SUPREME COURT OF NEW JERSEY
DOCKET NO. _____

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

BRIEF ON ORDER TO SHOW CAUSE

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

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Preliminary Statement

We face a dire crisis: COVID-19 infection rates are soaring throughout New Jersey, with outbreaks cropping up in jails in all parts of the state, while jail populations are rising to levels not seen in years. The suspension of jury trials necessitated by the pandemic has created a one-way ratchet, whereby people get arrested, booked, and ordered detained in jails but have no reasonable prospect of release. As populations continue to rise, so too does the danger for those incarcerated in jails (and those who work there). But there exist risks beyond those faced by people in the jails: the indefinite nature of detention occasioned by the suspension of jury trials jeopardizes the very constitutionality of the Criminal Justice Reform Act (CJRA).

The detention of presumptively innocent people prior to trial strains conceptions of fairness and justice. But, where that detention serves regulatory purposes – such as ensuring presence at trial or protecting community safety – the State and Federal Constitutions permit it. Defendants who cannot reasonably expect trials, however, are no longer being detained pretrial; they are being detained without trial. And although pretrial detention does not, in ordinary times, constitute punishment, the risk of infection in jails alters that calculous. To preserve the constitutionality of the CJRA requires the Court to calibrate the scale

of risk tolerance to acknowledge the dual realities of the public health emergency: that trials have been suspended and that jails are vectors of infection. (Point I).

Confronted with this reality, the Court need not let the CJRA encroach on New Jerseyan's constitutional rights. The Court has broad rule-making authority, allowing it to interpret portions of the CJRA that allow temporary release of otherwise detainable defendants based on previously unknown information that alters the risk calculous or for "compelling reasons." That alone provides the Court the authority to grant the relief sought in the Order to Show Cause. To the extent the Court does not utilize its rule-making authority in that way, it can conduct judicial surgery to make minor alterations to the statutes as written, rather than striking them down as unconstitutional. Before the Court performs surgery on a statute it must ask whether the Legislature would prefer the Court to make the proposed changes or strike down the law. There can be no debate: the Legislature would surely rather conform the CJRA to the pandemic realities than return to the system of pretrial detention and release – now viewed as an unfair relic – that existed before the CJRA's effective date. (Point II).

The Court has the power to provide the relief sought in the Order to Show Cause. It should do so.

Statement of Facts and Procedural History[1]

On March 9, 2020, Governor Murphy issued Executive Order No. 103, declaring both a Public Health Emergency and State of Emergency due to the COVID-19 pandemic.

In response to the spread of COVID-19 throughout the state and the risk of its rapid spread in the county jails, on March 19, 2020, the Office of the Public Defender (OPD) and the American Civil Liberties Union of New Jersey (ACLU-NJ) submitted a joint application seeking the Court's consideration of an Order to Show Cause designed to suspend or commute county jail sentences. After this Court ordered the parties to engage in mediation, an agreement was reached, and on March 23, 2020, the Court approved a mechanism that led to the release of nearly 700 people serving relatively short sentences in county jails.

Since March 23, this Court has issued nine Omnibus Orders addressing COVID-19 issues. Those Orders have suspended nearly all in-person court proceedings, including grand jury panels and jury trials, beginning on March 27, 2020, with a brief resumption of some in-person court proceedings, including trials in certain counties, between July and November 2020. Those Orders also granted excludable time for defendants detained under the CJRA from March 27, 2020,

[1] For the convenience of the Court, and because they are inextricably linked, Movants combine the statement of facts and procedural history.

through at least January 15, 2021. However, this Court's most recent Omnibus Order, issued November 16, 2020, re-imposed the suspension of jury trials and in-person grand jury proceedings until further order, extended the period of excludable time for defendants detained under the CJRA who have been indicted until March 1, 2021, and 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.

Since the first Order to Show Cause, the state has entered a "second wave" of the pandemic, with 6,046 residents testing positive on December 6, 2020, a record high for the state. Kaitlyn Kanzler, *'The numbers speak for themselves': NJ reports over 6,000 daily COVID cases for first time*, NorthJersey.com (Dec. 6, 2020).[2] Just two days prior, on December 4, the state broke its previous record with 5,673 residents testing positive, which had broken the previous record of 4,913 set on December 3. *Id.* Then, on December 12, 2020, New Jersey again recorded a record high, reporting 6,247 new positive cases. New Jersey COVID-19 Dashboard (last updated Dec. 12, 2020).[3] The New Jersey Department of Health

[2] Available at https://www.northjersey.com/story/news/coronavirus/2020/12/06/nj-covid-state-hits-new-high-reported-daily-cases-over-6-000/3848546001/.

