SUPREME COURT OF NEW JERSEY
DOCKET NO. 085186

IN THE MATTER OF THE REQUEST TO RELEASE CERTAIN PRETRIAL DETAINEES AND GRANT NEW DETENTION HEARINGS TO OTHER DETAINEES

REPLY BRIEF ON ORDER TO SHOW CAUSE

REPLY BRIEF OF OFFICE OF THE PUBLIC DEFENDER AND AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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Preliminary Statement

Movants asked the Court to take action to preserve the constitutionality of the Criminal Justice Reform Act (CJRA) and to ensure that the suspension of jury trials does not transform New Jersey's much-heralded system of pretrial justice into one where over one thousand people are detained with no prospect of a trial within the foreseeable future. Reasonable people can certainly disagree about *what* the Court should do to address the crisis that faces its criminal courts. But there should be no dispute that *something* must be done. (Point I).

Criminal trials have, by and large, been suspended for ten months. They promise to be postponed for several months more. And then, when some trials can recommence, they will resume at such a limited pace and with such an accumulated backlog, that for many people currently detained, there exists no reasonable prospect of a trial for years to come. This is a crisis that requires the Court's intervention. (Point I, A).

The prospect of people who are presumed innocent spending month after month, and then year after year, in jail creates a sufficient basis for creating a mechanism for relief. But those who are detained are not housed in ordinary jails: COVID-19 has turned jails into incubators for the deadly disease. Although jails may be taking steps to keep people as safe as they can, they cannot alter the fundamental nature of jails which makes social distancing impossible. There is no

reasonable argument that jails today are safer than jails pre-pandemic, nor is there a reasonable argument that jails today are as safe as our communities. The danger in congregate living environments like jails heightens the need for the Court to take action. (Point I, B).

As a threshold matter, the Court can utilize traditional methods of statutory interpretation to provide the requested relief without a finding that the suspension of jury trials has rendered the CJRA unconstitutional. The Court can order the proposed relief by: 1) interpreting and implementing the "compelling reasons" clause of the CJRA; 2) directing that COVID-19 is relevant to the assessment of risk that the statute requires; or 3) recognizing that the suspension of jury trials necessitated by the pandemic creates a material change in circumstances warranting new detention hearings. (Point II).

But, to be clear, if the Court does not use those three methods of statutory interpretation, and instead determines that the suspension of jury trials has no impact on detention decisions, the CJRA will become unconstitutional. Although courts have upheld schemes that allow for the detention of some people pending trial, they have only done so after the provision of robust due process protections, *including speedy trial protections*. That is, it is not enough to say that a person had a fair detention hearing if that hearing then allowed for indefinite detention. The speedy trial provisions of the CJRA are critical to maintain its constitutionality.

Aware that the suspension of jury trials renders the statutory speedy trial protections meaningless, the Court can and must perform judicial surgery to save the general structure of the CJRA. (Point III).

Finally, despite suggestions to the contrary, the relief requested in the Order to Show Cause will not result in the blanket opening of jailhouse doors. Instead, the proposed relief allows for individualized, case-specific analysis in every case. (Point IV).

Statement of Facts and Procedural History

Movants rely on the Statement of Facts and Procedural History contained in their opening brief dated December 14, 2020.

Argument

I. COVID-19 has created a unique crisis in the criminal justice system that requires intervention from the Court.

The Court must take action to confront the crisis facing our criminal courts. Although neither the Attorney General nor the County Prosecutors' Association of New Jersey ("Prosecutors") say so explicitly, tacit in their briefs is the suggestion that although the pandemic has caused disruption and inconvenience, it has not created enough of a problem to require intervention from the Court. The Attorney General (AGBr 42)[1] and Prosecutors (CPBr 37-39) conflate the delay *already* occasioned by the suspension of jury trials with the inevitable *future* delay that is virtually certain even when trials eventually resume. Were the suspension of jury trials a relic of the past, and if anyone anticipated the resumption of jury trials at

[1] This brief will use the following designations:
AGBr refers to the Attorney General's brief;
AGa refers to the Appendix to the Attorney General's brief;
CPBr refers to the Prosecutor's brief;
CPANJa refers to the Appendix to the Prosecutor's brief; and
SRTMBr refers to the Attorney General's brief filed in *In re Request to Modify Prison Sentences, Expedite Parole Hearings, & Identify Vulnerable Prisoners*, 242 N.J. 357 (2020).

rates comparable to those that existed pre-pandemic, Movants' requested relief would admittedly be unnecessary. As will be discussed below (Point I, A), the delay in the resumption of jury trials promises to be both significant and long lasting. This requires intervention from the Court.

