

SUPREME COURT OF NEW JERSEY

WHEREAS, on March 11, 2020, COVID-19 was declared to be a global pandemic by the World Health Organization; and

WHEREAS, on March 13, 2020, the President of the United States declared a national emergency pursuant to his constitutional and statutory powers, including those granted by Sections 201 and 301 of the National Emergencies Act (50 U.S.C. § 1601, et seq.) and consistent with Section 1135 of the Social Security Act, as amended (42 U.S.C. § 1320b-5); and

WHEREAS, in light of the dangers posed by COVID-19, the Governor of New Jersey issued Executive Order No. 103 (2020) on March 9, 2020, which declared both a Public Health Emergency and State of Emergency; and

WHEREAS, the Governor of New Jersey issued Executive Order No. 200 (2020) on November 22, 2020, extending the Public Health Emergency and State of Emergency in New Jersey for the ninth time; and

WHEREAS, to further protect the health, safety, and welfare of New Jersey residents by, among other things, reducing the rate of community spread of COVID-19, the Governor issued Executive Order No. 104 (2020) on March 16, 2020, which established statewide social mitigation strategies for combatting COVID-19; and

WHEREAS, as of December 1, 2020, according to the World Health Organization ("WHO"), there were more than 62,662,181 confirmed

cases of COVID-19 worldwide, with over 1,460,223 of those cases having resulted in death;¹ and

WHEREAS, as of December 1, 2020, according to the Centers for Disease Control and Prevention ("CDC"), there were more than 13,447,627 confirmed cases of COVID-19 in the United States, with 267,302 of those cases having resulted in death;² and

WHEREAS, as of December 1, 2020, the United States has reported more cases of COVID-19 than any other country;³ and

WHEREAS, as of December 1, 2020, there were 341,910 positive cases of COVID-19 in New Jersey, spread across every county, resulting in 15,254 confirmed deaths and an additional 1,829 probable deaths linked to the virus;⁴ and

WHEREAS, New Jersey is currently in the midst of a "second wave" of the pandemic, with 5,673 residents testing positive reported on December 4, 2020, a record high for the state;⁵ and

¹ WHO Coronavirus Disease (COVID-19) Dashboard (last updated Dec. 1, 2020), available at <https://covid19.who.int/>.

² United States COVID-19 Cases and Deaths by State, CDC (last updated Dec. 1, 2020), available at https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days.

³ *Supra*, note 1.

⁴ New Jersey COVID-19 Dashboard (last updated Dec. 4, 2020), available at https://www.nj.gov/health/cd/topics/covid2019_dashboard.shtml.

⁵ Brent Johnson, *Second Wave Surge in N.J.*, NJ Advance Media (Nov. 12, 2020), available at <https://www.nj.com/coronavirus/2020/11/second-wave-surge-in-nj->

WHEREAS, social mitigation strategies for combatting COVID-19 require every effort to reduce the rate of community spread of the disease;⁶ and

WHEREAS, recognizing that the “number of confirmed cases of COVID-19 ha[s] increased dramatically, demonstrating more significant community spread,” the Governor issued Executive Order 192 (2020) on November 11, 2020, ordering food and beverage establishments, casinos, and retail stores to cease indoor operations between 10:00 p.m. and 5:00 a.m. each day; and

WHEREAS, on November 12, 2020, the Governor issued Executive Order 195 (2020), authorizing counties and municipalities to prohibit non-essential businesses from operating after 8:00 p.m.; and

WHEREAS, on November 16, 2020, the Governor issued Executive Order 196 (2020), further restricting the limits for indoor gatherings to 10 people, and outdoor gatherings to 150 people; and

[hits-3517-new-covid-19-cases-18-more-deaths-transmission-rate-test-positivity-increase.html](https://www.cdc.gov/coronavirus/2019-ncov/community/community-mitigation.html); *supra*, note 4.

⁶ Community Mitigation Framework, CDC (lasted updated Oct. 29, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/community/community-mitigation.html>.

