Supreme Court of New Jersey

IN THE MATTER OF THE
REQUEST TO RELEASE CERTAIN
PRETRIAL DETAINEES

DOCKET NO. 085186
ORDER TO SHOW CAUSE

BRIEF ON BEHALF OF THE
COUNTY PROSECUTORS ASSOCIATION OF NEW JERSEY (CPANJ)

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PRELIMINARY STATEMENT

The Criminal Justice Reform Act (CJRA) was enacted on August 11, 2014, with an effective date of January 1, 2017. It has three principal components. First, it provides for pretrial detention of defendants who present such a serious risk of danger, flight or obstruction that no combination of release conditions would otherwise be adequate. Second, it substituted the prior system's reliance on money bail for a system calling for an objective evaluation of each defendant's risk level and consideration of conditions of release that will be monitored by judicial employees. Third, it established statutory speedy trial deadlines for defendants who are detained pending trial.

Movants now ask this Court to scuttle that carefully drawn legislative framework. They want this Court to essentially rewrite the CJRA, making up new standards and tests out of whole cloth along the way, and to grant extraordinary relief designed to compel the release of several hundred, if not over a thousand, pretrial detainees. This request is based on this Court's prior orders that temporarily suspended jury trials, and is made, despite the individualized judicial determinations that have already been made that each and every one of those defendants pose such a risk as contemplated by the CJRA as to warrant pretrial detention.

The County Prosecutors Association of New Jersey (CPANJ) urges this Court to reject all of that. Movants' proposed changes to the statutory features of the CJRA-- which have withstood constitutional challenges since its inception-- are not supported by a consideration of the interests at stake, including the public safety concerns related to releasing so many lawfully-detained individuals.

The current delay of criminal trials was rendered necessary by concerns for the potential spread of the Sars-CoV-2 virus, which causes the respiratory disease coronavirus 19 (COVID-19). The decision to delay trials was premised on sound policy concerns, which were designed to minimize the risk of potential spread of the virus. This delay does not render the CJRA unconstitutional on its face.

Each county prosecutor has ensured that criminal cases are processed, calendar hearings are held, discovery is provided and plea offers conveyed, all while complying with social distancing protocols rendered necessary by gubernatorial orders. Likewise, the county prosecutors have complied with this Court's Orders that Grand Jury proceedings be conducted statewide, with the assistance of the judiciary in creating virtual environments. Moreover, and contrary to movants' claims, our jails are working diligently to control the spread of COVID-19 among their inmate populations. Those populations have not grown appreciably, much less to historic

levels, during the temporary cessation of jury trials. Thus, separation of powers concerns strongly militate against the unprecedented across-the-board relief sought, which itself would violate our Legislature's own constitutional prerogatives, if this requested relief were to be granted.

STATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

On March 9, 2020, Governor Philip D. Murphy issued Executive Order No. 103, declaring a Public Health Emergency and a State of Emergency in New Jersey as a result of the threats and dangers associated with exposure to coronavirus disease 2019 (COVID-19), a contagious and, at times, fatal, respiratory disease caused by the SARS-CoV-2 virus. Exec. Order No. 103 (Murphy) (March 9, 2020), at 1, 4.

On March 20, 2020, this Court entered an Order to Show Cause, in which it instructed the Office of the Attorney General (OAG), CPANJ, the Office of the Public Defender (OPD), the American Civil Liberties Union of New Jersey (ACLU-NJ), and other interested parties to file briefs addressing why an Order should not be entered granting relief consistent with the OPD's request to commute or suspend county jail sentences currently being served either as a condition of probation for

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[1] The Statement of Facts and Procedural History have been combined for clarity.
References are as follows:
Mb refers to Movants' Brief
CPANJa refers to the CPANJ Appendix to this Brief.

an indictable offense or because of a municipal court conviction. In the Matter of the Request to Commute or Suspend Certain County Jail Sentences, 241 N.J. 404, 404-08 (2020)(Order to Show Cause, Docket No. 084230). This Court further ordered the OAG, CPANJ, OPD and ACLU-NJ to appear for mediation before the Honorable Philip S. Carchman, P.J.A.D. (ret.). Ibid.