[3] Available at http://covid.nj.gov.

projects that cases will continue to rise in the upcoming weeks, reaching a potential high of over 12,595 infections per day by mid-January. *See* Gov. Murphy COVID-19 Briefing (Dec. 9, 2020).[4]

In the state's correctional institutions, cases of COVID-19 amongst prisoners and staff are sharply on the rise. The New Jersey Department of Corrections reports that as of December 13, 2020, there have been 3,557 confirmed cumulative cases among inmates and 1,487 among staff in state prisons, resulting in 52 deaths. COVID-19 Updates, N.J. Department of Corrections (last updated Dec. 13, 2020).[5] Where only 117 prisoners and 67 staff members tested positive between July 27 and August 21, 2020, since August 22, 548 prisoners and 487 staff members have tested positive. *Id.* New Jersey continues to lead the nation in COVID-19 deaths in its jails and prisons, recently tying with Arkansas as to that ignominious distinction. *A State-by-State Look at Coronavirus in Prisons*, The Marshall Project (Updated Dec. 7, 2020).[6]

In the county jails, positive cases of COVID-19 are also on the rise. The Passaic County Jail has reported that as of December 4, 2020, 19 inmates and 22

[4] Available at https://www.youtube.com/watch?v=TzMT9DrqOl4.

[5] Available at https://www.state.nj.us/corrections/pages/COVID19Updates.shtml.

[6] Available at https://www.themarshallproject.org/2020/05/01/a-state-by-statelook-at-coronavirus-in-prisons.

staff members have tested positive for COVID-19, while 18 inmates are in medical quarantine awaiting test results. Letter from Captain John Arturi - Weekly COVID-19 Update (December 4, 2020).[7] Those numbers reflect "a spike in both inmates and staff in the last 2 weeks." *Id*. On November 25, 2020, the Somerset County Jail experienced its first resident inmate to test positive for COVID-19. Letter from Kelly Mager to Tom Chaves, Esq., in Response to OPRA Request (Dec. 9, 2020).[8] As of December 4, 2020, six additional inmates have tested positive in the Somerset County Jail. *Id.* On December 3, 2020, a Camden County spokesperson confirmed that 39 inmates and 75 staff members have tested positive in the Camden County Jail, with all of the inmate cases occurring this fall. Steven Rodas, *114 Inmates, Staff Members Tested Positive for COVID-19 at Camden Jail*, TAP into Camden (Dec. 3, 2020).[9] Since October 29, 2020, the Cumberland County Jail reports that at least 40 inmates and 11 corrections officers tested positive. *PBA Local 231: COVID Cases Spike in Warden Smith's Jail*, Insider NJ (Nov. 9

[7] Available at https://www.aclu-nj.org/files/8616/0787/8495/PCJ-COVID19-Update12042020.pdf.

[8] Available at https://www.aclu-nj.org/files/2816/0787/8512/Somerset_County_OPRA_Response.pdf.

[9]Available at https://www.tapinto.net/towns/camden/sections/government/articles/114-inmates-staff-members-tested-positive-for-covid-19-at-camden-jail.

2020);[10] Rodrigo Torrejon, *1 Inmate, 4 Correctional Officers At N.J. Jail Test Positive for COVID-19*, NJ Advance Media (Oct. 29, 2020).[11] The Essex County Corrections Facility has also reported 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. ECCF Current Situational Awareness Report (Nov. 30, 2020). And in the Bergen County Jail, several ICE detainees have engaged in a hunger strike, alleging "poor health and safety standards made worse by the rising surge of COVID-19 cases." Briana Vannozzi, *ICE detainees at Bergen County Jail in second week of hunger strike*, NJ Spotlight News (Nov. 30, 2020).[12]

As of October 31, 2020, there were 5,478 people incarcerated pretrial in the county jails throughout the state. Criminal Justice Reform Statistics: Jan 1. – Oct. 31, 2020.[13] This number represents not only an increase in the pretrial jail population since March 19, 2020, (just before the first Order to Show Cause) but is

[10] Available at https://www.insidernj.com/press-release/pba-local-231-covid-cases-spike-warden-smiths-jail/.

[11] Available at https://www.nj.com/coronavirus/2020/10/1-inmate-4-correctional-officers-at-nj-jail-test-positive-for-covid-19.html.

[12] Available at https://www.njspotlight.com/video/ice-detainees-at-bergen-county-jail-in-second-week-of-hunger-strike/.