WHEREAS, on November 21, 2020, the City of Newark issued an advisory instructing people to stay home for 10 days except for non-essential functions;⁷ and

WHEREAS, on November 30, 2020, the Governor issued Executive Order 204 (2020), further restricting the limits for outdoor gatherings to 25 people and suspending non-collegiate and non-professional indoor sports until at least January 2, 2021; and

WHEREAS, the CDC has advised that COVID-19 spreads most frequently through person-to-person contact when individuals are within six feet or less of one another;⁸ and

WHEREAS, as a result, the CDC has recommended that individuals practice "social distancing" to prevent community spread of the virus;⁹ and

WHEREAS, the CDC has defined social distancing as the practice of remaining out of congregate settings, avoiding mass gatherings, and maintaining distance (approximately 6 feet or 2 meters) from others when possible;¹⁰ and

⁷ *Newark Mayor issues stay at home advisory for next week*, Fox 5 NY (Nov. 21, 2020), available at <https://www.fox5ny.com/news/newark-mayor-issues-stay-at-home-advisory-for-next-week>.

⁸ *Supra*, note 6.

⁹ *Ibid.*

¹⁰ *Ibid.*

WHEREAS, social distancing is an enhanced challenge - indeed, often impossible - in congregate settings like New Jersey's jails and prisons;¹¹ and

WHEREAS, the CDC has identified individuals with increased risks of severe disease from COVID-19, including individuals sixty-five years or older and individuals with underlying conditions including asthma, HIV, heart conditions, immune diseases, liver disease, kidney disease, obesity, or diabetes;¹² and

WHEREAS, these increased risk factors are prevalent among incarcerated individuals;¹³

¹¹ Executive Order 124 (2020) (recognizing that "there are challenges associated with maintaining traditional social distancing in correctional settings"); See also Blake Nelson, *Social distancing is difficult in NJ prisons. And that could be a problem for all of us*, NJ Advance Media (Apr. 11, 2020), available at <https://www.nj.com/coronavirus/2020/04/social-distancing-is-difficult-in-nj-prisons-that-could-be-a-problem-for-all-of-us.html>; Aleks Kajstura & Jenny Landon, *Since you asked: Is social distancing possible behind bars?*, Prison Policy Initiative (Apr. 3, 2020) available at <https://www.prisonpolicy.org/blog/2020/04/03/density/>.

¹² Centers for Diseases Control and Prevention, *People Who Are at Higher Risk for Severe Illness* (April 2, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

¹³ See, e.g., Weihua Li and Nicole Lewis, *This Chart Shows Why The Prison Population Is So Vulnerable to COVID-19*, The Marshall Project (March 19, 2020), available at <https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19>.

WHEREAS, medical experts throughout the country have recognized the unique risks of COVID-19 in correctional facilities;¹⁴ and

WHEREAS, the health and safety of incarcerated people, correctional police officers, and others who work in correctional facilities is at significant risk during this pandemic;¹⁵ and

WHEREAS, studies have shown that an increase of COVID-19 infections within the jails poses a threat to public health at large;¹⁶ and

WHEREAS, COVID-19 infections have rapidly emerged in correctional facilities throughout the country and in New Jersey; and

WHEREAS, according to the Marshall Project and the Associated Press, the week of November 17 2020, saw COVID-19 infections in

¹⁴ Matthew J. Akiyama et al., *Flattening the Curve for Incarcerated Populations - COVID-19 in Jails and Prisons*, The New England Journal of Medicine (May 28, 2020), available at <https://www.nejm.org/doi/full/10.1056/NEJMp2005687>.

¹⁵ See, e.g., Rodrigo Torrejon, *Family of correctional officer who died from COVID-19 plans to sue N.J. county for not providing PPE*, NJ Advance Media (Nov. 11, 2020), available at <https://www.nj.com/coronavirus/2020/11/family-of-correctional-officer-who-died-from-covid-19-plans-to-sue-nj-county-for-not-providing-ppe.html>.