On March 20-22, 2020, the parties mediated as directed and generated a Consent Order (which this Court entered on March 22, 2020) in which a process was developed to order the release of county inmates due to a mutual understanding that "the reduction of county jail populations, under appropriate conditions, is in the public interest to mitigate risks imposed by COVID-19." Id. at 404. The relief contemplated in the Consent Order applied to inmates serving county jail sentences: as a condition of probation; as the result of a municipal court conviction; as the result of a resentencing following a finding of a violation of probation in Superior Court or municipal court; or otherwise not linked to a probationary sentence for a fourth-degree crime, disorderly persons offense, or petty disorderly persons offense in Superior Court. Id. at 405-08. The Order delineated an expedited process on how the relevant prosecuting agencies could file objections to the inmates' presumed released based on the significant risk to the individual inmate or the public

the inmate's release would pose. The Order further established procedures for how the OPD, through its provisional representation, could file responses to the objections; how the appointed Special Masters should summarily decide if the presumption of release was overcome by a preponderance of the evidence that the release would pose a significant risk to the safety of the inmate or the public; how decisions by the Masters were subject to emergent appellate review; how released inmates were required to comply with non-custodial conditions of their sentences and how victims were to be notified of an inmate's release. Ibid.

On March 23, 2020, this Court entered an Amended Consent Order, in which it added a category of inmates who should not be released. In the Matter of the Request to Commute or Suspend Certain County Jail Sentences, Amended Consent Order, Docket No. 08423 (March 23, 2020), at 1-2. The original Order prohibited the release of any inmate who tested positive for COVID-19, who was identified as presumptively positive for COVID-19, or who advised that he or she did not wish to be released based on safety, health or housing concerns. Consent Order at 8-9. The Amended Consent Order included an additional class of inmates who identified as unable to obtain safe housing or photo identification upon release. Amended Consent Order at 2.

The process outlined in the Consent Orders resulted in the release of approximately 700 of the estimated 1,000 eligible inmates from the county jails. New Jersey COVID-19 Jail Release Agreement, American Bar Association (March 27, 2020), https://www.americanbar.org/content/dam/aba/administrative/crsj/webinar/new-jersey-covid-19-release-agreement-webinar-summary.pdf. Under the Orders, prosecutors objected in 260 cases, but consented to release in 539 cases. Ibid.

On April 10, 2020, Governor Murphy issued Executive Order No. 124, stating that inmates in the custody of the New Jersey Department of Corrections "face a heightened risk of death or serious injury if they contract COVID-19" due to their age and/or underlying medical conditions. Exec. Order No. 124 (Murphy) (April 10, 2020), at 2. The Governor suggested that temporarily removing these inmates from congregate custody in DOC facilities would protect them from the health risks associated with COVID-19. Ibid. The Governor also acknowledged that two procedures enabled the relief he proposed: parole supervision and furloughs. Id. at 2-3. For those inmates eligible for parole, the Governor noted that the Public Health Emergency necessitated accelerated review of their applications by the State Parole Board. Id. at 2. For those inmates ineligible for parole, the Governor observed that the DOC Commissioner is authorized to issue furloughs, i.e., "emergency medical home confinements," so

long as the inmates were not convicted of an enumerated violent crime, specifically, murder (N.J.S.A. 2C:11-3); manslaughter (N.J.S.A. 2C:11-4); sexual assault (N.J.S.A. 2C:14-2); robbery (N.J.S.A. 2C:15-1); kidnapping (N.J.S.A. 2C:13-1); and aggravated assault (N.J.S.A. 2C:12-1b). Id. at 2. Notably, the Governor recognized that removing inmates from custody to parole supervision or through a furlough included established safeguards to protect the inmates' health and safety, as well as the safety of the public. Id. at 2-3.

On May 11, 2020, this Court entered an Order to Show Cause, in which it directed OPD, ACLU-NJ, OAG, CPANJ, the New Jersey Department of Corrections (DOC), and the New Jersey State Parole Board, to file briefs addressing the issue of why an Order should or should not be entered granting relief consistent with the OPD/ACLU-NJ's (movants') joint request. In the Matter of the Request to Modify Prison Sentences, Expedite Parole Hearings, and Identify Vulnerable Prisoners, Order to Show Cause, Docket No. 084412 (May 11, 2020), at 1-8. This Court further ordered the parties to address this Court's authority to grant the relief requested by movants, and "provide updated information on the status of the implementation of" EO 124. Id. at 8-9.

On June 5, 2020, this Court rendered its opinion, In the Matter of the Request to Modify Prison Sentences, Expedite

Parole Hearings, and Identify Vulnerable Prisoners, which recognized certain due process protections related to the implementation of EO 124. 242 N.J. 357, 368-71 (2020) (hereinafter OTSC State Inmates).

On July 22, 2020, this Court authorized the resumption of jury trials in a hybrid format, with primarily virtual jury selection and socially distanced in-person trials.

On October 8, 2020, this Court issued an Omnibus Order (Ninth Omnibus Order) mandating that Grand Jury proceedings resume on a statewide basis. The Ninth Omnibus Order provided for the conclusion of pre-indictment excludable time resulting from the pandemic to begin in phases.

