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February 4, 2021

Honorable Mark Chase, J.S.C.
Superior Court of New Jersey
Camden County Hall of Justice
101 South 5th Street, Suite 430
Camden, New Jersey 08104

RE: State v. Jeremy Benson, Indictment No. 19-09-2195-I
Returnable February 16, 2021 at 2:00 p.m.

Dear Judge Chase,

Please accept this letter brief in support of Mr. Benson's pretrial motion to suppress a statement he made to investigators and as a supplement to his previously-filed motion to suppress certain identification evidence.

PRELIMINARY STATEMENT:

The State alleges that Mr. Benson committed a gunpoint robbery on July 20, 2019. After he was arrested on a warrant for that crime on August 21, 2019, detectives interrogated Mr. Benson. Although he made several inculpatory statements during the interrogation, Mr. Benson adamantly denied involvement in the crime. On December 23, 2020 – after Mr. Benson sat in the Camden County Correctional Facility for more than sixteen months – the State notified defense counsel of that statement. The statement should be suppressed. There is no doubt that the police may lie to a suspect to get the suspect to say he committed the crime. Indeed, the textbook on which interrogations are based encourages interrogators to lie. The New Jersey Supreme Court has carved out one small area where interrogators cannot lie. That proved too stringent a rule for Mr. Benson's interrogators. So, they broke the rule.

In addition to the statement, Mr. Benson renews his request for a **full** *Wade/Henderson* hearing because numerous system variables were apparent from the initial, limited hearing.

FACTS & PROCEDURAL HISTORY

The facts and procedural history of this matter have been recounted in several prior briefs. The undersigned counsel will forego a full recitation. More importantly, an in-person hearing on this matter was held on January 4, 2021. The undersigned counsel has ordered the transcripts from that hearing, but the transcripts have not been completed as of the writing of this brief. Once those transcripts are available, the undersigned counsel will provide a copy to the State and this Court.

LEGAL ARGUMENT

Point I

The New Jersey Supreme Court mandates that interrogators accurately inform suspects of warrants for their arrest and the charges therein. The interrogators here did not do so. Instead, they lied about the one thing they are not allowed to lie about. The resulting statement must be suppressed.

Law-enforcement officers are allowed to lie to suspects. But the State of New Jersey provides its citizens a heightened right against self-incrimination. To balance those two propositions, the New Jersey appellate courts have carved out one area where interrogators must be honest with suspects. Once the interrogators make that one simple and true statement, the interrogators may return to lying. Here, the interrogators did not make that one simple and honest statement. Instead, they lied. As a result, the statement they elicited from Mr. Benson must be suppressed.

"New Jersey common law has accorded its citizens their right against self-incrimination since colonial times." *State v. A.G.D.*, 178 N.J. 56, 66 (2003). That "common law privilege against self-incrimination affords greater protection to an individual than that accorded under the federal privilege." *State v. Vinventy*, 237 N.J. 122, 132 (2019) (quoting *In re Grand Jury Proceedings of Guarino*,

104 N.J. 218, 29 (1986)). The rule is now codified in New Jersey's statutes, N.J.S.A. 2A:84A-19, and rules, N.J.R.E. 503.

New Jersey protects its citizens' rights against self-incrimination in both procedure and substance. Procedurally, "[t]he State carries the burden of proving 'beyond a reasonable doubt that the suspect's waiver was knowing, intelligent, and voluntary[.]" *Vincenty*, 237 N.J. at 133 (quoting *State v. Presha*, 163 N.J. 304, 313 (2000)). *See also A.G.D.*, 178 N.J. at 67 ("for a confession to be admissible as evidence, prosecutors must prove beyond a reasonable doubt that the suspect's waiver was knowing, intelligent, and voluntary in light of all the circumstances.") (quotation omitted)). Though this rule is traditionally assessed by the totality of the circumstances, *id.* at 67, as it pertains to the following discussion, the courts must apply a *per se* and bright-line analysis, *id.* at 67-68, *State v. Sims*, __ A.3d __. ___, No. A-2641-17T2, slip. op. at 18-19 (App. Div. Jan. 4, 2021).