¹⁶ Michael Ollove, *How COVID-19 in Jails and Prisons Threatens Nearby Communities*, Pew (July 1, 2020), available at <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons-threatens-nearby-communities>.

U.S. prisons and jails rise “sharply,” noting that the “new surges far outpaced the previous peak in early August”;¹⁷ and

WHEREAS, as of November 30, 2020, the Federal Bureau of Prisons reports 4,721 active confirmed cases of COVID-19 among incarcerated people and 1,414 among staff in its facilities, with more than 22,000 staff and inmates who tested positive but recovered from the virus;¹⁸ and

WHEREAS, the Federal Bureau of Prisons reports that 145 inmates and 2 staff members have died from the disease;¹⁹ and

WHEREAS, COVID-19 has spread rapidly through New Jersey correctional institutions, with the Department of Corrections reporting that as of December 1, 2020, there have been 3,310 confirmed cumulative cases among inmates and 1,367 among staff in state prisons, resulting in 52 deaths;²⁰ and

¹⁷ *A State-by-State Look at Coronavirus in Prisons*, The Marshall Project (Updated Nov. 20, 2020), available at <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

¹⁸ COVID-19 Coronavirus, Federal Bureau of Prisons (last updated Dec. 1, 2020), available at <https://www.bop.gov/coronavirus/>.

¹⁹ *Ibid.*

²⁰ Covid 19 Updates, NJ Department of Corrections (last updated Dec. 1, 2020), available at <https://www.state.nj.us/corrections/pages/COVID19Updates.shtml>.

WHEREAS, the death rate in New Jersey's jails and prisons from COVID-19 is the worst in the nation,²¹

WHEREAS, as of December 1, 2020, the New Jersey Department of Corrections reports 298 cases among inmates and 307 cases among staff in state prisons, plus 3 additional cases among residents of Residential Community Release Programs since August 22, 2020;²² and

WHEREAS, an outbreak at Fort Dix, a minimum-security federal facility in Burlington County, has become an "escalating crisis," where, as of December 4, 2020, at least 289 inmates and 28 staff are suffering from active infections, which makes it the worst outbreak in the federal prison system;²³ and

WHEREAS, outbreaks of COVID-19 continue to plague county jails; and

WHEREAS, a Camden County spokesperson confirmed on December 3, 2020, that 39 inmates and 75 staff members have tested positive

²¹ *Supra*, note 17.

²² *Supra*, note 18.

²³ *When a Vaccine Becomes Available, Will Prisons and Jails Be Prioritized?* The Takeaway (Dev. 3, 2020), available at <https://www.wnycstudios.org/podcasts/takeaway/segments/prisons-jails-vaccine>; Samantha Melamed, *COVID-19 Outbreak Infecting Hundreds at Fort Dix is 'Escalating Crisis,' N.J. Senators Warn*, The Philadelphia Inquirer (Nov. 10, 2020), available at <https://www.inquirer.com/news/fci-fort-dix-coronavirus-covid-outbreak-transfers-elkton-cory-booker-bob-menendez-20201110.html>.

in the Camden County Jail, with all of the inmate cases occurring this fall;²⁴ and

WHEREAS, the Cumberland County Jail reports that at least 40 inmates and 11 corrections officers tested positive since October 29, 2020;²⁵ and

WHEREAS, the Essex County Corrections Facility reports a surge in cases, where the number of county inmates who have tested positive since the start of the pandemic increased from five to 30 on November 30, 2020;²⁶ and

WHEREAS, several ICE detainees housed in the Bergen County Jail have engaged in a hunger strike, alleging “poor health and safety standards made worse by the rising surge of COVID-19 cases”;²⁷

²⁴ Steven Rodas, *114 Inmates, Staff Members Tested Positive for COVID-19 at Camden Jail*, TAP into Camden (Dec. 3, 2020), available at <https://www.tapinto.net/towns/camden/sections/government/article/s/114-inmates-staff-members-tested-positive-for-covid-19-at-camden-jail>.

