

Your Honor:

Please accept this letter brief in support of Jason [redacted]'s pretrial release.

PROCEDURAL HISTORY

The Court granted the State's motion for pretrial detention on or about May 4, 2018. Prior defense counsel appealed the Court's pretrial detention order on May 11, 2018.

On May 31, 2018, the Appellate Division remanded the matter for the Court to reconsider its decision and for written findings in light of State v. Mercedes, ___ N.J. ___ (2018). The Appellate Division did not retain jurisdiction.

Your Honor issued a written decision and again ordered pretrial detention. Rather than seeking leave to appeal, Jason [redacted] seeks reconsideration of the Court's decision in light of new evidence and considerations. See the attached 16-page report and related witness statements. Exhibit A.

LEGAL ARGUMENT

I. [redacted] SHOULD BE RELEASED BECAUSE THERE IS NO CLEAR AND CONVINCING EVIDENCE THAT HE WILL: FAIL TO APPEAR, ENDANGER THE SAEFTY OF THE COMMUNITY, OR OBSTRUCT THE CRIMINAL JUSTICE PROCESS.

New Jersey's pretrial release statutes are designed to be "liberally construed to effectuate the purpose of primarily relying upon pretrial release by non-monetary means" to achieve the three purposes of pretrial release: (1) ensuring the accused's appearance in court; (2) protecting the safety of the community; and (3) preventing the accused from attempting to obstruct the criminal justice process. N.J.S.A. 2A:162-15. The accused may only be detained pretrial if the court finds clear and convincing evidence that no condition or combination of conditions can reasonably ensure that the defendant will appear in court, will not be a danger to the community, and will not obstruct the criminal justice process. Id. Pretrial release condition(s) must be the least restrictive condition(s) to achieve the three aforementioned purposes of the law. N.J.S.A. 2A:162-17b(2).

Unless the right to pretrial release is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning. Stack v. Boyle, 342 U.S. 1 (1951). In our society, liberty is the norm, and detention prior

to trial is the carefully limited exception. Salerno v. U.S., 481 U.S. 739, 755 (1987).

It is only when the State demonstrates probable cause that the accused committed a crime that carries a potential life sentence, that the accused is required to rebut a presumption of pretrial detention. N.J.S.A. 2A:162-19b. Otherwise, there is a presumption against pretrial detention and the state is required to demonstrate: (1) probable cause for the offense(s) and (2) that there is clear and convincing evidence that no combination of conditions would accomplish the purposes of the pretrial release statutes.[1] N.J.S.A. 2A:162-19a.

At the May 4, 2018 detention hearing, the Court cited the number of charges and that there are charges pending in two counties.[2] With regard to the number of charges, the Public Safety Assessment lists a total of 13. See S-3[3] on file with the Court. For purposes of sentencing exposure, all but two of the charges would merge legally and/or factually. Thus, [redacted] is not

[1] The purposes of the statutes are: (1) ensuring the accused's appearance in court; (2) protecting the safety of the community; and (3) preventing the accused from attempting to obstruct the criminal justice process. N.J.S.A. 2A:162-15.

[2] This writer reviewed the audio recording of the May 4, 2018, detention hearing along with the Court's May 31, 2018 Written Decision Pursuant to Appellate Remand.

[3] For clarity, the exhibits on file with the Court from the May 4, 2018 detention hearing will be referred to as D-1, S-1, S-2, etc. The exhibits attached to this brief are referred to as Exhibits A and B.

facing more than a maximum sentence of 30 years in prison (twenty years for a first-degree narcotics production facility charge and a consecutive ten years for possession of a firearm while engaged in drug activity). This thirty-year maximum term is mitigated by [redacted] being 35 years old and only having one[4] prior felony conviction. That underlying offense occurred more than 15 years ago and resulted in a term of probation. See S-4 (page 2). The sentencing exposure in the instant case does not account for admissibility issues and the new evidence further demonstrating that all of the charges are subject to dismissal at a Franks[5] hearing.

Moreover, charges are no longer pending in two counties. The charges in Gloucester and Ocean counties were always part of the same case. They have since been consolidated in Ocean County

---

[4] The PSA lists two additional offenses being adjudicated on the same date as [redacted]'s lone prior indictable conviction. S-3. These other offenses appear to be listed in error as one is missing an offense date and both are absent from his New Jersey Criminal History Detailed Record which "is a certified true copy of the Criminal History record information on file for the assigned State Identification Number." S-4. Even if the other convictions were accurate, they occurred more than 16 years ago and would not make [redacted] extended term eligible as they would have all been adjudicated on one date (1/24/2003) and he would have been released from confinement more than ten years ago. See N.J.S.A. 2C:44-3(a) (requiring convictions on at least two separate prior occasions and the last release from confinement to have occurred within ten years). The remoteness of [redacted]'s prior conviction(s) makes it unlikely to even be admissible for impeachment purposes under State v. Sands, 138 N.J. Super. 103 (App. Div. 1975).