The Attorney General and Prosecutors also conflate evidence that jails are taking steps to protect people within the confines of their walls with the indisputable truth – just months ago not even disputed by them – that jails, like other congregate living environments, are necessarily less safe because people cannot practice social distancing. As will be discussed below (Point I, B), in order to demonstrate the relative safety of county jails, the Attorney General and Prosecutors rely on selective data to paint a misleading picture of the gravity of the situation. The grave health risk in our jails also requires the Court to take action.

A. The current inability to safely conduct jury trials, the anticipated futher delay before trials can resume, and the liklihood that when trials resume they will do so at a slower pace than usual has created a crisis.

COVID-19 has impacted New Jersey Courts for nearly ten months. *See, e.g.*, AOC, Notice of Court Operations Due to COVID-19, at 1 (Mar. 12, 2020) (first Order impacting court opperations). Despite promising information about the efficacy of vaccines, the end of the tumult is not near. "Anthony Fauci, the nation's top infectious disease expert, predicted . . . that normal life would not resume for

most Americans amid the coronavirus pandemic until as late as next fall." Quint Forgey, *Politico*, Fauci predicts normal life won't return in U.S. before fall 2021 (Dec. 31, 2020).[2] Indeed, even that prediction – that we have as much ahead of us as we have already endured – "will be contingent upon the U.S. 'efficiently, quickly and effectively' implementing vaccination programs that have thus far lagged behind schedule, as well as 'a rather strict adherence' to personal mitigation measures such as hand washing, mask wearing and social distancing." *Id.* But the suspension of jury trials already endured coupled with that which will likely be required for several more months represents only a portion of the delay the detained accused will face waiting for a trial.

Before the second wave of COVID-19 infections hit New Jersey, the Court attempted the resumption of jury trials. The Court explained that the resumption of "jury trials [wa]s necessary – and it [wa]s urgent. . . [because t]he suspension of new jury trials . . . jeopardizes the rights of criminal defendants, including those who are detained, as well as victims seeking to complete a critical event in their recovery process." New Jersey Supreme Court, *Plan for Resuming Jury Trials*, August 14, 2020, p. 5.[3] The Court's plan made clear that the resumption of jury

[2] Available at https://www.politico.com/news/2020/12/31/fauci-covid-normal-life-fall-2021-453055.

[3] Available at https://www.njcourts.gov/public/assets/jurytrialplan.pdf.

trials would require significant planning and adaptation. After all, the Court appropriately remained committed to abiding by public health requirements. *Id.* at 3. The Court explained: "We face severe space restrictions. We will need multiple courtrooms for individual trials and will be unable in some counties to conduct multiple trials simultaneously for the foreseeable future." *Id.*

Even before the second wave hit, the Court could not "predict if or when jury trials will be able to resume in a pre-COVID-19 format. [It explained t]hat time may be months or more than a year from now." *Id*. at 6. The Court explained that "[o]nly a few courtrooms in each county are large enough to accommodate jury trials with social distancing." *Id*. at 13. Indeed, although high-volume counties like Essex and Camden "should be able to accommodate 3-4 trials at one time – but only if courtroom space is reserved for trial and deliberations" *id*. at 14, in many counties, facilities could support no more than one criminal and one civil trial at one time. *Id.* at 13. [4]

Thus the issue is not only the lag that has already occurred, but the delay that has occurred coupled with the futher delays that are certain to follow (additionally, when and if trials can again be conducted in pre-pandemic conditions, a significant

[4] Prosecutors' suggestion that there exists an appropriate remedy – the resumption of jury trials (CPBr 60-64) – ignores both the public health concerns that exist and the logistical complications that will necessarily follow. But it also implicitly concedes that *some* action is needed.

backlog will persist). As Movants explained in their opening brief, although the CJRA is ordinarily constitutional, where defendants cannot reasonably expect trials, they are no longer being detained pretrial; they are being detained without trial.