²⁵ *PBA Local 231: COVID Cases Spike in Warden Smith's Jail*, Insider NJ (Nov. 9 2020), available at <https://www.insidernj.com/press-release/pba-local-231-covid-cases-spike-warden-smiths-jail/>; Rodrigo Torrejon, *1 Inmate, 4 Correctional Officers At N.J. Jail Test Positive for COVID-19*, NJ Advance Media (Oct. 29, 2020), available at <https://www.nj.com/coronavirus/2020/10/1-inmate-4-correctional-officers-at-nj-jail-test-positive-for-covid-19.html>.

²⁶ ECCF Current Situational Awareness Report (Nov. 30, 2020).

²⁷ Briana Vannozzi, *Ice detainees at Bergen County Jail in second week of hunger strike*, NJ Spotlight News (Nov. 30, 2020),

WHEREAS, stakeholders in the administration of criminal justice in New Jersey have taken significant steps to reduce prison and jail populations since the pandemic began; and

WHEREAS, on March 23, 2020, the Supreme Court of New Jersey signed a consent order agreed to by the Public Defender, the American Civil Liberties Union of New Jersey, the Attorney General, and the County Prosecutors Association of New Jersey setting forth a procedure for the release of county jail inmates, resulting in the release of approximately 700 individuals; and

WHEREAS, on April 10, 2020, the Governor issued Executive Order 124 (2020), resulting in the release of several hundred state prison inmates to temporary home confinement; and

WHEREAS, as a result of a S2519, a public health emergency credits bill passed by the New Jersey Legislature and signed by the Governor, 2,258 state prison inmates were released on November 9, 2020, with approximately one thousand more set to be released in the coming months;²⁸ and

WHEREAS, the pandemic has resulted in monumental changes to the administration of criminal justice in New Jersey; and

available at <https://www.njspotlight.com/video/ice-detainees-at-bergen-county-jail-in-second-week-of-hunger-strike/>.

²⁸ Tracey Tully, *2,258 N.J. Prisoners Will Be Released in a Single Day*, N.Y. Times (Nov. 4, 2020), available at <https://www.nytimes.com/2020/11/04/nyregion/nj-prisoner-release-covid.html>.

WHEREAS, on March 27, 2020, in its first Omnibus Order regarding COVID-19 issues, the Supreme Court of New Jersey suspended nearly all in-person court proceedings including grand jury panels and jury trials, and granted excludable time until April 26, 2020, for defendants detained pretrial under the Criminal Justice Reform Act (CJRA); and

WHEREAS, the Supreme Court of New Jersey issued eight additional Omnibus Orders granting excludable time for defendants detained under the CJRA through at least January 15, 2021; and

WHEREAS, the Supreme Court of New Jersey, which in July 2020 had authorized the resumption of some in-person court proceedings, including trials in certain counties, on November 16, 2020, issued an order re-imposing the suspension of in-person jury trial and in-person grand jury proceedings until further order; and

WHEREAS, the Supreme Court of New Jersey's November 16, 2020, order extended the period of excludable time for defendants detained under the CJRA and who have been indicted until March 1, 2021; and

WHEREAS, the Supreme Court of New Jersey's November 16, 2020, order extended the period of excludable time for defendants detained under the CJRA who have not been indicted to at least March 1, 2021, and up to May 1, 2021, depending on the defendant's date of commitment to the county jail; and

WHEREAS, as of October 31, 2020, there are 5,478 people incarcerated pretrial in the county jails, which represents not only an increase in the pretrial jail population since March 19, 2020, but is the highest number of people detained pretrial since March of 2018;²⁹ and

WHEREAS, of the defendants represented by the Office of the Public Defender who have been detained pretrial in our county jails for six months or longer, approximately 650 people are charged with a second-, third-, or fourth-degree crime as their most serious charge, and approximately 400 additional people are charged with a first-degree crime but have a presumption of release;³⁰ and

WHEREAS, since September 1, 2020, the Office of the Public Defender filed over 550 motions in the trial court seeking release of defendants detained pretrial under the CJRA, resulting in the release of only 33 defendants;³¹ and

WHEREAS, pretrial detention is consistent with due process only when it serves a legitimate regulatory purpose, namely

²⁹ Criminal Justice Reform Statistics: Jan 1. - Oct. 31, 2020, available at <https://njcourts.gov/courts/assets/criminal/cjrreport2020.pdf>.