On October 22, 2020, Gov. Murphy issued an executive order, which, in pertinent part, exempted the court personnel from the requirements imposed relating to social distancing and mask requirements. Executive Order 192 (Murphy) (October 22, 2020), para. 2.

On November 16, 2020, this Court, noted that "[a] second wave of COVID-19 has struck New Jersey and the rest of the nation", and it issued an Order in which it was deemed necessary to suspend in-person jury trials and in-person grand jury sessions, "based on current COVID-19 trends and health and safety concerns." (Hereinafter Order 11/16/20). Existing virtual grand jury proceedings were authorized to continue in a virtual format.

On November 10, 2020, this Court adopted R. 3:4-7, to be effective January 15, 2021, which authorized a new court procedure to be held under certain circumstances, as an "interim measure during the COVID-19 pandemic." (Notice to the Bar, November 10, 2020). This new Court Rule authorizes a court to conduct a hearing regarding the presence of probable cause for an eligible defendant who is detained but who has not yet been indicted. The time frames in R. 3:4-7 are adjusted for excludable time. R. 3:4-7(b).

On November 20, 2020, Gov. Murphy issued Executive Order No. 200, which extended the declaration of public health emergency. Executive Order 200 (Murphy) (November 20, 2020).

On December 8, 2020, this Court denied an emergent application in State v. Wildemar Dangcil, Dkt. No. 084990, which sought direct certification of the trial court's rulings allowing certain virtual petit jury selection procedures. The denial was without prejudice.

On December 16, 2020, this Court, having relaxed the Rules of Court upon its own motion, issued an Order to the OPD, ACLU-NJ, OAG and CPANJ to file briefs addressing "why an Order should not be granted granting the relief sought in paragraphs A-C" of the proposed OTSC, and whether the Court had authority to grant the relief requested. In the Matter of the Request to Release Certain Pretrial Detainees, Dkt. No. 085186. (hereinafter OTSC PTD). (CPANJa13-CPANJa18).

Gov. Murphy extended the declaration of public health emergency on December 21, 2020. Executive Order 210 (Murphy) (December 21, 2020).

CPANJ's brief was made due no later than December 30, 2020.

LEGAL ARGUMENT

POINT I

THE CRIMINAL JUSTICE REFORM ACT (CJRA) REMAINS A CONSTITUTIONAL MECHANISM TO DETAIN INDIVIDUALS PRETRIAL, AND SEPARATION OF POWERS PRINCIPLES MILITATE AGAINST GRANTING THE PROPOSED ORDER TO SHOW CAUSE.
(ADDRESSING MB-POINT II)

Movants request that this Court create a new structure, in the guise of a proposed Order to Show Cause (OTSC PTD), for the consideration of pretrial detention during the current declared public health emergency. Movants suggest this Court's considered judgment to delay criminal jury trials in an effort to help mitigate the risk of spread of the novel coronavirus has resulted in a deprivation of due process for pretrial detainees. Movants are wrong.

Simply put, the current status of the pretrial detainees does not result in a deprivation of due process. Application of the appropriate standards for resolving due process challenges necessarily would result in a determination that neither federal nor state constitutional concepts of due

process are offended. Thus, there is no need for this Court to adopt any of movants' suggestions in order to provide a remedy for a constitutional violation.

Sanding away the constitutional gloss, movants' arguments are best characterized as an entreaty for this Court to exercise judicial power to effect a policy change. Movants' proposal would require this Court to rewrite the plain text of the CJRA based on a cramped view of legislative intent and enforce a policy change that neither the executive nor the legislative branch endorses.

At the outset, we must emphasize that the individual criminal defendants at issue have all been ordered detained after adversarial proceedings and a judicial determination that the State met its weighty burden to warrant detention. It must also be assumed that appeals which could be brought as of right (R. 2:9-13(a)), were either denied or were not sought in each case. Thus, this Court's appellate jurisdiction is not properly invoked by the proposed OTSC PTD.

It is also not disputed that the decision to delay criminal jury trials, as a means to help address the challenges of the public health emergency, fell within this Court's constitutional power regarding the administration of the courts. N.J. Const., Art. VI, §2, ¶3. It goes without saying that the judicial branch will be expected to order the

resumption of in-person jury trials as soon as is deemed practicable.

The CPANJ recognizes that many of the policy considerations regarding the communicable risk that COVID-19 poses to all of the people of New Jersey, and then, in a real sense, onward to the global community, are not easily loaded into clearly demarcated silos within our interconnected branches of government.