[5] Franks v. Del., 438 U.S. 154 (1978).

at the State's request. Exhibit B.

With regard to any concern that the firearms charge relates to the potential "obstruction of justice, danger to the community, or intimidation of witnesses", we ask the Court to consider that [redacted] has no history of violence or violent charges pending. See S-3, page 1 (Public Safety Assessment).

It is alleged that a firearm was found inside the home occupied by [redacted] and his co-defendant girlfriend. It is not alleged that the firearm was found on [redacted]'s person, that he ever threatened anyone with it, or that it was ever taken outside of the home. This is a case with no tangible victim. All of the evidence, including the firearm, is subject to suppression at a Franks hearing.

Regarding the Court's giving "moderate weight to whether [redacted] would obstruct the criminal justice process because of the prior convictions for criminal mischief, contempt, and resisting arrest", all of these convictions are remote and two of the three are non-indictable, minor offenses. S-4, pages 2-3. The PSA accounted for these remote, minor offenses in recommending pre-trial release.

[redacted]'s lone indictable conviction(s) resulted in a term of probation completed without a violation. Id. His record on probation and record of always appearing in court further demonstrate that he will comply with any conditions of release.

[redacted] has no history of violence and this case involves no violent offenses or tangible victims. There is no indication that he would obstruct of the criminal justice process.

The two periods of incarceration of 14 days or more that [redacted] served in 2002 and 2003 should also be given little to no weight. S-3, page 3. These county jail sentences occurred before criminal justice reform, when it was common for indigent defendants like [redacted] to serve county jail terms while those with bail money avoided incarceration. To double-count [redacted]'s remote prior record and the related terms of incarceration for a disorderly persons and non-violent third-degree offense would undermine criminal justice reform.

The Court recognized that a strong presumption against detention exists. This strong presumption is further supported by the recommendation for release in the Public Safety Assessment. S-3.

Regarding [redacted]'s lone juvenile adjudication, the State argues that it is relevant to the release or detain decision despite it not being accounted for in the Public Safety Assessment. See S-4, page 1. A unanimous Supreme Court recently recognized why the adjudication is not considered:

> "scientific and sociological studies have shined new light on adolescent brain development and on the recidivism rates of juvenile sex offenders compared to adult offenders . . . They tell us that, generally, juvenile sex offenders are less likely to reoffend than adult sex offenders and

> that the likelihood of *recidivism is particularly low for those who have not reoffended for a long period of time.*" In re C.K., ___ N.J. ___ (2018) (emphasis added).

Consistent with C.K., [redacted]'s remote 1999 adjudication should not be given weight where more than 19 years have passed without reoffending and where the issue is whether he deserves the extreme sanction of pretrial detention.

Our Supreme Court's C.K. decision also calls the holding of State v. C.W.[6] into question, a case cited in the Court's May 31, 2018 Written Decision Pursuant to Appellate Remand. Even if C.W. were still good law, it held that considerable weight should be given to juvenile sex offenses that resulted in tier 3 high risk classifications and where pending charges involve new sex offenses. C.W., at 236. Neither situation applies to [redacted], a tier one registrant with charges unrelated to sex offenses.

Regarding any alleged "danger to the community" posed by the distribution of controlled substances, the fact that marijuana is the only substance allegedly possessed with the intent to distribute should weigh in favor of release. Marijuana is unique among controlled substances in that it has never caused an overdose death. See https://www.dea.gov/pr/multimedia-library/publications/drug_of_abuse.pdf, page 75 of 94. It presents far less of a danger to the community than all other

---

[6] 449 N.J. Super. 231 (App. Div. 2017).

controlled substances.

With respect to the primary question, whether [redacted] will appear in court as required, the fact that he has never failed to appear in court should be given heavy weight. See S-3, page 1.

