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March 24, 2025

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On the Letter-Brief

SUPREME COURT OF NEW JERSEY
DOCKET NO. 089386
APP. DIV. NO. A-3359-21

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Certification from a Judgment of the Superior Court of New Jersey,
v.	:	Appellate Division
DELSHON J. TAYLOR JR., a/k/a TAYLOR DELSHON, and DJ,	:	Indictment No. 18-07-0257-I
	:	Sat Below: Hon. Heidi Willis Currier, P.J.A.D.
Defendant-Appellant.	:	Hon. Ronald Susswein, J.A.D. Hon. Christine M. Vanek, J.A.D. Hon. Linda L. Lawhun, P.J.Cr.

Your Honors:

This letter-brief is submitted in response to the Attorney General's Amicus Brief on behalf of Defendant in lieu of a formal brief pursuant to R. 2:6-2(b).

TABLE OF CONTENTS

PAGE NOS.

PROCEDURAL HISTORY AND STATEMENT OF FACTS.....1

LEGAL ARGUMENT 1

POINT I.....1

BECAUSE THE PRESIDING JUDGE FAILED TO APPLY THE CORRECT STANDARD OF REVIEW FOR DENIALS OF GRAVES ACT WAIVERS—ORDINARY ABUSE OF DISCRETION—THIS COURT SHOULD REVERSE AND REMAND FOR RECONSIDERATION UNDER THE CORRECT STANDARD. 1

A. The Benjamin Court's Quotation Of The Alvarez Standard Is Not Subject To Stare Decisis, But Defendant Has Nonetheless Demonstrated A Special Justification To Depart From This Precedent. 2

B. The Assignment Judge Should Review A Prosecutor's Graves Waiver Denial Under The Same Abuse Of Discretion Standard Under Which Appellate Courts Review Sentencing Court Decisions. 11

C. If This Court Adopts The Ordinary Abuse Of Discretion Standard, It Should Be Afforded Pipeline Retroactivity. 18

CONCLUSION.....19

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant relies on the procedural history and statement of facts in his supplemental brief (DSb1-11)[1]

LEGAL ARGUMENT

POINT I

BECAUSE THE PRESIDING JUDGE FAILED TO APPLY THE CORRECT STANDARD OF REVIEW FOR DENIALS OF GRAVES ACT WAIVERS—ORDINARY ABUSE OF DISCRETION—THIS COURT SHOULD REVERSE AND REMAND FOR RECONSIDERATION UNDER THE CORRECT STANDARD.

In its amicus brief, the Attorney General asserts three arguments: (1) In State v. Benjamin, 228 N.J. 358 (2017), this Court "confirmed" that the

[1] The following abbreviations will be used:
AG – Attorney General's Amicus Brief
DSb – Defendant's Supplemental Supreme Court brief
Pa – Defendant's Petition Appendix
Db – Defendant's Appellate Division Brief (filed Nov. 16, 2022)
Da – Defendant-Appellant's Appendix (filed Nov. 16, 2022)
Dca – Defendant-Appellant's Confidential Appendix (filed Oct 5, 2022)
1T – Oct. 12, 2018 (evidentiary hearing on suppression motion)
2T – Nov. 2, 2018 (initial decision on suppression motion
3T – Feb. 8, 2019 (motion for reconsideration)
4T – Oct. 10, 2019 (decision on remand from Appellate Division)
5T – Apr. 26, 2021 (plea)
6T – July 16, 2021 (adjournment of sentencing)
7T – July 23, 2021 (motion to override Graves Act waiver denial)
8T – June 24, 2022 (sentencing)
PSR – Presentence Report (submitted under separate cover)

standard of review of a prosecutor's decision denying a Graves Act waiver is patent and gross abuse of discretion, which enjoys stare decisis, and Mr. Taylor has failed to demonstrate a "special justification" to overturn precedent; (2) if this Court does adopt the ordinary abuse of discretion standard, it should explain that this standard is highly deferential, can only be overcome by clear and convincing evidence, and judges are not free to substitute their views for those of the prosecutor; and (3) any change in the law should apply only prospectively. (AG1-2) Each of these claims will be addressed in turn.

A. The Benjamin Court's Quotation Of The Alvarez Standard Is Not Subject To Stare Decisis, But Defendant Has Nonetheless Demonstrated A Special Justification To Depart From This Precedent.