[13] Available at https://njcourts.gov/courts/assets/criminal/cjrreport2020.pdf.

the highest number of people detained pretrial in the county jails since March of 2018. *Id.* The OPD estimates that of its clients detained pretrial in the jails, approximately 650 have been detained for six months or longer and are charged with second-, third-, or fourth-degree crimes. Certification from Public Defender Joseph E. Krakora, Esq. (Dec. 4, 2020). Approximately 400 additional defendants represented by the OPD have been detained for six months or longer and are charged with a first-degree crime subject to the presumption of release. *Id.*

Due to the growing number of defendants detained in the county jails, OPD attorneys, since September 1, 2020, have filed over 550 motions in trial courts throughout the state seeking release of defendants detained pretrial under the CJRA. *Id.* Only 33 of those motions were granted. *Id.*

On December 4, 2020, the OPD and the ACLU-NJ submitted a joint application seeking the Court's consideration of an Order to Show Cause designed to release certain pretrial detainees. Proposed Order to Show Cause Seeking Release of Certain Pretrial Detainees (submitted Dec. 4, 2020). The application requests that this Court issue an Order 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, subject to objections by the State and decision by appointed judges or special masters. *Id.* at 13-15. The application also requests that this Court issue an Order granting new detention hearings to all

defendants who are detained pretrial on first-degree charges who have a presumption of release and who seek a new hearing. *Id.* at 15-16.

On December 8, 2020, this Court requested that the OPD and the ACLU-NJ supplement their filing with a brief setting forth the legal authority supporting the relief requested in the proposed Order to Show Cause. This brief follows.

Argument

I. The continued detention of pretrial detainees raises serious due process concerns and requires intervention by this Court to ensure the continued constitutionality of the Criminal Justice Reform Act.

The historic agreement ratified by the people of New Jersey authorizes the pretrial detention of a carefully limited subset of defendants in exchange for a promise that those who are detained would get their day in court within a reasonable amount of time. But due to the suspension of jury trials caused by the coronavirus pandemic, as the months have dragged on, it is now abundantly clear that a vast majority of these people will not receive a trial at all within the statutorily mandated time limits of the CJRA. Instead, people are being detained indefinitely with no trial in the foreseeable future. As a result, continued pretrial detention under these circumstances requires a reassessment and greater showing of risk than what is statutorily required under the CJRA, given the significant due process concerns occasioned by the pandemic. Put simply, the status quo risks the prolonged detention of individuals presumed innocent without due process. Such a system would violate the New Jersey Constitution's promise of due process. This Court must act to save the CJRA's constitutionality.

The Fourteenth Amendment of the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." *U.S. Const.* Amend. XIV, § 1. "Although Article I, Paragraph 1 of the

New Jersey Constitution does not expressly state that due process of law protects persons from arbitrary government action, it does provide 'that every person possesses the "unalienable rights" to enjoy life, liberty, and property, and to pursue happiness.'" *Jamgochian v. N.J. State Parole Bd.*, 196 N.J. 222, 239 (2008) (quoting *Lewis v. Harris*, 188 N.J. 415, 442 (2006)). This Court has "construed the expansive language of Article I, Paragraph 1 [of our State Constitution] to embrace the fundamental guarantee of due process." *Id.* (citing *Doe v. Poritz*, 142 N.J. 1, 99 (1995)). Thus, this Court has interpreted our State Constitution to provide more due process protections than those afforded under the Federal Constitution. *Id.* (citing *Avant v. Clifford*, 67 N.J. 496, 519 n. 20 (1975)).

It is a fundamental principle that "[i]n the American criminal justice system, defendants are presumed innocent until proven guilty." *United States v. Gatto*, 750 F. Supp. 664, 672 (3d Cir. 1990). In accordance with due process, the government is only permitted to detain a person pretrial if there is a legitimate, regulatory purpose of securing that person's appearance for trial. *Bell v. Wolfish*, 441 U.S. 520, 536 (1979). Once pretrial detention has a punitive rather than regulatory purpose, however, this detention violates due process. *Id.* at 537. In *United States v. Salerno*, the United States Supreme Court upheld the constitutionality of pretrial detention under the Bail Reform Act because it was "regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause." 481

U.S. 739, 748 (1987). In so holding, the Court based its decision on the fact that the Act "carefully limits the circumstances under which detention may be sought to the most serious of crimes" and because "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act." *Id.* at 747.

But while the government may have a legitimate interest in detaining a defendant to secure their appearance and protect the public pending an adjudication of guilt, the government may only subject a detained person "to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution." *Bell*, 441 U.S. at 536–37. The Due Process Clause thus prohibits pretrial detention "if the condition of confinement being challenged 'is not reasonably related to a legitimate goal'" or "'is arbitrary or purposeless[.]'" *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2470 (2015) (quoting *Bell*, 441 U.S. at 539); *see also Doe v. Kelly*, 878 F.3d 710, 714 (9th Cir. 2017) (explaining that "a particular restriction or condition is punishment if the restriction or condition is not reasonably related to a legitimate governmental objective or is excessive in relation to the legitimate governmental objective").