Regarding the appellate remand, State v. Mercedes, ___ N.J. ___, and the amendment to R. 3:4A(b)(5), the Supreme Court held that Rule 3:4A(b)(5) is revised to make clear that a recommendation against a defendant's pretrial release that is based only on the type of offense charged cannot justify detention by itself unless the recommendation is based on one of two presumptions in the statute. See N.J.S.A. 2A:162-19(b). A pending charge is a charge that has a future pre-disposition related court date or is pending presentation to the grand jury, or has not been disposed of due to the defendant's failure to appear pending trial or sentencing, or that is in some form of deferred status. Mercedes, pages 33-34.

Since [redacted]'s "pending charges" in Gloucester County were always part of and have now been consolidated with the Ocean County case (or are awaiting the consolidation order), there is no additional "pending charge", i.e. no court date or pending grand jury presentation in Gloucester County and no failure to appear or deferred status in Gloucester County. These factors weigh in favor of release. Additionally, the PSAs recommended

detention in the Mercedes case whereas [redacted]'s PSA recommended release. The PSA recommended [redacted]'s release even before the consolidation of his Gloucester and Ocean County charges. S-3, page 1.

Regarding the inadmissibility of the evidence derived from material false statements and omissions in the search warrant affidavits, [redacted] was targeted by law enforcement in or before January of 2018. See D-1, page 7, par. A. After over a month of investigating, the State failed to develop probable cause for the installation of a GPS a monitoring device on [redacted]'s vehicle. D-1, page 25, par. N.

On February 12, 2018, the Honorable M. Christine Allen-Jackson, J.S.C. found no probable cause to approve the state's application for the GPS warrant. Id. Her Honor's decision that there was no evidence to establish probable cause should be regarded by other trial judges as binding. See State v. Kasabucki, 52 N.J. 110, 117 (1968).

More than a month after the GPS warrant application was denied and two months or more after [redacted] was targeted, the State again sought a GPS warrant. Rather than return to Judge Allen-Jackson, who was familiar with the case from the previous GPS warrant application, on March 15, 2018, the State sent a different affiant to request the warrant from a different Superior Court Judge, the Honorable Guy Ryan, J.S.C. D-1, page

25-26, par. N.

The State concealed Judge Allen-Jackson's previous denial of the GPS warrant application and Judge Ryan issued the warrant. It was only after the GPS warrant was used to invade 's privacy from March 16, 2018 through April 12, 2018, that, at page 26 of a 37-page search warrant application, that the affiant revealed his material omissions. D-1, page 25-26, par. N. The affiant did not reveal his material omissions to Judge Allen-Jackson, the judge who denied the GPS warrant. The affiant did not reveal his material omissions to Judge Ryan, the judge who granted the GPS warrant after being deceived about Judge Allen-Jackson's decision to deny the GPS warrant. The disclosure was buried in the middle of a lengthy application to a third judge who unlike the other two, was unfamiliar with the investigation, the Honorable Therese Cunningham, J.S.C. The revelation was made during the course of the April 24, 2018 search warrant application[7] that produced the evidence against Bacon. Id.

The April 24 search warrant application before Judge Cunningham alleges two pieces of evidence after Judge Allen-Jackson's February 12, 2018 finding that no probable cause existed. One is a non-descript hand-to-hand transaction. The

---

[7] One affidavit was used to request search warrants for 's two properties and his truck. D-1, pages 35-36.

other is the smell of raw marijuana around [redacted]'s person and vehicle.[8]

The hand-to-hand exchange communicated through multiple hearsay is said to have occurred on March 12, 2018. D-1, pages 22-23, paragraph L. [redacted]'s neighbor, Michelle [redacted], recalls her described meeting with [redacted] on March 12, 2018. Exhibit A, pages 7 and 14.[9] She affirms that [redacted] has never provided her with any illegal substances. Id. at 14. [redacted] immediately returned to her residence across the street from [redacted]'s after their meeting. Id.

There is no claim that anything resembling a controlled substance was seen. Id. There is no claim that [redacted] has any criminal history. Id. Her identity was verifiable through her license plate and home address across the street from [redacted]'s residence. There are only the bald assertions that a hand-to-hand exchange occurred and that it was "indicative of a CDS transaction." [redacted]'s sworn statement and lack of criminal history demonstrate additional material omissions in the affidavit and/or a lack of probable cause for the issuance of

---

[8] The GPS warrant allowed the State to invade [redacted]'s privacy for nearly a month. Like so many of the methods used in this protracted investigation, it produced no evidence of criminal activity. D-1, page 25-26, par. N.

[9] This alleged hand-to-hand transaction was the only new claim for Judge Ryan to consider on March 15, 2018, when he issued the GPS warrant.

the search warrants.