Movants' proposed reworking of the CJRA's mechanism for determining whether pretrial detention is appropriate would necessarily require this Court to determine that a constitutional violation exists before it could undergo some form of statutory rehabilitation as proposed by the movants. "While the courts necessarily make new substantive law through the decision of specific cases coming before them, they are not to make substantive law wholesale through the exercise of the rule-making power." Winberry v. Salisbury, 5 N.J. 240, 248 (1950).

If the Court were to stray from this analytic framework, the doctrinal separation of powers would raise its own spectre of unconstitutional judicial action if there were to be countenance of movants' request for such a departure. In other words, unilateral action by the Court, without a determination that its own Order to delay criminal trials itself violates due process, is not supported by the reasoned

consideration of the interests at stake, which must also necessarily include consideration of public safety concerns regarding the potential release of a huge number of lawfully-detained prisoners.

This Court has shown reluctance to act unilaterally when the font of power may not be as clear as an advocate desires. For example, in the context of adopting evidentiary rules, this Court has declined to issue new rules it deemed to bring fundamental changes as a matter of judicial power, refraining in the interest of comity. See, e.g., State v. Byrd, 198 N.J. 319, 342-50 (2009) (Forfeiture-by-Wrongdoing); State v. Terry, 218 N.J. 224, 242-44 (2014) (Marital Privilege Crime-Fraud Exception); State v. D.R., 109 N.J. 348, 375-76 (1988) (Tender Years).

Movants admit they seek a reworking of the CJRA. (Mb20-23). Yet they fail to demonstrate a constitutional violation. Instead, they claim a potential constitutional issue needs to be addressed by a complete overhaul of the CJRA. And it is clear that a complete overhaul is being championed when one views the CJRA as it currently exists. In that regard, an overview of the CJRA and the underlying principles that have led to the refined structure regarding pretrial detention provides necessary context so as to make stark the substantial departures movants advocate here.

The Criminal Justice Reform Law was enacted on August 11, 2014. It was made effective on January 1, 2017. The pertinent parts of the law which deal with individual prosecutions are codified at N.J.S.A. 2A:162-15 to -25.

The CJRA has three principal components. First, it provides for pretrial detention of defendants who present such a serious risk of danger, flight or obstruction that no combination of release conditions would be adequate. Second, it substituted the prior system's reliance on monetary bail for a system that calls for an objective evaluation of each defendant's risk level and consideration of conditions of release that will be monitored by judicial employees. Third, it established statutory speedy trial deadlines for defendants who are detained pending trial. State v. Robinson, 229 N.J. 44, 54 (2017).

Pretrial detention may be ordered on cases where the presumption of pretrial detention applies. The presumption of detention is applicable when an eligible defendant is charged with murder, N.J.S.A. 2C:162-19b(1), or if the eligible defendant may receive an ordinary or extended term of life imprisonment if convicted. N.J.S.A. 2C:162-19b(2). The State must demonstrate probable cause, and the presumption could then be sufficient to allow pretrial detention as the burden of proof would be met by the presumption. See also N.J.R.E. 301. In those cases where there is a statutory presumption of

detention, a defendant may rebut the presumption of detention by a preponderance of the evidence. N.J.S.A. 2C:162-19e(2). However, the State may still demonstrate, by clear and convincing evidence, that detention is warranted even if the presumption of detention has been rebutted. N.J.S.A. 2A:162-19e(2).

In cases with a presumption of release, if the State rebuts the presumption of release, a court must still, in every case, consider whether detention is appropriate as compared to less restrictive alternatives. N.J.S.A. 2A:162-18a(1). It is the State's burden to rebut the presumption of release by clear and convincing evidence by establishing that only detention would reasonably assure defendant's appearance, the safety of the community, and the integrity of the criminal justice process. N.J.S.A. 2A:162-19.

The Legislature endorsed a model for the detention decision that allowed for weight to be given to a Pretrial Services Program (PSP) recommendation. First, the statute required development of a risk assessment instrument that is "objective, standardized and developed based on an analysis of empirical data." N.J.S.A. 2A:162-25c. The statute expressly authorizes a court to consider any "release recommendation of the [PSP] obtained using a risk assessment instrument under [N.J.S.A. 2A:162-25]." N.J.S.A. 2A:162-20f. In fact, the legislation requires a court to document its

reasons if it deviates from the recommendation that is made in accordance with a risk assessment. N.J.S.A. 2A:162-23a(2).

The instrument used by the judiciary "has both a risk measurement component and risk management component that will assist the court in making objective and informed pretrial release decisions." Criminal Justice Reform Annual Report to the Governor and Legislature (2016)(hereinafter CJR Report).