The prospect of unlimited preventative detention – which Justice Marshall once called "consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state" *United States v. Salerno*, 481 U.S. 739, 755 (1987) (Marshall, J., dissenting) – requires the Court to take action.

B. The danger created by COVID-19 in jails has created a crisis.

When Movants filed a proposed Order to Show Cause on March 19, 2020 (addressing people sentenced to incarceration in county jails), the proposed Order included a whereas clause that indicated that "COVID-19 is already present in at least one county jail in New Jersey" and cited to a news report indicating that a single corrections officer (and no incarcerated people) had tested positive. *In re Request to Commute or Suspend Cnty. Jail Sentences*, No. 084230 (N.J. Mar. 22, 2020) (citing Edward Edwards, *Insider NJ*, Bergen County Jail Corrections Officer Tests Positive for COVID-19 (March 19, 2020)[5]). Movants, the Attorney General, and Prosecutors then engaged in mediation and agreed to a consent order that

[5] Available at https://www.insidernj.com/bergen-county-jail-corrections-officer-tests-positive-covid-19/.

indicated that "[t]he parties . . . reviewed certifications from healthcare professionals regarding the profound risk posed to people in correctional facilities arising from the spread of COVID-19 . . . [and agreed] that the reduction of county jail populations, under appropriate conditions, is in the public interest to mitigate risks imposed by COVID-19." *Id.*

In the intervening months, our worst fears have been confirmed. Hundreds of people have gotten sick and the risks remain grave. Even by the Prosecutors' count, 160 people incarcerated in our county jails are *currently* infected. CPBr 51. That number represents a dramatic undercount of the gravity of the problem. Unlike our prisons, our jails have not implemented a program of universal testing. Whereas, in the context of prisons, the Attorney General proudly boasted that "[p]erhaps the most significant recent step in the DOC's efforts to combat COVID-19 has been initiation of a process to conduct COVID-19 testing of the entire inmate and staff population" SRTMBr 31, the jails are only testing subsets of incarcerated people. AGa1-AGa56. So, we really have no sense of the true scope the problem in any New Jersey jail.[6]

[6] For example, the Prosecutors contend that only seven of the 1154 people incarcerated at the Camden County Jail have tested positive for COVID-19. CPBr 52. Further reading shows that that number actually reflects the positive results of just 142 tests conducted on a single date. CPANJa2.

We do know that nationally few prisons or jails have escaped the scourge of COVID-19. The crisis is so acute that now fully 20 percent of state and federal prisoners in the United States has tested positive for the coronavirus. Beth Schwartzapfel, Katie Park and Andrew Demillo, *The Marshall Project*, 1 in 5 Prisoners in the U.S. Has Had COVID-19 (Dec. 18, 2020).[7] With nationwide infection rates in prisons four times as high as rates in the general population, *id.*, it beggars belief that Prosecutors ask the Court to accept that New Jersey jails are outliers that are "[p]rovably [s]afer" than our communities. CPBr 49.[8]

The idea that jails are safe is belied by some of the very evidence Prosecutors use to suggest that the risk posed in jails will soon be reduced: because

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[7] Available at https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19.

[8] Movants appreciate that the study addresses prison not jails. But the design feature that make both deadly – the inability to socially distance – is common to prisons and jails. National reports of the impact on COVID-19 on incarcerated people have addressed both prisons and jails. *See*, *e.g.*, Brendon Derr, Rebecca Griesbach and Danya Issawi, *N.Y. Times*, States Are Shutting Down Prisons as Guards are Crippled By Covid-19 (Jan. 1, 2021), available at https://www.nytimes.com/2021/01/01/us/coronavirus-prisons-jails-closing.html. There exist, of course, significant differences between prisons and jails. Of particular note here is that all of the impacted people – unlike those who benefited from the March consent order, Executive Order 124, or the public health emergency credits legislation – have not been convicted of a crime. The fact that pretrial detainees have not been convicted requires courts to ensure that they are not subject to any punishment, as opposed to the narrower prohibition on cruel and unusual punishment applicable to those who no longer enjoy the presumption of innocence. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