The only other alleged unlawful activity concerned a renewed claim regarding the area around [redacted] and his vehicle smelling like raw marijuana on April 19, 2018. D-1, page 31-32, par. Q. The same claim was made against [redacted] through multiple hearsay on February 5, 2018, regarding [redacted]'s vehicle being stopped and allegedly smelling of marijuana on January 4, 2017. D-1, page 19, par. 9. The search of [redacted]'s vehicle on that occasion produced nothing of evidentiary value. *Id.* The reasonable inference[10] is that this February 5 claim of smelling raw marijuana around [redacted]'s vehicle and finding nothing of evidentiary value was put before Judge Allen-Jackson during the February 12, 2018 GPS warrant application. Judge Allen-Jackson rejected those claims as evidence of criminal activity, just as the renewed claims should be rejected.

Moreover, the renewed claims of smelling marijuana around [redacted]'s person and vehicle are, at most, evidence of a disorderly persons possession of marijuana. This writer is unaware of any authority permitting the issuance of a search warrant for a home based on evidence of a non-violent disorderly persons offense.

---

[10] This writer is not yet privy to either of the GPS warrant affidavits or the GPS data obtained from the application that was not rejected.

While a Franks hearing is a separate proceeding for another day, it would be fundamentally unfair to force [redacted] to remain incarcerated while we wait for the voluminous discovery that will have to be turned over and analyzed before a Franks hearing can be decided. The search warrant affidavit reveals that there are weeks of GPS data, pole camera footage, "electronic surveillance", and numerous other pieces of evidence that have yet to be disclosed.

It will be many months before these materials are turned over, analyzed, briefed, and challenged at a testimonial Franks hearing. Additional time will then be needed for the trial court to issue its decision. In the meantime, the inadmissibility of the evidence is a relevant basis for [redacted]'s release. See N.J.S.A. 2A:162-20(B).

The affiant's alleged expertise should be discounted by the credibility issues inherent in his deceptive actions involving three Superior Court judges. It is also undermined by the expertise of retired New Jersey State Police Lieutenant Robert [redacted]. Exhibit A, page 16. Evidence uncovered at this early stage of the defense investigation further demonstrates the affiant's material false statements and omissions. While additional evidence can be developed to strengthen the case for suppression, the affiant's statements

and omissions can not be saved by evidence outside of the four corners of the affidavit. State v. Altenburg, 223 N.J. Super. 289, 296 (App. Div. 1988).

The affiant's claims of speeding and reckless driving are judicially noticeable boilerplate language that is routinely alleged by the State in their efforts to obtain search warrants. The affiant's claims regarding [redacted]'s "travelling well beyond the posted speed limit" on March 13, 2018 are demonstrably false when considering the time and distance travelled. Exhibit A, page 2-3.

The use of false boilerplate language is further demonstrated by the affiant's claims of [redacted] travelling in the center lane of Interstate 195. This description appears to have been copied from an unrelated search warrant application. The claims are false since Interstate 195 does not have a center lane. Id. at 3. These false claims referencing a non-existent center lane were repeated regarding [redacted]'s April 19, 2018 path of travel. Id. at 4-5.

The claims of erratic driving are also inconsistent with the actual practices of narcotics distributors. Logic and law enforcement experience confirm that they are known for driving cautiously to avoid the attention of law enforcement and to avoid providing bases to stop and search their vehicles and persons. Exhibit A, pages 4-5.

With regard to the bank deposits into █████'s accounts, Karen █████ confirms that she provided █████ with a $20,000 check in February of 2018. Exhibit A, pages 4, 12-13. Jason's mother, Kim █████, sister Jenn █████, and aunt Karen █████ all certify to █████'s known history of employment, including the full-time operation of his food truck business for the years since he worked in construction and for a solar panel company in 2011. Exhibit A, pages 8, 10, and 12. Claims regarding unreported income are insufficient bases to justify the extreme sanction of pretrial detention.

All of the witnesses sworn statements confirm that █████ is a truthful person of good character. Exhibit A, pages 8, 10, 12, and 14. His mother, sister, and aunt all promise to provide any assistance that he needs with regard to appearing in court. Id. at 8, 10, and 12. █████'s familial and community ties are strong. He has lived his entire life in Ocean and Monmouth Counties. █████'s good character is further supported by his honorable discharge from the National Guard after six years of service. Id. at 8, 12.

CONCLUSION

In light of the foregoing, Jason [redacted] should be released and subject to the least restrictive conditions necessary to ensure his appearance, protect the community, and prevent the obstruction of justice.

Respectfully submitted,

Frederick P. Sisto, Esq.