The right is also protected in substance. Interrogators must inform a suspect "that a criminal complaint or arrest warrant has been filed or issued[,]" *A.G.D.*, 178 N.J. at 68, and "the essence of the charges filed against him[,]" *Vincenty*, 237 N.J. at 134; s*ee also Sims*, slip. op. at 22 (holding that a suspect arrested without a warrant is "entitled to be informed of the charge for which he was being placed under arrest before" he is interrogated), and *State v. O'Neill*, 193 N.J. 148, 179 (2007) (interrogators must inform the suspect prior to questioning that a complaint or warrant has been filed or issued). The interrogators must advise the suspect in a "simple declaratory statement at the outset of an interrogation" and the "information should not be woven into accusatory questions posed during the interview." *Vincenty*, 237 N.J. at 134. This rule is critical because "a criminal complaint and arrest warrant signify that a veil of suspicion is about to be draped on the person, heightening his risk of criminal liability. Without advising the suspect of his true status when he does not otherwise know it," the suspect cannot knowingly, intelligently, and voluntarily waive his right against incrimination. *A.G.D.*, 178 N.J. at 68.

Here, the interrogators told Mr. Benson at the outset of questioning that "no judge has been called yet, nothing yet." (N.T. 8/21/19, p. 3, ln. 6[1].) They told him they were "here to get [his] version of the story before everybody makes their decision down the road with this[,]" and that the case could go "two different ways" as things stood. (*Id.* at p. 3, lns. 6-7, 13.) Those statements were lies. The interrogation occurred on August 21, 2019. One month prior, on July 21, 2019, Judge David Garnes, J.M.C., was called and signed a complaint-report, thereby instituting a formal criminal prosecution against Mr. Benson. The complaint-warrant charged Mr. Benson with robbery, unlawful possession of a firearm, possession of a firearm without a permit, and certain persons not to possess a weapon.[2] And though the interrogators immediately mentioned a robbery charge, the first mention of a gun occurred well over halfway through the interrogation. (*See id.* at p. 11, ln. 10). Instead of offering that information in a "simple declaratory statement at the outset of an interrogation[,]" as required by our Supreme Court, the interrogators did exactly that which is forbidden by interweaving the information "into accusatory questions posed during the interview." *See Vincenty*, 237 N.J. at 134.

Not only did the interrogators' lies violate the *per se* and bright-line rule, but the lies did violence to the principles that animate the rule. The questioning detectives told Mr. Benson that they were merely "here to get [his] version of the story before everybody makes their decision down the road with this[.]" And they reiterated that the case "can go in two different ways" from the interrogation. Those statements offered a false promise: that there existed an explanation that Mr. Benson could provide to stave off criminal charges. The interrogators assured him that there were

[1] This citation format refers to the transcript for the event on the indicated date, and the page and line on which the cited text can be found. This transcript – of Mr. Benson's interrogation – was marked and moved into evidence at the recent pretrial hearing and is appended to the State's most recent brief.

[2] N.J.S.A. 2C:15-1A(2), N.J.S.A. 2C:39-4A(1), N.J.S.A. 2C:39-5B(1), and N.J.S.A. 2C:39-7B(1), respectively.

two potential paths forward, clearly implying that the process could go good for Mr. Benson or bad for Mr. Benson. But no such fork in the road existed. Indeed, the road inextricably led to only one place: the Camden County Correctional Facility. Though Mr. Benson adamantly denied involvement in the robbery, goaded by these false promises and fake "ways" the case could proceed, Mr. Benson did offer some potentially inculpatory information.