of the widely acknowledged dangers in prisons and jails, incarcerated people have been prioritized for coronavirus vaccinations.[9] Governor Murphy recently confirmed that because incarcerated people represent "a very vulnerable community," people in prisons and jails are among the highest priorities for early access to vaccination. Blake Nelson, *NJ.com,* N.J. prisoners will have access to the COVID shot early. Corrections officer vaccinations have already begun (Dec. 30, 2020).[10] If the Prosecutors' contention – that jails are safer than communities – were true, why are jails being prioritized for vaccinations?

In March, before infections had spread in correctional facilities, all parties agreed that the danger posed by COVID-19 in jails warranted bold action. Now, inexplicably, Prosecutors ask the Court to stand down and let the virus run its course. The Court should not; action is needed.

[9] The Prosecutors also overstate the relief that will flow from the availability of vaccines. Even people who have been vaccinated may still transmit COVID-19. Apoorva Mandavilli, *NY Times*, Here's Why Vaccinated People Still Need to Wear a Mask (Dec. 9, 2020), available at https://www.nytimes.com/2020/12/08/health/covid-vaccine-mask.html.

[10] Available at https://www.nj.com/news/2020/12/nj-prisoners-will-have-access-to-the-covid-shot-early-corrections-officer-vaccinations-have-already-begun.html.

II. The Court has the authority through traditional means of statutory interpretation to grant the relief requested in order to avoid any constitutional deficiency arising from the suspension of jury trials.

The Court retains the authority to implement the proposed relief through traditional methods of statutory interpretation, without having to conduct judicial surgery on the CJRA. Specifically, the Court can order the proposed relief by: 1) interpreting and implementing the "compelling reasons" clause of the CJRA, N.J.S.A. 2A:162-21(b); (2) directing that COVID-19 is relevant to the assessment of risk, N.J.S.A. 2A:162-19 and -20; and (3) recognizing that the suspension of jury trials necessitated by the COVID-19 pandemic amounts to a material change in circumstances warranting new detention hearings under N.J.S.A. 2A:162-19(f). Contrary to the arguments made by the Attorney General and Prosecutors, the Court is not only authorized to engage in each of these tasks, but duty bound to do so.

It is "'the province and duty of the judicial department to say what the law is.'" *Sherman v. Citibank (S.D.), N.A.*, 143 N.J. 35, (1995) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). Because the Legislature cannot envision every factual scenario that may arise, Legislative acts are written to apply generally and it becomes the role of the Judiciary to apply the law to the facts at hand, however novel or unexpected. As part of this responsibility, a central role of the Judiciary is the statutory interpretation of legislative acts. *Japan Whaling Ass'n v. American*

Catacean Soc'y, 478 U.S. 221, 230 (1986) (noting that "one of the Judiciary's characteristic roles is to interpret statutes"). Here, the Court can simply interpret the CJRA's provisions and apply the law to the circumstances before it – the public health crisis and suspension of jury trials – to order the relief proposed in the Order to Show Cause.

First, the "compelling reasons" clause of the CJRA provides authority for the Court to afford relief. N.J.S.A. 2A:162-21(b) states that a court may order the "temporary release" of a pretrial detainee "subject to appropriate restrictive conditions" if the court determines that the release is "necessary" for a "compelling reason." While no published case in New Jersey interprets this provision of the statute, its text gives broad authority for courts to act, as the plain meaning of "compelling" – defined as "forceful," "demanding attention," and "convincing"[11] – easily encompasses the current crisis caused by COVID-19 and the suspension of jury trials. Indeed, several federal courts have released pretrial detainees under the analogous provision of the federal Bail Reform Act due to compelling reasons stemming from the COVID-19 pandemic. *See*, *e.g.*, *United States v. Kennedy*, 449 F. Supp. 3d 713, 718 (E.D. Mich. 2020); *United States v. Ramirez-Rodriguez*, 453 F. Supp. 3d 1242, 1248 (D. Minn. 2020); *United States v. Stephens*, 447 F.Supp.3d

[11] *Compelling*, Merriam-Webster's Dictionary, available at https://www.merriam-webster.com/dictionary/compelling.