Additionally, because a "defendant who ultimately may be acquitted can be detained for months or even years under the Bail Reform Act," prolonged detention in and of itself "rais[es] substantial due process concerns." *Gatto*, 750 F. Supp. at 672. Consequently, courts recognize that "at some point a pretrial detainee

denied bail must be tried or released" and that "[a]lthough pretrial detention is permissible when it serves a regulatory rather than a punitive purpose . . . valid pretrial detention assumes a punitive character when it is prolonged significantly." *United States v. Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986). In assessing a due process violation on these grounds, courts weigh factors such as "the seriousness of the charges, the strength of the government's proof that defendant poses a risk of flight or a danger to the community, and the strength of the government's case on the merits," against the length of the detention. *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986).

The length of a defendant's pretrial detention may violate due process even if a defendant's time in custody is not longer than that prohibited by statute. *See United States v. Ojeda Rios*, 846 F.2d 167, 168-169 (2d Cir. 1988) (thirty-two month detention found to violate due process); *United States v. Gonzales-Claudio*, 806 F.2d 334, 341 (2d Cir. 1986) (fourteen-month pretrial detention found to violate due process); *Theron*, 782 F.2d at 1516 (four-month detention constitutes a due process violation); *United States v. Zannino*, 798 F.2d 544, 548 (1st Cir. 1986) ("[I]n many, perhaps most cases, sixteen months would be found to exceed the due process limitation on pretrial confinement."); *United States v. Millan*, 824 F. Supp. 38, 40 (S.D.N.Y. 1993) (thirty-month pretrial detention violates due process); *United States v. Gallo*, 653 F. Supp. 320, 334 (E.D.N.Y. 1986) ("[A]ny pretrial

detention of more than 90 days exceeds what Congress contemplated, and a pretrial detention of more than six months should flash a warning that a violation of due process has probably occurred.").

In assessing the length of detention, courts not only consider how long the defendant has been in custody, but also how much longer the defendant will likely remain in custody before a jury verdict. *See, e.g.*, *Millan*, 824 F. Supp. at 40 (concluding that thirty-month delay violates due process where "Millan has been detained for twenty-three months and faces a nonspeculative additional detention of at least seven months (two months pretrial and five months retrial)"); *Gatto*, 750 F. Supp. at 674-75 (noting that while defendants were detained fifteen months, because their trial date was more than three months away and the State estimated trial taking another three months, defendants would be "detained twenty-one months before a jury adjudicates their guilt").

With the suspension of jury trials for nine months and counting, there is no longer a legitimate, regulatory government purpose for pretrial detention. The constitutionality of the CJRA relies on the promise that detained people will receive a trial. A system to the contrary runs counter to fundamental principles of justice. *See Salerno*, 481 U.S. at 755 (Marshall, J., dissenting) (explaining that schemes that allow for unlimited preventative detention are "consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the

police state [and as a result], have long been thought incompatible with the fundamental human rights protected by our Constitution").

As this public health emergency continues, it has become clear that trials for the vast majority of detained people are simply not on the horizon. Even when jury trials might resume – perhaps this spring at the earliest – the significant backlog, combined with social distancing restrictions, will make it impossible for all detained people to receive trials. Instead, pretrial detainees have returned to the pre-CJRA landscape where their only two options are to 1) remain detained; or 2) plead guilty regardless of their guilt or innocence in order to obtain release or finality of their case. This is precisely the situation that the CJRA sought to eliminate. But now, defendants are in an even more desperate situation because there is no opportunity for release on bail. As a result, many people – especially those whose highest charge is a third-degree, fourth-degree, or domestic violence disorderly persons offense – will be forced to serve the entirety of their potential sentence as pretrial detainees without ever being tried and convicted. Such detention constitutes punishment and thus cannot comport with due process.

In addition, the dangerous conditions of pretrial detention caused by the pandemic implicate significant due process concerns. COVID-19 spreads rapidly through jails and prisons due to the challenges associated with social distancing in congregate settings. *See* Executive Order 124 (2020). Incarcerated people are also

more likely to have preexisting conditions putting them at greater risk of death from the virus. *See* Weihua Li and Nicole Lewis, *This Chart Shows Why The Prison Population Is So Vulnerable to COVID-19*, The Marshall Project (March 19, 2020).[14] As a result, jails across the county and in New Jersey have seen staggering rates of COVID-19 and, tragically, deaths of both detainees and facility staff. A detention order, thus, no longer only means the loss of one's liberty. It poses a threat to one's life. The confluence of theoretically indefinite detention and potentially deadly conditions of confinement, of course, exacerbate risks of forcing defendants into the Hobson's choice of accepting detention or pleading guilty despite their innocence.