The risk measurement component is the Public Safety Assessment (PSA) that creates a score reported on two scales; a risk of Failure to Appear (FTA), and a risk of New Violent Criminal Activity (NVCA). CJR Report, p.4. This Court has described the risk assessment tool and the attendant judicial process relating to it:

> [T]he Judiciary worked with the Laura and John Arnold Foundation to develop an objective risk-assessment tool. The tool is designed to measure two types of risk: whether a defendant will fail to appear for court proceedings and whether he or she will engage in new criminal activity while on release. The tool considers nine factors: (1) the defendant's age at the time of the current offense; (2) whether the offense is violent and, if so, whether the defendant is age 20 or older; (3) any additional pending charge(s) at the time of the current offense; and whether the defendant has any prior (4) disorderly persons convictions, (5) indictable convictions, (6) violent convictions, (7) failures to appear pretrial in the past two years or (8) more than two years ago, or (9) sentences of incarceration of fourteen days or more.
>
> Within hours of an arrest, pretrial services officers gather this and other relevant information about each eligible defendant to prepare a "Public

> Safety Assessment" (PSA). N.J.S.A. 2A:162-16(a), (b)(1). The PSA assesses the level of risk for failure to appear and for new criminal activity on a scale of 1 to 6, with 6 being the highest, and may include a flag to denote new violent criminal activity. The PSA also recommends whether to release a defendant and what, if any, conditions of release to impose.
>
> Trial judges consider the PSA but make the ultimate decision on release after reviewing other relevant information as well. See N.J.S.A. 2A:162-20.
>
> [Robinson, 229 N.J. at 62].
>
> Accord State v. Mercedes, 233 N.J. 152, 172 (2018).

The risk management component, called the Decision-Making Framework (DMF), "attempts to identify the recommended level and type of conditions and intervention or monitoring services needed to manage the risks posed by defendant if he were released." State v. C.W., 449 N.J. Super. 231, 240 (App. Div. 2017).

The DMF is "primarily driven by the defendant's charges and the risk that the criminal justice system is willing to tolerate as to defendants who are charged with certain types of crimes." Acting Admin. Dir. of the Courts Memorandum, Criminal Justice Reform - Revisions to the Decision-Making Framework (DMF) Regarding Certain Gun/Explosive Weapons Cases and Repeat Arrest Cases - May 25 Supreme Court Action (May 31, 2017). (hereinafter Memo, 5/31/17).

As currently instituted, a no release recommendation, regardless of the PSA score, would be put forth if the defendant were charged with any of the following: Escape

(N.J.S.A. 2C:29-5a); Murder, Aggravated Manslaughter or Manslaughter (N.J.S.A. 2C:11-3 or 2C:11-4); Aggravated Sexual Assault or Sexual Assault (N.J.S.A. 2C:14-2a, 2b or 2c(1)), or first-degree Robbery or Carjacking. (N.J.S.A. 2C:15-1 or -2). If the defendant were charged with a NERA offense other than the above, any recommendation of the pretrial monitoring level (PML) would be increased by one level. These crimes were identified as those which an objective determination of increased risk has been validated by the instrument designed on behalf of the judiciary by Dr. Marie Van Nostrand, Ph.D. The commission of a current violent offense has been validated as predictive of recidivism, violent recidivism and nonappearance. See CPC Report II, Hon. Martin Cronin, J.S.C. (Concur in part, Dissent in part), pp. 95-96. Among those objective factors identified as predictive of violent recidivism was the presence of a "current violent offense." These crimes were identified as meeting the definition of violent offense as used by Dr. Van Nostrand. Id. at 95.

For any other pretrial detention-qualifying crime or offense, a no release recommendation will be made in those circumstances where a defendant receives the following PSA scores: 6,4; 6,5; 6,6; 3,6; 4,6; 5,6, or 6,6. A no release recommendation is also made for a defendant who receives a preliminary PSA recommended level of supervision of PML3+ EM/HD, but who is then subject to an increase of one level

when charged with a crime subject to NERA. A no release recommendation is also sanctioned by the DMF in those cases when the NVCA flag is raised, and the eligible defendant is charged with a violent offense, and one of the current charges is an indictable crime or an offense involving domestic violence.