63, 67 (S.D.N.Y. 2020); *United States v. Garcha*, 445 F. Supp. 3d 93, 97 (N.D. Cal. 2020); *United States v. Michaels*, 2020 U.S. Dist. LEXIS 56239, at *2-3 (C.D. Cal. Mar. 26, 2020); *United States v. Perez*, 2020 U.S. Dist. LEXIS 51867, at *1-2 (S.D.N.Y. Mar. 19, 2020).

In addition, given the expansive definition of "compelling," this clause leaves room for interpretation to avoid any constitutional challenge. Although the primary goal of statutory interpretation is to affect the Legislature's intent, "the judiciary has a duty, when confronted with alternative interpretations which are equally plausible, to adopt the construction which avoids the constitutional issue and sustains the legislative enactment." *Morss v. Forbes*, 24 N.J. 341, 355-56 (1957).

In interpreting the compelling reasons provision, the Court can create a rule requiring the release of a class of pretrial detainees, subject to individual objections and case-by-case review. The Legislature specifically delegated to this Court the authority to create rules and procedures in order to implement the statute. L. 2014, ch. 31 § 21(d) ("The Supreme Court may adopt Rules of Court and take any administrative action necessary to implement the provisions of this act[.]"). Given this authority, the Court has not hesitated to adopt procedures, either by Court Rule or case law, to implement the statute. *See, e.g.*, *State v. Hyppolite*, 236 N.J. 154, 169 (2018) (articulating procedure and defining new standard for reopening

detention hearings when prosecution withholds exculpatory evidence); *State v. Mercedes*, 233 N.J. 152, 178 (2018) (creating test to reopen detention hearings when detention decision was based on repealed Court Rule).

In devising procedures to implement release under the compelling reasons provision, the Court must necessarily articulate a standard for reviewing judges to apply that is different than the one currently set forth in the CJRA. As the Attorney General and Prosecutors correctly point out, for each pretrial detainee, the State has already met its burden to overcome the presumption of release under the CJRA. N.J.S.A. 2A:162-19. Judges, thus, must be provided with a new standard to determine which of these detainees should be released since application of the standard already articulated in the CJRA would result in no defendant being released given that the State has already met its burden. The other alternative is equally unworkable: to order all defendants released *carte blanche* without any opportunity for case-by-case review.[12] Thus, the adoption of a new, heightened standard is necessary to interpret the statute. By raising both the burden of proof as well as the level of risk society will tolerate, this Court can interpret the compelling

[12] As explained *infra* Point IV, contrary to the arguments made by the Attorney General and Prosecutors, the proposed relief allows for individualized assessment consistent with both the CJRA and due process.

reasons clause in a way that provides a procedure for meaningful case-by-case review of prosecutorial objections.

Next, it is wholly within the Court's domain to provide guidance as to how COVID-19 is relevant to the risk assessment that must be made under the CJRA. This is a straightforward exercise in statutory interpretation and the application of law to facts, a familiar practice for this Court. *See*, *e.g.*, *State v. S.N.*, 231 N.J. 497, 517-19 (2018) (interpreting the CJRA and providing guidance about how courts should consider certain circumstances when assessing risk, such as defendant's dual citizenship). As discussed in Movants' opening brief, several federal courts have done just this, holding that the COVID-19 pandemic is relevant to assessing risk. This Court should do the same. Providing such guidance is plainly within the Court's purview.

Finally, the Court can recognize that COVID-19 and the suspension of jury trials is new information that has a "material bearing" on the risk assessment, allowing for new detention hearings under N.J.S.A. 2A:162-19(f). Without questioning its authority to do so, the Court has previously interpreted this section of the statute and articulated a procedure and standard for when a new hearing is required. *Hyppolite*, 236 N.J. at 169. Whether the current dire circumstances warrant new hearings is a proper question for the Court to consider and answer.

The CJRA itself provides an avenue for the relief Movants seek. The Court need only interpret the statute using traditional methods of statutory interpretation to determine how it should apply in these extraordinary circumstances. Interpreting the identified sections of the CJRA in a manner to allow for the relief outlined in the proposed Order to Show Cause would not only be within this Court's authority, but would avoid needing to engage in judicial surgery to save the statute from being struck down as unconstitutional.