The State attempts to diffuse the problem by citing cases that permit interrogators to use "trickery and deception" and to lie. State's Brief, filed Jan. 28, 2021, at p. 11 (quoting *State v. Patton*, 362 N.J. Super. 16, 25 (App. Div. 2003), and *State v Manning*, 165 N.J. Super. 19, 30-31 (App. Div. 1978)). The State concedes only that the interrogators "used mild deceptive techniques, such as indicating the use facial recognition technology when no such evidence existed." *Id.* at p. 12. And in that regard, the State is correct. In New Jersey, as is the case elsewhere, police officers are permitted – even encouraged – to lie. *See, e.g., State v. Galloway*, 133 N.J. 631, 655 (1993) ("[t]he fact that the police lie to a suspect does not, by itself, render a confession involuntary); Saul Kassin, *It's Time for Police to Stop Lying to Suspects*, N.Y. TIMES, Jan. 29, 2021, at A23 ("[m]ost Americans don't know this, but police officers in the United States are permitted by law to outright lie about evidence to suspects they interrogate in pursuit of a confession"); James L. Trainum, HOW THE POLICE GENERAL FALSE CONFESSIONS: AN INSIDE LOOK AT THE INTERROGATION ROOM 88 (Rowman & Littlefield 2016) (former police officer details ways police officers are trained to lie to suspects). Though encouraging police officers to lie "is precisely one of the parade of horrors civics teachers have long taught their pupils that our modern judicial system was designed to correct[,]" *Patton*, 362 N.J. Super. at 33 (quoting *State v. Cayward*, 552 So.2d 971, 974 (Fla. Dist.Ct.App. 1989)), the State remains correct in its assertion that lying about facial-recognition software was allowable.

But the State fails to account for the interrogator's outright lie about Mr. Benson's "true status" as someone subject to an arrest warrant and whose next stop was jail, no matter what was

said in the interrogation. Indeed, the interrogators were as powerless as Mr. Benson in that regard; they were obliged to take him to the jail even if somehow he had convinced them of his innocence.

New Jersey courts allow interrogators to lie about almost everything. There is one area where they must be honest. The interrogators must simply inform a suspect that he is subject to a warrant or arrest, and of the charges in the warrant or that he has been arrested for. That did not happen here. As a result, the statement must be suppressed.

Point II

Mr. Benson renews his request for a full *Wade/Henderson* hearing.

On March 9, 2020, the undersigned submitted a letter-brief in support of Mr. Benson's motion to suppress certain identification evidence. And on January 4, 2021, this Court held a limited hearing on that motion, ordering the parties to confine their questioning to whether law enforcement showed the victim video of the crime prior to taking his statement. Based on evidence proffered previously in his March 9th brief, and additional evidence elicited at the January 4th hearing, Mr. Benson requests a full hearing. With the transcript from the prior hearing unavailable as of the writing of this brief, the undersigned counsel offers simply these system variables made evident at the hearing:

- Officer Rubi Rivera conducted the first lineup involving suspect Tommil Roberson and then participated in the interview of the victim, Samuel Rodriguez. The same officer then showed the photo array involving Mr. Benson. Not only was the photo array involving Mr. Benson not double-blind, but there appear to be no additional precautionary steps, such as "blinding", as described in *State v. Henderson*, 208 N.J. 208 (2011).

- Though Officer Rivera repeatedly told Mr. Rodriguez during the identification procedure involving Mr. Benson that "you will . . . have to say yes or no. We cannot be in the middle[,]" she never said the same when Mr. Rodriguez was unsure during the earlier identification procedure involving Mr. Roberson.

In *Henderson*, the Supreme Court offered the example that, if an administrator confirmed "an eyewitness' identification by telling the witness she did a 'good job[,]' [t]hat proffer would warrant a *Wade* hearing." *Id.* at 291. At a full hearing, the trial court an "can end the hearing **absent any other evidence of suggestiveness**. In other words, if no evidence of suggestiveness is left in the case, there is no need to explore estimator variables at the pretrial hearing." *Id.* (emphasis added). The Supreme Court made clear that, once a hearing is granted, the movant has the right to inquire beyond a circumscribed set of questions. Any *Wade/Henderson* hearing is a "full hearing", the trial court simply retains the right to halt a fishing expedition. Here, ample system variables warrant a hearing (after all, this Court did order a hearing). More variables came to light during the hearing. A full hearing is warranted to further review estimator variables and any other system variables that become apparent.

CONCLUSION

Mr. Benson respectfully requests this Court to enter an order suppressing the statement he made on or about August 21, 2019, and to set a date and time for another in-person hearing pursuant to the previously-filed motion to suppress certain identification evidence.

Respectfully submitted,

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Attorney for Jeremy Benson

BY: */s/ David M. Simon*
DAVID M. SIMON, ESQUIRE

CC: Assistant Prosecutor Barry Sullivan (*via eCourts*)