Conditions of confinement violate due process when they are excessive in relation to a legitimate government interest. New Jersey's jails are either experiencing or on the verge of COVID-19 outbreaks. People detained pretrial have almost no ability to protect themselves from being exposed to the virus. Instead, they are subject to increased risk of illness or even death. Such conditions of pretrial detention raise serious due process concerns requiring intervention. *See Pimentel-Estrada v. Barr*, 458 F. Supp. 3d 1226, 1251 (W. D. Wash. 2020) (releasing pretrial detainee, finding risk of COVID-19 due to pretrial detention

[14] Available at https://www.themarshallproject.org/2020/03/19/this-chart-shows-why-the-prison-population-is-so-vulnerable-to-covid-19.

created conditions violating due process). *See also United States v. Scarpa*, 815 F.Supp.88 (E.D.N.Y. 1993) (releasing pretrial defendant with AIDS facing murder charges because of "unacceptably high risk of infection and death on a daily basis inside the MCC," explaining that "We do not punish those who have not been proven guilty. When we do punish, we do not act cruelly.").

In light of these concerns, other jurisdictions have instructed judges to release people from jail or reconsider detention in the face of this global pandemic. *See, e.g., Karr v. State*, 459 P.3d 1183, 1186 (Alaska Ct. App. 2020) ("[C]ourts must now balance the public health safety risk posed by the continued incarceration of pre-trial defendants in crowded correctional facilities with any community safety risk posed by a defendant's release. Additionally, courts must re-evaluate the flight risk and safety risk posed by releasing a defendant into a community which now has fewer open businesses, fewer opportunities, for travel, and more people staying at home."); Mem. from Mike McGrath, Chief Justice, Mont. Sup. Ct., to Montana Courts of Limited Jurisdiction Judges (Mar. 20, 2020) ("Because of the high risk of transmittal of COVID-19, not only to prisoners within correctional facilities but staff and defense attorneys as well, we ask that you review your jail rosters and release, without bond, as many prisoners as you

are able, especially those being held for non-violent offenses.");[15] Mem. from Chief Justice Beatty, S.C. Sup. Ct., to Magistrates, Municipal Judges, and Summary Court Staff (Mar. 16, 2020) ("Any person charged with a non-capital crime shall be ordered released pending trial on his own recognizance without surety, unless an unreasonable danger to the community will result or the accused is an extreme flight risk.").[16] *See also Responses to the COVID-19 Pandemic*, Prison Policy Initiative (last updated Nov. 24, 2020).[17]

Indeed, courts continue to find pretrial release necessary "for the compelling reason that it will protect Defendant, the prison population, and the wider community during the COVID-19 pandemic" – "[e]ven if Defendant did not have a heightened susceptibility to COVID-19." *United States v. Kennedy*, 449 F. Supp. 3d 713, 718 (E.D. Mich. 2020). *See also United States v. Barkman*, 446 F. Supp. 3d 705, 710 (D. Nev. 2020) (ordering suspension of intermittent confinement as probation condition in light of COVID-19 in order to protect defendant and people in detention facility).[18]

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[15] Available at https://courts.mt.gov/Portals/189/virus/Ltr%20to%20COLJ%20Judges% 20re%20COVID-19%20032020.pdf.

[16] Available at https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2461.

[17] Available at https://www.prisonpolicy.org/virus/virusresponse.html.

Given these due process considerations, this Court must act to ensure the continued constitutionality of pretrial detention under the CJRA during the pandemic. The current substantive and procedural protections of the CJRA reflect the due process concerns for defendants detained pre-pandemic, who could be assured a trial within a reasonable amount of time, and whose lives were not at risk due to their incarceration. This landscape has now changed. Many defendants detained pretrial have no hope of receiving their day in court, and their conditions of detention are dangerous, even life-threatening. As one Appellate Division judge recently wrote in an order granting the defendant a new detention hearing, "[t]hrough no one's fault, defendant can colorably argue that he has become a 'hostage of the pandemic.' There is no final disposition of this criminal matter on the visible horizon, yet defendant remains behind bars and that time will continue to be viewed as excludable, with no certain end in sight." *State v. Harper*, Order, A-0538-20 (App. Div. Oct. 23, 2020).[19] Given these changes, due process requires heightened protections so that pretrial detention and the CJRA do not become constitutionally infirm. *See State in the Interest of D.G.W.*, 70 N.J. 488, 502 (1976) ("The requirements of due process are, of necessity, flexible, calling for such

[18] Other courts have reached the opposite result. *See, e.g.*, *United States v. Riggins*, 456 F. Supp. 3d 138 (D. D.C. 2020).

[19] Available at https://www.aclu-nj.org/files/1016/0787/8537/State_v._Harper_-_Appellate_Division_Order_Clarkson_Fisher.pdf.

procedural protections as the situation demands. Simply put, 'not all situations calling for procedural safeguards call for the same kind of procedure.'") (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

For defendants charged with a second-degree offense or lower and who have been detained for six months or longer, this Court should require a different, heightened standard in order to justify continued detention. Currently, in cases where defendants enjoy the presumption of release, the State must demonstrate "clear and convincing evidence that no amount of monetary bail, non-monetary conditions of pretrial release or combination of monetary bail and conditions would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process." N.J.S.A. 2A:162-18(a). To create a higher standard, this Court should require a greater showing of risk and place a higher burden on the State to demonstrate that risk.