III. Because allowing the status quo to continue unabated would render the CJRA unconstitutional, the Court is permitted to conduct judicial surgery to avoid a preventive detention system at odds with democratic norms.

The Attorney General and Prosecutors argue that the CJRA is not unconstitutional, even during a public health emergency, because judges are still weighing risk and considering detention motions within the parameters of the CJRA, and defendants are still afforded due process safeguards, such as the right to counsel and the right to present witnesses, during detention motion hearings. (AGBr Point II; CPBr Points I and II) They argue that so long as detention decisions are being made in accordance with the CJRA, and defendants are afforded procedural due process rights at detention hearings, the CJRA remains constitutional and that, therefore, the Court need not cure the statute through judicial surgery. *Id.*

Movants do not dispute that under normal circumstances, the CJRA is constitutional. These are not normal circumstances. Allowing risk and detention decisions to proceed as usual under the CJRA while the COVID-19 crisis persists renders detention under the statue unconstitutional because the entire scheme relies on the promise of timely trials. Thus, if this Court is not inclined to implement the proposed relief sought by Movants through traditional methods of statutory interpretation and rule making (as discussed in Point II, *supra*), this Court must engage in judicial surgery to cure the constitutional infirmity caused by the suspension of jury trials.

Contrary to the Attorney General and Prosecutor's assertions, the CJRA's due process protections are not limited to only those rights provided to defendants at detention hearings. A critical component to the constitutionality of the CJRA is the very premise that people are being detained pending a trial that will be afforded within a reasonable time. *See Salerno*, 481 U.S. at 747-48 (upholding the constitutionality of pretrial detention under federal Bail Reform Act because statute was regulatory, did not constitute punishment before trial in violation of Due Process Clause, limited circumstances under which detention may be sought, and limited "the maximum length of pretrial detention . . . [through] the stringent time limitations of the Speedy Trial Act"); *State v. Robinson*, 229 N.J. 44, 54-56

(2017) (discussing due process components of CJRA, including speedy trial sections).

Unfortunately, through no fault of defendants, the State, or the Judiciary, the speedy trial protections provided by the CJRA have been gutted by the public health crisis.[13] People are being detained with no hope of receiving a trial within the statutorily mandated deadlines. Instead, they are condemned to either remain detained for two years, at which time the CJRA will mandate release, or plead guilty to win their liberty. Without meaningful speedy trial protections under the statute, detention during the public health emergency becomes punitive, not regulatory, and violates due process. *Bell v. Wolfish*, 441 U.S. 520, 537 (1979). This remains the case even if trial courts are conducting detention hearings and providing defendants with procedural due process protections at those hearings in conformity with the CJRA. Defendants may be receiving the statutorily mandated due process protections at detention hearings, but once detained, they are being

[13] It is worth noting that for speedy trial purposes, although purposeful delay by prosecutors is treated differently than "more neutral reason[s]" such as this one, even delays for which the prosecutors are not responsible will "be weighed against the government, albeit less heavily than deliberate delay, because it is the government's ultimate responsibility to prosecute cases in a timely fashion." *State v. Cahill*, 213 N.J. 253, 266 (2013) (citing *Barker v. Wingo*, 407 U.S. 514, 531 (1972)); *see also State v. Townsend*, 186 N.J. 473, 488 (2006) (considering bad faith in assessment of due process violation for prosecutorial delay). In those cases, the remedy is dismissal of the indictment with prejudice. Here, Movants seek only release from pretrial custody; the State would remain free to pursue its prosecution.

denied the constitutional right to be free from punitive detention before an adjudication of guilt.

Applying the CJRA detention provisions in the normal course without acknowledgement that detained defendants now have no meaningful speedy trial rights does nothing to alleviate this constitutional infirmity; rather, it exacerbates it. Although individual defendants are free to argue at detention hearings that COVID-19 concerns should allow them to be released pretrial, the Attorney General itself argues that generalized concerns about COVID-19 do not justify release under the CJRA. AGBr 27. And even if courts are considering individualized COVID-19 concerns, courts are not considering that once detained, defendants have no opportunity to have their day in court while jury trials are indefinitely suspended. Thus, weighing risk and detention decisions in the normal course without consideration of the constitutional impact that the ongoing suspension of jury trials has on detained defendants' right to a trial renders detention under the CJRA unconstitutional during the public health crisis. Put differently, although it is true that "when it comes to pretrial detention, the State is continuing to implement the same regulatory regime that it always does," *id.* at 38, addressing the new speedy trial landscape by applying old standards fails to comport with due process.