In Point I of the Attorney General's brief, rather than address the merits of the argument set forth in Mr. Taylor's supplemental brief, the Attorney General relies entirely on its assertion of stare decisis, asserting that Mr. Taylor failed to demonstrate the type of "special justification" necessary to overturn Benjamin's decision regarding the standard of review. (AG2-23) Specifically, the Attorney General argues that Mr. Taylor's merits argument falls short of a "special justification" to overturn stare decisis because "[a]ll defendant can say is that the standard of review is intellectually inconsistent with this Court's rulings in other contexts." (AG19) This argument is flawed

because (a) Benjamin's quoting of the standard of review articulated by the Appellate Division was dicta, which, though binding, does not enjoy stare decisis, and (b) even if Benjamin's recitation of the Appellate Division standard enjoys stare decisis, Mr. Taylor has articulated a special justification for overturning it, as the principles undergirding judicial review of a prosecutor's exercise of discretion impacting a defendant's sentence require compel principled consistency in review of Graves waiver decisions.

First, the Attorney General argues that this Court "confirmed" patent and gross abuse of discretion "to be the applicable standard in" Benjamin. (AG3) The Attorney General notes before turning to the discovery issue on which it granted certification, the Court in Benjamin considered "whether the Graves Act provides the procedural safeguards required by this Court in Lagares[2] and Vasquez[3]." 228 N.J. at 371. (AG11) The Attorney General then quotes the following paragraph from Benjamin:

> Third, since the Appellate Division's 1991 decision in [State v. Alvarez, 246 N.J. Super. 137 (App. Div. 1991)], upholding section 6.2, defendants have been able to seek judicial review of prosecutors' waiver decisions. In order to do so, a defendant must, by motion to the assignment judge, demonstrate "arbitrariness constituting an unconstitutional discrimination or denial of equal protection" in the prosecutor's decision. Alvarez, supra, 246 N.J. Super.

[2] State v. Lagares, 127 N.J. 20 (1992).
[3] State v. Vasquez, 129 N.J. 189, 195-97 (1992).

> at 148; State v. Watson, 346 N.J. Super. 521, 535 (2002) (explaining defendant must show "prosecutor's refusal [was] a patent and gross abuse of discretion"). Once a defendant makes this threshold showing, the defendant can obtain a hearing to review the prosecutor's decision if the assignment judge concludes that the "interests of justice" so require. Alvarez, supra, 246 N.J. Super. at 148-49. This judicial backstop ensures that prosecutorial discretion is not unchecked because the assignment judge retains "ultimate authority" to review the prosecutor's waiver decisions for arbitrariness and discrimination. Id. at 146-47.
>
> [Id. at 372-73. (AG12)]

It's noteworthy that the patent and gross abuse of discretion language appears only in a parenthetical quoting the Appellate Division's decision in Watson. When the Court directly described the standard a defendant must meet to overcome a Graves waiver denial, the Court instead quoted Alvarez's language, "arbitrariness constituting an unconstitutional discrimination or denial of equal protection." Id. (quoting Alvarez, 246 N.J. Super. at 148). If this Court had intended to affirmatively adopt the Watson patent and gross abuse of discretion standard over the Alvarez arbitrary and discriminatory standard, it stands to reason the Court would have clearly stated this.

What almost certainly explains the Court's quoting of these two different standards without evaluating, explaining, or attempting to reconcile them, is that the standard of review of a prosecutor's denial of a Graves waiver was not at issue in Benjamin. The Benjamin Court granted certification limited to the

issue of "whether a defendant seeking a waiver of a mandatory sentence under the Graves Act has the right to discovery of the prosecutor's files on previous applications for Graves Act waivers." State v. Benjamin, 224 N.J. 119 (2016). The parties appear to have accepted the Alvarez arbitrary or discriminatory standard and framed their arguments around whether discovery was necessary or appropriate for a defendant to be able to successfully meet that standard. Benjamin, 228 N.J. at 365-67. The question of whether the Alvarez standard was the correct standard of review "does not appear to have been raised or briefed by the parties or analyzed by the Court."[4] In re A.D., 441 N.J. Super. 403, 423 (App. Div. 2015), aff'd, 227 N.J. 626 (2017).

Moreover, the precise contours of the standard of judicial review of a prosecutor's Graves waiver denial was not necessary to the Court's decision. The context in which the Court quoted the Alvarez standard was in its consideration of "whether the Graves Act provides the procedural safeguards required by this Court in Lagares and Vasquez." Benjamin, 228 N.J. at 371.