First, release for this class of defendants should be presumed unless the risk to public safety, non-appearance, 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. In assessing this risk, consideration should be given to the dramatic changes to the speedy trial timeline occasioned by

the pandemic, as well as the risks posed to defendants by incarceration during the pandemic.

These considerations are not novel, and are relevant to the detention analysis. Several federal courts have determined that the COVID-19 pandemic is a relevant factor in assessing the whether a defendant's release would pose a public safety risk under the Bail Reform Act. *See United States v. Shaheed*, 455 F. Supp. 3d 225, 232 (D. Md. 2020) (considering COVID-19 health crisis when assessing whether defendant's release would pose public safety risk and finding "that reducing the number of pretrial detainees during this public health emergency, as a general matter, is safer for jail communities and the greater community"); *United States v. Davis*, 449 F. Supp. 3d 532, 536 (D. Md. 2020) ("The Court finds that the COVID-19 public health emergency must be considered when weighing 'the nature and seriousness of the danger to any person or the community that would be posed by the person's release' and the defendant's 'physical and mental health.'"). *United States v. Stephens*, 447 F. Supp. 3d 63, 65 (S.D.N.Y. 2020) (noting that "the unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic has become apparent" and concluding that "a comprehensive view of the danger the Defendant poses to the community requires considering all factors – including this one – on a case-by-case basis"). These cases are consistent with the basic principle that a court should consider the "total harm and benefits to prisoner and

society" that continued pretrial imprisonment will yield. *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (calling for heightened judicial scrutiny of projected impact of jail and prison conditions on defendant).

Further, a defendant's risk of non-appearance should 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. With court proceedings occurring virtually, appearance has become easier for many. And with restrictions on both domestic and international travel, leaving the state has become more difficult. Even if a defendant fails to appear, the law permits trials to be held in absentia if necessary. *State v. Hudson*, 119 N.J. 165, 182 (1990). Most importantly, the risk of non-appearance does not threaten public safety in and of itself.

In addition to increasing the level of risk required for detention, this Court should require that the State demonstrate this risk beyond a reasonable doubt, instead of by clear and convincing evidence. Without mincing words, Justice Stevens once wrote that "Executive power to detain an individual is the hallmark of the totalitarian state." *United States v. Montalvo-Murillo*, 495 U.S. 711, 723 (1990) (Stevens, J., dissenting, joined by Brennan and Marshall, JJ.). A single individual unnecessarily detained before trial is one individual too many, and the increasing use of the practice places tremendous wear on our constitutional system.

Id. at 723–24. Given these concerns, and the heightened liberty at stake due to the pandemic, the burden placed on the State must also be increased to comport with due process. *See Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

And second, for defendants charged with first-degree crimes who have been detained for six months or longer, and who have a presumption of release, due process demands the opportunity for a new detention hearing under the standard articulated in the CJRA. As discussed above, several federal courts have determined that COVID-19 is relevant to the detention analysis and warrants a new detention hearing for defendants detained pretrial. Courts should be assessing the threat posed by COVID-19 to the defendant, as well as the increased threat posed to the public from incarcerating large numbers of pretrial detainees, when determining whether continued detention is excessive in light of the government's interest in detention.

Without intervention by this Court, the vast majority of defendants will remain incarcerated without recourse. Since September 2020, the OPD filed over 550 motions for release, raising both constitutional and statutory arguments. The trial courts have ordered the release of only about 30 of these clients; in all of these cases, release was granted not as a result of the pandemic, but rather because of new information that would have otherwise changed the outcome of detention pursuant to N.J.S.A. 2A:162-19(f). Our trial and appellate courts have largely

rejected arguments that the COVID-19 pandemic warrants reconsideration of detention. Many courts have taken the position that because the excludable time orders have been issued directly from this Court, they must defer to them and deny relief. Without further intervention and guidance from this Court, defendants will continue to be detained in a manner that threatens the constitutionality of the CJRA.

The proposed remedy is well-within the Court's rule-making authority over the courts. *See infra* Point II. It is designed in its broadest sense to ensure that the CJRA's preventive detention component is constitutionally applied in the context of a public health emergency that has necessitated an indefinite suspension of jury trials. In a more practical sense, it is a framework within which the courts can reassess the appropriateness of the continued pretrial detention of the identified class of defendants. It acknowledges the need for a sliding scale of risk tolerance during the public health emergency that protects the constitutionality of the CJRA. Finally, it does so by focusing on defendants charged with less serious offenses and deemphasizing the risk of non-appearance in the risk analysis. In the end, the proposed remedy balances the need to protect not only public safety but the safety of jail inmates and staff against the unacceptable indefinite pretrial detention of thousands of defendants occasioned by the pandemic.

II. This Court is authorized to order the requested relief by exercising its rule-making authority or, alternatively, by engaging in judicial surgery.