The heightened standard of risk assessment contained in the proposed Order to Show Cause for defendants charged with a second-degree offense or lower and who have been detained for six months or longer still permits trial courts to consider risk of new criminal activity and failure to appear, but requires that judges consider the inescapable fact that defendants detained under the CJRA during the public health crisis will be denied the right to a trial within the statutorily defined time limits. The heightened standard considers the constitutional infirmity that attaches when a defendant is detained without access to a date certain – or even a realistic prospect – for trial while also balancing the interests of the State in assuring that those defendants with serious or imminent risk of new criminal activity and failure to appear are nonetheless detained. Likewise, providing defendants charged with first-degree crimes carrying the presumption of release and who have been detained for six months or longer the opportunity for a new detention hearing allows courts in those cases to make risk assessments that consider the impact that the suspension of jury trials has had on a detained defendant's constitutional rights while also balancing the concerns of the State. Movants urge the Court to order the fair and balanced relief contained in the proposed Order to Show Cause.

Because the CJRA's detention provisions are unconstitutional as applied during this public health crisis due to the suspension of jury trials, the Court can

and should engage in judicial surgery to cure the constitutional deficiency. *See State v. Natale*, 184 N.J. 458 (2005) (judicial surgery utilized to cure unconstitutional sentencing scheme). To be clear, Movants are not asking this Court to engage in judiciary surgery that would impact detention decisions made under the CJRA during normal circumstances (*i.e.*, when the criminal justice system is not burdened by a public health emergency caused by a novel virus). Rather, Movants simply ask the Court to fashion a remedy to rectify the constitutional violation that detained defendants have incurred because of the ongoing suspension of jury trials. Failure to act at all would permit continued indefinite detentions while the public health crisis and suspension of jury trials continues.

IV. Consistent with the CJRA, the remedy proposed allows for individualized consideration of risk in each case and will not result in the blanket release of thousands of pretrial detainees.

Contrary to the arguments made by the Attorney General and Prosecutors, the relief requested – under both Paragraphs A and B of the proposed Order to Show Cause – provides a mechanism for individualized consideration of risk on a case-by-case basis. Under Paragraph A, the Order to Show Cause specifies that upon objection by the prosecutor, a defendant's continued detention would be reviewed by a judge applying a heightened standard to assess risk. Like at an initial detention hearing, the judge may take into consideration all of the enumerated

statutory factors, now in light of the COVID-19 pandemic. Thus, the court would be free to consider facts such as the nature of the charges, the defendant's ties to the community, the PSA scores, the DMF recommendation, and the weight of the evidence. N.J.S.A. 2A:162-20. This procedure allows the State the opportunity, on a case-by-case basis, to demonstrate that release would be inappropriate.

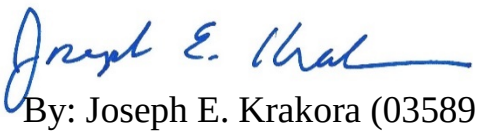
Moreover, under Paragraph B, the Order to Show Cause merely allows certain defendants to obtain a new detention hearing. Like at any detention hearing, the court would be obligated to consider the particular facts and circumstances of the case, but would do so with guidance from this Court about how the COVID-19 public health crisis is relevant to its assessment. In short, the proposed relief provides a thoughtful and nuanced procedure to address a crisis impacting hundreds of people while still allowing for individualized consideration of risk. The Attorney General and Prosecutors' protestations to the contrary ignore the plain words of the Order to Show Cause.

Conclusion

For the reasons set forth above, and those explained in the Movants' opening brief, the Court should grant the relief set forth in Paragraphs A, B, and C of the Order to Show Cause.

Respectfully submitted,

Office of the Public Defender



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