[4] The Attorney General at oral argument did ask the Court to clarify the standard of review—a request absent from the AG's brief—but Justice Patterson emphasized that the Court only had the case on a limited grant of certification limited to the discovery issue and expressed concern that no party to the case had anticipated the Court addressing the standard of review. Oral Argument Video for A-43-15, State v. Benjamin (Nov. 7, 2016) at 1:32:30 to 1:34:08, available at https://njj-aocmedia-prod-general-purpose.s3.amazonaws.com/watch/supreme-court/2016/11/a-43-15.mp4?VersionId=_fox_i1CUUGCEr7CDp8_HMl75zMnGZ7z.

The Alvarez standard was mentioned in reference to the third "procedural safeguard" of Lagares and Vasquez, which is judicial review of the prosecutor's decision. Id. at 371-73. The Court was simply noting that the implementation of the Graves waiver statute comported with all three procedural safeguards—that "prosecutors are guided by standards, inform defendants of the basis for their decisions, and are subject to judicial oversight." Id. at 373. What was relevant in this context was the availability of judicial review, not the precise standard of review employed. Thus, the Court's observation that the standard of review employed in practice was the Alvarez standard was not necessary to the Court's finding that the existence of judicial review satisfied the procedural safeguards of Lagares and Vasquez.

Because the Benjamin Court's observation that the standard of review employed in practice was the Alvarez standard "was not necessary to the decision then being made," it was dicta. State v. Coviello, 252 N.J. 539, 558 (2023). (quoting Jamouneau v. Div. of Tax Appeals, 2 N.J. 325, 332 (1949)). The Attorney General counters that "matters in the opinion of a higher court which are not decisive of the primary issue presented but which are germane to that issue" are "binding decisions of the court." State v. Rose, 206 N.J. 141, 183 (2011) (quoting 5 Am.Jur.2d Appellate Review § 564 (2007)). (AG18) The Attorney General failed to quote the preceding paragraph in Rose, which

specified: "an expression of opinion on a point involved in a case, argued by counsel and deliberately mentioned by the court, although not essential to the disposition of the case ... becomes authoritative." Ibid. (emphasis added) (quoting 21 C.J.S. Courts § 230 (2006)). As noted, the standard of review was not argued in Benjamin. Moreover, the question of whether dicta is binding is separate from whether it enjoys stare decisis. As noted by this Court in Jamouneau, "dictum"—a statement that "was not necessary to the decision then being made"—"is entitled to due consideration but does not invoke the principle of stare decisis." Jamouneau v. Div. of Tax Appeals, 2 N.J. 325, 332 (1949). See also Marconi v. United Airlines, 460 N.J. Super. 330, 339 (App. Div. 2019).

Finally, it bears noting that none of the Appellate Division decisions—not Alvarez, Watson, or Rodriguez—are entitled to stare decisis that requires this Court to find a special justification to overturn. A "decision of the Appellate Division . . . [is] binding on the trial court; but it is not Stare decisis on [the Supreme] [C]ourt." Fantony v. Fantony, 21 N.J. 525, 532 (1956) (citing New Amsterdam Casualty Co. v. Popovich, 18 N.J. 218, 224 (1955); see also State v. Hess, 207 N.J. 123, 174 n.4 (2011). When this Court considered the applicable standards of review for a prosecutor's decisions whether to seek a waiver of forfeiture of public employment and whether to

move to waive a juvenile to be tried as an adult, the Court was confronted in both instances with published Appellate Division cases which held that the standard of review was for patent and gross abuse of discretion. State in re V.A., 212 N.J. 1, 20-21 (2012) (noting that in State ex rel. R.C., 351 N.J. Super. 248, 260 (App. Div. 2002), "the Appellate Division concluded that the patent and gross abuse of discretion standard was applicable to a family court's review of a motion to waive a juvenile"); Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 570 (2002) (nothing that in State v. Lazarchick, 314 N.J. Super. 500, 530-31 (App. Div. 1998), the Appellate Division adopted "the 'patent and gross abuse of discretion' standard used in PTI cases"). But the Court did not apply stare decisis analysis in either case. Thus, this Court in this case is not required to clear the extra hurdle of a "special justification" to reject the Alvarez arbitrary and discriminatory standard or the patent and gross abuse of discretion standard and adopt the ordinary abuse of discretion standard instead.