Although the CJRA does not explicitly authorize the relief requested by the OPD and the ACLU-NJ, this Court has the authority to grant it through two means: through its rule-making authority and, alternatively, through judicial surgery.

The New Jersey Constitution vests this Court with the power to make rules concerning the administration, practice, and procedure of the courts of this State. N.J. Const. Art. VI, Sec. II, Para. 3. "This power has been broadly construed to include not only the promulgation of such rules, but their interpretation and enforcement as well." *State v. Leonardis*, 71 N.J. 85, 108-09 (1976) (internal citations omitted). Additionally, there is not an "absolute prohibition against rules which merely affect substantive rights" because such a prohibition "would seriously cripple the authority and concomitant responsibility which have been given to the Court by the Constitution." *State v. Leonardis (Leonardis II)*, 73 N.J. 360, 374 (1977) (citing *Fehrenbach v. Fehrenback*, 42 Wis. 2d 410 (1969) (statutory grant of rule-making power not violated by rule which has substantive effect of extinguishing a right or cause of action or creating a defense)).

Since the CJRA was passed, this Court has exercised its rule-making authority to enact, enforce, and interpret court rules promulgated to address various facets of the CJRA. *See State v. Robinson*, 229 N.J. 44, 59 (2017) (acknowledging

that "[a]fter the Legislature enacted the Criminal Justice Reform Act, the Court asked the Criminal Practice Committee to propose amendments to the court rules"); *R.* 3:4A (new rule adopted to address pretrial detention). *See also State v. Mercedes*, 233 N.J. 152 (2018) (revising *R.* 3:4A(b)(5) to make clear that recommendation against pretrial release that is based only on type of offense charged cannot justify detention by itself unless recommendation based on one of two presumptions in CJRA); *State v. Dickerson*, 232 N.J. 2 (2018) (holding that under *R.* 3:4-2(c)(1)(B) search warrant affidavit need not be disclosed as a matter of course).

This authority has also been used to "fill the gaps" in the CJRA through the promulgation of more detailed and expansive court rules addressing various aspects of the statute. For example, the issue of what type of discovery, if any, a defendant would be entitled to prior to a detention hearing is not addressed in the CJRA. Rather, *Rule* 3:4-2(c) was amended to provide defendants with certain types of discovery where a detention motion has been filed. *See Robinson*, 229 N.J. at 59-61 (discussing amendment of discovery rule). Likewise, time limits for certain excludable time exceptions have been enacted through court rule only. *Compare* N.J.S.A. 2A:162-22(b)(1)(c) (generally excluding time from the filing to final disposition of a motion) *with R.* 3:25-4(i)(3) (limiting excludable time from the filing and disposition of motions to 90 days).

The Court can similarly exercise its rule-making power here in a manner that would not be inconsistent with the statutory language of the CJRA but that would also address the constitutional issues caused by the indefinite cancellation of trials. After a defendant has been detained, the CJRA allows for trial courts to revisit a detention decision and issue a release order if certain elements are met. For instance, N.J.S.A. 2A:162-19(f) provides for the reopening of a detention hearing,

> at any time before trial, if the court finds that information exists that was not known to the prosecutor or the eligible defendant at the time of the hearing and that has a material bearing on the issue of whether there are conditions of release that will reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process.
>
> [*Id. See also R.* 3:4A(b)(3) (same).]

N.J.S.A. 2A:162-21(b) also provides for a "temporary release" from detention of an eligible defendant "to the extent that the court determines the release to be necessary for preparation of the eligible defendant's defense or for another compelling reason."

Our appellate courts have not had the opportunity to interpret the phrase "compelling reason" as it appears in N.J.S.A. 2A:162-21(b). However, the cancellation of jury trials for the foreseeable future due to the COVID-19 pandemic – and the impact that the cancellation has had on a detained defendants'

due process and speedy trial rights – amounts to a compelling reason under the CJRA to authorize release. Nothing in the statute prevents this Court from interpreting "compelling reason" in this manner.

And, as an extension of its rule-making authority, this Court may promulgate a rule, consistent with the relief requested by the OPD and ACLU-NJ in the proposed Order to Show Cause, that creates a mechanism that would allow for the release of certain defendants who have been detained for longer than six months. Creation of rule addressing the relief requested in the proposed Order to Show Cause would not be inconsistent with the language or the intent behind the CJRA, which in its opening paragraph declares that the statute "shall be liberally construed to effectuate the purpose or primarily relying on pretrial release[.]" N.J.S.A. 2A:162-15. Nor would promulgation of such a rule prejudice the State as the mechanism outlined by the proposed Order to Show Cause allows for the State to lodge an objection where it deems necessary and provides for meaningful judicial resolution of those objections. And creating such a rule would help ease the constitutional issues that have impacted detained defendants' due process and speedy trial rights caused by the indefinite cancellation of trials.