In May 2017, this Court modified the DMF to include ten Graves Act crimes that would warrant a no release recommendation. These included the crimes of Certain Persons Not to Have Weapons (N.J.S.A. 2C:39-7a, 7b(2), 7b(3)); and crimes involving a sawed-off shotgun (N.J.S.A. 2C:39-3b, N.J.S.A. 2C:39-9b); an assault firearm (N.J.S.A. 2C:39-5f, N.J.S.A. 2C:39-9g); a machine gun (N.J.S.A. 2C:39-5a and N.J.S.A. 2C:39-9a); and a defaced firearm (N.J.S.A. 2C:39-9e). Five non-Graves Act crimes were also added to the DMF and deemed apt for a no release recommendation: Certain Persons Not to Have Weapons (N.J.S.A. 2C:39-7b(1)); Possession of Explosives for an Unlawful Purpose (N.J.S.A. 2C:39-4b); Possession of a Destructive Device (N.J.S.A. 2C:39-4c); Unlawful Possession of a Firearm on School Property (N.J.S.A. 2C:39-5e(1)); and Transport of Firearms for the Purpose of an Unlawful Sale or Transfer (N.J.S.A. 2C:39-9i).

The DMF was also modified to take into account an eligible defendant subject to multiple arrests while on

release for other charged conduct. The DMF now allows for a no release recommendation when a defendant has been previously released on two separate occasions for charges that were pending at the time of a third (or subsequent) arrest, and the defendant is then charged on a complaint-warrant for an indictable crime or a disorderly persons offense committed while on release, and the new charge is subject to pretrial detention. (Memo, 5/31/17).

Then, with all the above, in determining whether detention is appropriate, a court may take into account the following six statutory factors: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the eligible defendant; (3) the history and characteristics of the eligible defendant; (4) the nature and seriousness of danger the defendant may pose to another person or the community if released; (5) the nature and seriousness of the risk that the defendant may obstruct or attempt to obstruct justice if released; and (6) the release recommendation of the Pretrial Services Program. N.J.S.A. 2A:162-20. A judge must consider a recommendation against release, and may rely "heavily" on it as part of the overall detention analysis. N.J.S.A. 2A:162-20f; Mercedes, 233 N.J. at 172. In fact, if a court declines to follow the recommendation, it is required to explain its reasoning. N.J.S.A. 2A:162-23a(2).

Against that extensive legal backdrop, movants now suggest substantial deviation from this carefully crafted structure as a matter of constitutional imperative. However, they do not argue that the delay of jury trials warrants release of every pretrial detainee. Instead, they ask this Court to rewrite the statute in a manner more consistent with advocacy for legislative choices, as opposed to judicial decision-making or remedy-creation.

For example, paragraph A of the proposed Order to Show Cause requests the release of 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, unless the State can demonstrate, 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 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. (CPANJa14-CPANJa16)

The proposal raises the standard of proof, for that identified subgroup who are detained longer than six months, from the current statutory standard of clear and convincing evidence, to beyond a reasonable doubt. (CPANJa14). This is contrary to the plain text of N.J.S.A. 2A:162-15 and 2A:162-18a.

Likewise, the proposal seems to suggest that the ascertainment of risk be viewed through "the dramatic changes to the speedy trial timeline occasioned by the pandemic." But this Court has cautioned that release decisions should not be premised upon considerations that fall outside the statutorily-identified risks in the CJRA. N.J.S.A. 2A:162-18a(1). See State v. Dickerson, 232 N.J. 2, 28 (2018) (release not a proper sanction for an alleged discovery violation); State v. Williams, 452 N.J. Super. 16, 21-22 (App. Div. 2017) (fact of pregnancy, without more, cannot be given undue weight in assessing risk factors).

So too, the OTSC PTD does not account for No Release Recommendations, and instead speaks only of the starting point of release presumptions. The existing DMF acts to identify defendants who may pose the risks identified by the CJRA to such an extent that pretrial detention is the only means to manage such risk.

The statute does not require "a serious and imminent risk" as now proposed by movants. N.J.S.A. 2A:162-19 speaks only of "serious risk." Cf. N.J.S.A. 9:6-8.32 (application to return child previously removed, a hearing shall be held and the child returned unless such return "presents an imminent risk to the child's life, safety, or health.")

Movants' proposal that the risk of failure to appear be accorded minimal weight is also in direct contradiction to

one of the central legislative policies made explicit by the Legislature when it enacted the CJRA. N.J.S.A. 2A:162-15 was enacted "to effectuate the purpose of primarily relying upon pretrial release by non-monetary means to reasonably assure an eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, and that the eligible defendant will comply with all conditions of release, while authorizing the court, upon motion of a prosecutor, to order pretrial detention of the eligible defendant when it finds clear and convincing evidence that no condition or combination of conditions can reasonably assure the effectuation of these goals." Id. (emphasis added).

Similarly, the risk assessment tool developed by the judiciary has a Failure to Appear (FTA) scale, which may result in a no release recommendation if the score is high enough. Failure to appear is not treated as an aside in the determination of pretrial detention, as movants now suggest. Flight risk is an independent consideration for a court to consider if the prosecution moves for pretrial detention for any crime or certain disorderly persons offenses involving domestic violence. See N.J.S.A. 2A:162-19a(7). Indeed, the risk of failure to appear can be the sole basis for detention.