If this Court disagrees and finds that stare decisis does apply to the Benjamin Court's quotation of the Alvarez and Watson standards, Mr. Taylor asserts that he has demonstrated a special justification to depart from precedent. "Although stare decisis furthers important policy goals, it is not an inflexible principle depriving courts of the ability to correct their errors." State v. Witt, 223 N.J. 409, 439 (2015) (citing Fox v. Snow, 6 N.J. 12, 23, 76 *A*.2d

877 (1950) (Vanderbilt, C.J., dissenting)). Stare decisis "is not an unyielding doctrine" Pinto v. Spectrum Chemicals & Lab'y Prods., 200 N.J. 580, 598 (2010), nor is it "a command to perpetuate the mistakes of the past." Witt, 223 N.J. at 440 (citing Lawrence v. Texas, 539 U.S. 558, 577 (2003)).

"Among the relevant considerations in determining whether to depart from precedent are whether the prior decision is unsound in principle, unworkable in practice, or implicates reliance interests." State v. Shannon, 210 N.J. 225, 227 (2012) (citing Allied–Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768, 783 (1992)). "Special justification to overturn precedent might exist when the passage of time illuminates that a ruling was poorly reasoned," Luchejko v. City of Hoboken, 207 N.J. 191, 209 (2011) (citing White v. Twp. of N. Bergen, 77 N.J. 538, 550-54 (1978)).

This Court in Shannon culled the "unsound in principle" variety of special justification from Allied-Signal, which in turn drew the "unsound in principle" concept from Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985). See Allied–Signal, 504 U.S. at 783. In Garcia, the Supreme Court overruled its prior holding National League of Cities v. Usery, 426 U.S. 833 (1976), which had held that the Commerce Clause of the United States constitution "does not empower Congress to enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act (FLSA) against the States

'in areas of traditional governmental functions.'" Garcia, 469 at 530 (quoting National League of Cities, 426 U.S. at 852). The Court found that the National League of Cities rule was "unsound in principle" because it was "inconsistent with established principles of federalism." Id. at 531, 547.

Likewise, reviewing a prosecutor's Graves waiver denial for patent and gross abuse of discretion is unsound in principle because it is inconsistent with established principles of separation of powers. As argued extensively in Mr. Taylor's supplemental brief, separation of powers concerns are present both in the context of judicial review of a prosecutor's decision whether to admit a defendant to PTI as well as in the context of a prosecutor's exercise of discretion impacting the authorized sentencing range, but they cut in opposite directions. (DSb 25-39) Because the decision whether to prosecute or defer prosecution by admitting a defendant to PTI is quintessentially a prosecutorial function, the force of separation of powers principles pushes back against judicial review, requiring that "the scope of such review . . . be limited" to ensure that such review "is consistent with applicable principles under the separation of powers doctrine." State v. Leonardis, 73 N.J. 360, 381 (1977) (Leonardis II)). Hence, our courts apply "extreme deference" to PTI denials, reviewing them under the patent and gross abuse of discretion standard. State v. Nwobu, 139 N.J. 236, 246 (1995). Converse, because sentencing is

quintessentially "a judicial function," Leonardis II, 73 N.J. at 369 n.5, the force of separation of powers principles requires judicial "oversight to ensure that prosecutorial discretion is not exercised in an arbitrary and capricious manner." State v. A.T.C., 239 N.J. 450, 474 (2019). It is for this reason that this Court has reserved the patent and gross abuse of discretion standard for PTI while holding that the ordinary abuse of discretion standard is applicable to a prosecutor's decision whether to waive a mandatory sentencing provision. V.A., 212 N.J. at 21; A.T.C., 239 N.J. at 476.

B. The Assignment Judge Should Review A Prosecutor's Graves Waiver Denial Under The Same Abuse Of Discretion Standard Under Which Appellate Courts Review Sentencing Court Decisions.

The Attorney General agrees with Mr. Taylor's position that this Court should give guidance to assignment judges regarding what the abuse of discretion standard should look like in practice. (AG29-32; DSb42-48) And Mr. Taylor and the Attorney General even agree on the broad strokes of how the assignment judge should approach that review. After noting the points of agreement, Mr. Taylor will then examine the points of disagreement.