Alternatively, this Court could, as it has frequently done in the past, engage in "judicial surgery" to save the construction of the CJRA and free it from the potential constitutional due process and speedy trial defects caused by the lack of

any foreseeable trials. *See generally, N.J. State Chamber of Commerce v. N.J. Election Law Enf't Commission*, 82 N.J. 57, 75 (1980) (using "judicial surgery" to narrow construction of term "to influence legislation" in campaign finance law so that it was not facially overbroad).

In *State v. Natale*, 184 N.J. 458 (2005), this Court engaged in judicial surgery to correct the sentencing scheme. This Court had found that the statutes ran afoul of the Sixth Amendment right to trial by jury because, at the time, it permitted judges to sentence defendants above a presumptive term if the judge found one or more statutory aggravating factors. *Id.* at 466. Instead of declaring the sentencing scheme unconstitutional and striking it down in its entirety, this Court corrected the constitutional error by eliminating presumptive terms and ordering that judges sentence defendants within the statutory range for the offense after weighing aggravating and mitigating factors. *Id.* at 466, 485-86. This Court recognized that invalidating the entire sentencing scheme would have gone against the Legislature's wishes: "We have little doubt that the Legislature would prefer that we sever the offending portion in order to save the major objectives of the Code's sentencing scheme." *Id.* at 486.

Notably, this Court has engaged in judicial surgery where it has determined that it can effectuate the Legislature's intent. *See id*. 466, 485-86 (using judicial surgery to amend sentencing statute to comply with constitution "in a way that the

Legislature would have intended"); *N.J. State Chamber of Commerce*, 82 N.J. at 75 (when determining whether to engage in judicial surgery, the question to be answered is "[w]ould the Legislature want the statute to survive?"); *State v. Rosenfeld*, 62 N.J. 594, 603 (1973) (in absence of ascertainable legislative preference among alternative statutory interpretations, judicial surgery is inappropriate).

In effectuating the CJRA, the Legislature clearly intended to provide meaningful due process and speedy trial rights to defendants detained pretrial pursuant to the statute. Under the CJRA, a defendant is entitled to a hearing on a detention motion filed by the State and is provided with the right to counsel as well as the right "to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise." *State v. Ingram*, 230 N.J. 190, 201-02 (2017) (citing N.J.S.A. 2A:162-10(d)(1), (2), and (e)(1)). Additionally, "the Act establishes statutory speedy trial deadlines for defendants who are detained pending trial." *Robinson*, 229 N.J. at 54 (citing N.J.S.A. 2A:162-22). Notably, prior to the CJRA, statutory speedy trial rights did not exist in this state.

Thus, imposing the mechanism for relief contained in the proposed Order to Show Cause through judicial surgery would not offend or contradict the Legislature's intent in affording detained defendants due process and speedy trial

rights. The CJRA was not passed during a pandemic. And, presumably, the Legislature, when enacting the CJRA, did not anticipate that our state would be impacted by a public health emergency resulting in the cancellation of all criminal trials for the foreseeable future. Had the Legislature been able to anticipate the public health crisis and the indefinite cancellation of trials, it likely would have enacted provisions to safeguard the due process and speedy trial protections provided to detained defendants under the CJRA. The mechanism outlined in the proposed Order to Show Cause provides the appropriate relief that balances the interests of detained defendants and the State while respecting the Legislature's intent.

Finally, holding that the COVID-19 pandemic amounts to a change in circumstances justifying a new detention hearing pursuant to N.J.S.A. 2A:162-19(f) would require a simple interpretation and application of the statute. Doing so is within the core functions of this Court.

The situation facing defendants detained pretrial – who enjoy the presumption of release – is dire. Without the foreseeable resumption of trials in the near future, these pretrial detainees are being warehoused in jail for an indeterminate length of time without resolution of the criminal cases against them and without access to programs and other services normally afforded to them before the pandemic struck. Additionally, these pretrial detainees are at

increased risk of being infected with COVID-19 given the social distancing challenges that jails naturally face. Accordingly, this Court should act through either its rule-making authority or through judicial surgery and grant the proposed relief contained in the Order to Show Cause.

Conclusion

The status quo cannot hold. Unless the Court intervenes, judges will continue to order defendants held with no prospect of trial in the near future. That will result in grave risk to defendants held in jails where the risk of deadly infection is enormous, and ever growing. It will also render the CJRA constitutionally infirm: the Constitution tolerates pretrial detention only where it is strictly limited in duration. But solutions exist.

The Court can insure that the risk calculous inherent in the CJRA gets calibrated to the situation brought about by COIVD-19. Using both its rule-making authority and the doctrine of judicial surgery, the Court can ensure that the CJRA adapts to reality that trials are not on the horizon. The Court should grant the relief in the Order to Show Cause.

Respectfully submitted,

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