³⁰ See Certification from Public Defender Joseph E. Krakora, Esq. (Dec. 4, 2020).

³¹ See *ibid*.

detention of high-risk individuals prior to trial with detention bounded by stringent time limits;³² and

WHEREAS, it is apparent that a significant number of people detained under the CJRA will not receive a trial within the speedy trial time limitations of the statute - and likely far longer - and therefore such detentions no longer serve a legitimate regulatory purpose; and

WHEREAS, this Court maintains the authority to release those individuals held in pretrial detention under the CJRA as required by due process and to protect public health;

IT IS on this _____ day of December, 2020,

ORDERED that the Attorney General, County Prosecutors Association of New Jersey, Office of the Public Defender and the American Civil Liberties Union of New Jersey should show cause on the _____ day of December, 2020, or as soon thereafter as counsel can be heard, why an Order should not be entered:

A. Releasing all defendants who have been detained under the CJRA for six months or longer whose most serious pending charge is a second-degree offense or lower.

1. For those defendants described in Paragraph A, the defendant shall be released on conditions unless the County Prosecutor or Attorney General objects to the

³² *United States v. Salerno*, 481 U.S. 739, 748 (1987); *Bell v. Wolfish*, 441 U.S. 520, 536 (1979).

release and has demonstrated beyond a reasonable doubt that no set of conditions can reasonably assure a defendant's appearance in court, the protection of the safety of any other person or the community, and that the defendant will not obstruct or attempt to obstruct the criminal justice process, in light of the dramatic changes to the speedy trial timeline occasioned by the pandemic.

- a. The Court shall appoint judges or special masters to address the cases in which an objection to release has been raised.
- b. Judges or special masters shall preside over cases from a county different than the one in which they are assigned.
- c. Judges or special masters shall presume that defendants should be released, unless they find, beyond a reasonable doubt, that the risk to public safety, flight, or obstruction presents a serious and imminent risk that cannot be reasonably assured by conditions including, but not limited to, home confinement and/or GPS monitoring. Consideration shall be given to the dramatic changes to the speedy trial timeline occasioned by the pandemic,

which now necessitates a finding of greater risk in order to constitutionally permit detention under the CJRA for this class of defendants. A defendant's risk of flight shall be afforded minimal weight in light of the suspension of most in-person court proceedings and because of governmentally-imposed restrictions on movement due to the pandemic.

d. Objections, and if required, appeals, shall be addressed on an expedited basis.

e. Defendants described in Paragraph A who are denied release shall be entitled to a right to appeal.

f. Objections under Paragraph A shall be addressed on the papers.

B. Granting a new detention hearing pursuant to N.J.S.A. 2A:162-19(f) and *Rule 3:4A(b)(3)* to all defendants not described in Paragraph A but who have a presumption of release and who seek a new hearing.

a. Defendants described in Paragraph B shall be entitled to a new detention hearing if a motion for a new hearing is filed within 14 days of this Order.

- b. The Court shall appoint judges or special masters to preside over these new detention hearings.
 - c. Judges or special masters shall preside over hearings from a county different than the one in which they are assigned.
 - d. Judges or special masters shall presume that defendants should be released, unless they find by clear and convincing evidence, that public safety, flight, or obstruction concerns overcome the presumption, in light of the dramatic changes to the speedy trial timeline occasioned by the pandemic.
 - e. These new detention hearings shall be scheduled and decided on an expedited basis.
 - f. Appeals from orders of detention entered as a result of detention hearings granted pursuant to Paragraph B shall be handled according to the procedures outlined in R. 2:9-13.
- C. Granting such other relief as the court deems equitable and just.

For the Court,

Chief Justice