The Attorney General and Mr. Taylor agree that because "the prosecutor's waiver decision will most often be based on review and weighing of the aggravating and mitigating factors found in N.J.S.A. 2C:44-1," the

assignment judges "reviewing a prosecutor's denial of a Graves Act waiver are cast more in the role of an appellate court reviewing a trial court's sentencing analysis." (AG27-28) Directing assignment judges to review a prosecutor's denial of a Graves waiver request applying the standard that an appellate court employs to review a sentencing court's decision is logical and consistent with existing jurisprudence for several reasons. Perhaps most importantly, "appellate review of sentencing decisions" is "governed by an abuse of discretion standard," the same standard that Mr. Taylor advocates applying to Graves waiver denials. State v. Blackmon, 202 N.J. 283, 297 (2010). "Appellate review of sentencing is deferential, and appellate courts are cautioned not to substitute their judgment for those of our sentencing courts," State v. Case, 220 N.J. 49, 65 (2014)—which is precisely the orientation urged by the Attorney General.[5] (AG26, 28)

In an appellate court's review of a sentencing court's decision, the appellate court should

> (a) review sentences to determine if the legislative policies, here the sentencing guidelines, were violated; (b) review the aggravating and mitigating factors found below to determine whether those factors were based upon competent credible evidence in the record; and (c) determine whether, even though the court sentenced in

[5] Mr. Taylor does not oppose the Attorney General's request that this Court endorse "the comparative analysis methodology" set forth in State v. Rodriguez, 466 N.J. Super. 71 (App. Div. 2021). (AG29)

> accordance with the guidelines, nevertheless the application of the guidelines to the facts of this case make the sentence clearly unreasonable so as to shock the judicial conscience.
>
> [State v. Roth, 95 N.J. 334, 364-65 (1984).]

This framework was influenced by the abuse of discretion standard articulated in State v. Bender, 80 N.J. 84, 93 (1979), which the Attorney General cites. Id. at 364. (AG25) And it lends itself handily to reviewing a prosecutor's decision under the Attorney General Directive to Ensure Uniform Enforcement of the "Graves Act" (Oct. 23, 2008, as corrected Nov. 25, 2008) ("Directive").

The Directive states, "In determining whether to move for or approve the waiver or reduction of the minimum term of parole ineligibility pursuant to N.J.S.A. 2C:43-6.2, the prosecuting agency shall consider all relevant circumstances concerning the offense conduct and the offender, including those aggravating and mitigating circumstances set forth in N.J.S.A. 2C:44-1." Directive at 12. The Directive further states,

> The prosecuting agency as part of the State's initial plea offer shall agree to move pursuant to N.J.S.A. 2C:43-6.2 for a reduction to a one-year term of parole ineligibility, unless the prosecuting agency determines that the aggravating factors applicable to the offense conduct and offender outweigh any applicable mitigating circumstances, or unless the prosecuting agency determines that a sentence reduction to a one-year term parole ineligibility would undermine the investigation or prosecution of another.

[Id. at 13 (emphasis added).]

There are two additionally exceptions to the requirement that the prosecutor "shall agree" to a waiver beyond the exceptions set forth in this quoted passage; the Directive prohibits a prosecutor from moving for a waiver if "(1) the defendant is ineligible for a waiver due to a prior conviction for a Graves Act offense, [or] (2) there is a 'substantial likelihood that the defendant is involved in organized criminal activity.'" State v. Andrews, 464 N.J. Super. 111, 121 (App. Div. 2020) (citing Directive at 7-14).

Thus, when the prosecutor denies a defendant's request for a waiver, the assignment judge first reviews the statement of reasons to determine whether the relevant "policies, here the [Directive], w[as] violated. Roth, 95 N.J. at 364. It would clearly be an abuse of discretion if the prosecutor denied a waiver without referencing the Directive or undertaking the analysis required by the Directive. It would also be an abuse of discretion if the prosecutor's statement of reasons conducted the analysis required by the Directive but denied a waiver even where none of the four exceptions to the Directive's command that the prosecutor "shall agree" to move for a waiver were present—i.e. if it was clear that the defendant was not ineligible by virtue of a prior conviction, there was no evidence that the defendant was involved in organized criminal activity or that a sentence reduction would undermine the

investigation or prosecution of another, and the prosecutor's statement of reasons found either that the mitigating factors outweigh the aggravating factors or the factors were in equipoise. The refusal to move for waiver as commanded by the Directive even where the prosecutor found that none of the exceptions to the waiver presumption applied would be analogous to a sentencing court imposing a term of incarceration on a first-time offender convicted of a third- or fourth-degree offense while finding that the presumption against incarceration was not overcome. See N.J.S.A. 2C:44-1(e).