A court has a compelling duty to ensure the appearance of an accused, and may do so in accord with constitutional principles. State v. Johnson, 61 N.J. 351, 363 (1972).

In State v. S.N., 231 N.J. 497 (2018), this Court analyzed whether sufficient evidence was present to support the hearing court's determination of pretrial detention, including evidence regarding the risk of flight. Although this Court found the evidence insufficient, it did not treat the category of flight risk differently than the risks to public safety or obstruction of justice in the evaluation of the validity of the pretrial detention order.

Paragraph B of the OTSC PTD is also an ill-advised request for this Court to create an entire layer of review for any detainee, as posed, who originally was entitled to a presumption of release, which would include first-degree offenders, and with no consideration for the amount of time detained. (CPANJa16-CPANJa17).

It must be noted that any defendant who may be subject to the OTSC PTD is no longer entitled to a presumption of release as the State has already carried its burden to overcome that presumption. Indeed, it is puzzling why the original statutory language regarding presumptions should be maintained for these newly-proposed hearings, but the standards of proof should be completely rewritten.

It must also be stressed that jury trials are merely delayed at this juncture. (Order 11/16/20). In-person jury trials had been authorized during the state of public health emergency, but subsequently it was deemed prudent by this Court to suspend them for a period of time. If this Court were to conclude its own Order resulting in the temporary suspension of jury trials rendered the CJRA unconstitutional as now offending due process, then it is unclear why every defendant should not be entitled to a remedy. As noted more fully below, the jurisprudential concepts of judicial surgery and constitutional avoidance cannot be the rampart to support the redrafting of the CJRA by judicial fiat unless secured to some constitutional violation.

The suggestion that the decisions should be reviewed by judges from a different county (and assuming vicinage) also does not withstand scrutiny. (CPANJa15). This presumed *en masse* disqualification of every county's judges finds no support in this Court's recusal jurisprudence. See State v. McCabe, 201 N.J. 34, 43-46 (2010).

Considerations of the constitutional doctrine of separation of powers further militate against a unilateral implementation of this Court's rulemaking powers to address the arguments proffered by the proposed OTSC PTD. The separation of powers clause of the Constitution directs that one branch of government cannot exercise powers that properly

belong to another. N.J. Const. Art. III, ¶ 1. It is intended to prevent the concentration of power in one branch at the expense of the other two co-equal branches. State v. Buckner, 223 N.J. 1, 37-38 (2015); In re P.L. 2001, Chapter 362, 186 N.J. 368, 378 (2006). Under the Constitution, no single branch can "claim[ ] or receiv[e] inordinate power." Buckner, 223 N.J. at 38. At the same time, the concept recognizes that the branches are interdependent, not watertight. The doctrine requires not an absolute division of power, "but a cooperative accommodation" among the three branches. Ibid. (citing Communications Workers of Am. v. Florio, 130 N.J. 439, 449 (1992)).

This Court has consistently identified its proper role when a party seeks a legislative rewrite. "A court may neither rewrite a plainly[ ]written enactment of the Legislature nor presume that the Legislature intended something other than that expressed by way of the plain language." O'Connell v. State, 171 N.J. 484, 488 (2002).

The CPANJ also notes that the Legislature has enacted over two dozen pieces of legislation since the issuance of EO 103 that concern a myriad of issues presented by the needed response of the government to the circumstances presented. See, e.g., P.L. 2020, c. 111 (public health emergency jail credits); P.L. 2020, c. 21 (changing Primary election date); P.L. 2020, c. 27 (allowing virtual or remote instruction by

the Department of Education); P.L. 2020, c. 18 (providing civil and criminal immunity for certain health care professionals); P.L. 2020, c. 12 (extending deadlines for adoption of county and municipal budgets). The Legislature has not enacted any legislation that would modify, alter, or amend the CJRA, and certainly not to the dramatic extent proposed here.

Significant consideration should be given to legislative choice in this particular arena as the Legislature has been given authority to enact procedures relevant to pretrial detention by a grant of constitutional power. N.J. Const. Art 1, ¶11. Thus, separation of powers principles strongly counsel against the extraordinary relief sought.

POINT II

DUE PROCESS IS NOT OFFENDED BY THIS COURT'S ORDER REQUIRING THE TEMPORARY SUSPENSION OF CRIMINAL JURY TRIALS RESULTING FROM A PUBLIC HEALTH EMERGENCY. (ADDRESSING MB-POINT I)

Movants' claim that the pretrial detention regime is rendered unconstitutional by the temporary suspension of jury trials is misplaced. (Mb10-Mb24). In that regard, it bodes well to remember that this Court has already held that the CJRA comports with due process. See, e.g., Robinson, 209 N.J. at 74-77; State v. Ingram, 230 N.J. 190, 207-212 (2017).