If, however, the prosecutor follows the Directive and denies the waiver request because the prosecutor finds that the aggravating factors outweigh the mitigating factors, the assignment judge must review the factors found "to determine whether those factors were based upon competent credible evidence in the record." Roth, 95 N.J. at 364. In this analysis, we agree with the Attorney General that "assignment judges not to engage in de novo finding of aggravating and mitigating factors, or the weight they are due." (AG29) The assignment judge reviews the prosecutor's finding and weighing of aggravating and mitigating factors just as an appellate court reviews a sentencing court's finding and weighing of aggravating and mitigating factors. In that vein, if the prosecutor "fails to identify relevant aggravating and mitigating factors, or merely enumerates them, or forgoes a qualitative

analysis, or provides little 'insight into the sentencing decision,' then the deferential standard will not apply." Case, 220 N.J. at 65 (State v. Kruse, 105 N.J. 354, 363 (1987).

The one area where Mr. Taylor diverges from the Attorney General is in the Attorney General's characterization of the work done by the "clear and convincing" standard. (AG26-27) Mr. Taylor acknowledges that this Court in Lagares stated that "to prove that a prosecutor's decision to deny leniency constituted an arbitrary and capricious exercise of discretion," defendants "must show clearly and convincingly their entitlement to relief." 127 N.J. at 33; see also V.A., 212 N.J. at 26 ("As in Lagares, we hold that a juvenile must show clearly and convincingly that a prosecutor abused his or her discretion in order to secure relief."). But the Attorney General's discussion of just how difficult it is to demonstrate clear and convincing evidence of an abuse of discretion raises a concern that if this Court were to construe the standard in the manner advocated by the Attorney General, it would effectively turn into the extreme deference of the patent and gross abuse of discretion standard—just under a different name.

On the contrary, Mr. Taylor understands the "clear and convincing" language of Lagares and V.A. to simply be another way of admonishing assignment judges that they are not to substitute their judgment for that of the

prosecutor. In evaluating aggravating and mitigating factors, there are legal rules and then there are more discretionary judgment calls. A defendant can show a clear and convincing abuse of discretion where the prosecutor's finding of an aggravating factor "was based upon a consideration of irrelevant or inappropriate factors," Bender, 80 N.J. at 93—i.e. if it were based on "prior dismissed charges" "when no such undisputed facts exist or findings are made." State v. K.S., 220 N.J. 190, 199 (2015). In contrast, the precise weight assigned to an aggravating factor often more closely resembles a discretionary judgment call, in which case a simple disagreement with the prosecutor's judgment would not constitute a clear and convincing abuse of discretion. While the "clear and convincing" standard seems unnecessary to layer on top of the deferential "abuse of discretion" standard that already prohibits the assignment judges from substituting their judgment from that of the prosecutor—and indeed the abuse of discretion standard for appellate review of a sentence does not use the "clear and convincing" language—the approach advocated by Mr. Taylor would most closely harmonize the review of a Graves waiver denial with appellate review of a sentencing court's decision.

C. If This Court Adopts The Ordinary Abuse Of Discretion Standard, It Should Be Afforded Pipeline Retroactivity.

The Attorney General argues that if this Court adopts the ordinary abuse of discretion standard, the only defendants who would be able to prevail on appeal are those who have "(1) not exhausted his direct appeals, and (2) had challenged a prosecutor's refusal to accede to a waiver under the existing framework, and (3) had established that an abuse of discretion had, in fact, occurred, but was nevertheless unable to satisfy that last component that separates the 'patent and gross' abuses from a regular abuse of discretion." (AG36-37) The Attorney General is thus advocating pipeline retroactivity with an added hurdle that a defendant on direct appeal would have to demonstrate on appeal he would have succeeded under the less demanding standard in order to get relief.

While this Court need not reach the question of retroactivity, if the Corut does reach the question of retroactivity, Mr. Taylor agrees that the ordinary abuse of discretion rule should be afforded pipeline retroactivity. Mr. Taylor thus agrees with prongs (1) and (2) set forth by the Attorney General. However, Mr. Taylor disagrees that a defendant should have to demonstrate definitively on appeal that he would have succeeded under the ordinary abuse of discretion standard where he failed under the patent and gross abuse of

discretion standard. Where a trial court applied the wrong standard in rendering a legal determination, the appropriate remedy is to remand for reconsideration by the trial court under the correct legal standard. The Appellate Division should not attempt to apply the ordinary abuse of discretion standard in the first instance on appeal to determine whether the defendant would have succeeded, but instead should remand.

CONCLUSION

For the foregoing reasons, this Court should hold that the correct standard of review for Graves Act waiver denials is ordinary abuse of discretion, and remand to the Presiding Judge for reconsideration of Mr. Taylor's motion to override the prosecutor's denial of his request for a Graves Act waiver.

Respectfully submitted,

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