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. This Court has explained that Article I, paragraph 1 of the New Jersey Constitution does not enumerate the right to due process, but protects against injustice and, to that extent, protects the values encompassed by the principles of due process. Doe v. Poritz, 142 N.J. 1, 99 (1995).

Constitutional jurisprudence has evolved in such a manner that the concept of due process encompasses both "substantive due process" and "procedural due process". The requisite analysis is determined by which aspect is being examined.

"Substantive due process" is limited to those rights characterized as fundamental. Whether the font of authority is the Fourteenth Amendment or our State Constitution, substantive due process analysis requires a court to undertake a two-step process to determine whether a fundamental right exists. First, the asserted fundamental liberty interest must be clearly identified. Second, that liberty interest must be objectively and deeply rooted in the traditions, history, and conscience of the people of this State. Washington v. Glucksberg, 502 U.S. 702, 721 (1997). See also Lewis v. Harris, 188 N.J. 415, 435 (2006).

Pretrial detention does not violate substantive due process as it is considered a valid regulatory scheme which

does not constitute punishment. United States v. Salerno, 481 U.S. 739, 746-52 (1987); Ingram, 230 N.J. at 207-12.

With respect to "procedural due process," since it is conceded that a liberty interest exists, this Court must assess whether the procedures attendant upon that deprivation are constitutionally sufficient. Poritz, 142 N.J. at 99. A court applies a flexible test that calls for only those protections the particular situation demands when assessing what procedural due process may require. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); OTSC State Inmates, 242 N.J. at 386; State in Interest of D.G.W., 70 N.J. 488, 521 (1976).

The core principle of due process is notice and an opportunity to be heard. Poritz, 142 N.J. at 106. A defendant is accorded these rights during the initial detention determination.

Movants' arguments center on the time that pretrial detainees are awaiting trial, and the potential risk caused by exposure to COVID-19 in the penal environment. (Mb1). The claim itself cannot be adequately examined without reference to the excludable time provisions of the CJRA, and the legislative choices regarding particular timeframes engendered by the speedy trial provisions of the CJRA.

It is important to note that movants apparently do not rely upon constitutional speedy trial considerations that flow from either the Sixth Amendment or the Fourteenth

Amendment. This is understandable, but the conceded opportunity for a particular defendant to assert that his or her individual rights were violated by delay in a particular case is a strong counter to why the across-the-board remedy sought here would somehow be an appropriate and necessary exercise of this Court's authority.

The constitutional analysis - state and federal - recognizes a different test depending on whether one is reviewing pre-indictment delay, which requires examination under due process, or post-indictment delay, which falls within the protections of the Sixth Amendment and our state constitutional counterpart.

As the U.S. Supreme Court has held, "[t]he Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused'" – that is, upon indictment." United States v. Marion, 404 U.S. 307, 313 (1971). Thus, pre-indictment delay is assessed through a fact-specific due process analysis. Id. at 324-25.

Our courts have likewise recognized this important distinction. "Unlike analysis under the Sixth Amendment's Speedy Trial Clause, which involves a four-factor balancing test and under which prejudice to the defense is presumed from an unusually long delay between indictment and trial, claims under the Due Process Clause arising from undue pre-indictment or pre-arrest delay are measured by a far more

rigorous standard." State v. Aguirre, 287 N.J. Super. 128, 132 (App. Div.), certif. denied, 144 N.J. 585 (1996). A defendant must show the pre-indictment delay caused actual and substantial prejudice which endangered the right to a fair trial, as shown by concrete evidence of material harm. Id. at 133-34. See also State v. Alexander, 310 N.J. Super. 348, 355 (App. Div. 1998). To prevail, a defendant must show "both that (1) there was no legitimate reason for the delay and (2) [defendant] was prejudiced thereby." State v. Rodriguez, 112 N.J. Super. 513, 515 (App. Div. 1970); Aguirre, 287 N.J. Super. at 185.

The right to a speedy trial, as guaranteed by the Sixth Amendment, was made applicable to the states by the Due Process Clause of the Fourteenth Amendment. Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1967). This Court has held that the four-factor balancing analysis of Barker v. Wingo, 407 U.S. 514 (1972), is the governing state standard in all criminal and quasi-criminal matters. State v. Cahill, 213 N.J. 253, 258 (2013). Those four non-exclusive factors a court should assess when a defendant asserts that the government denied his right to a speedy trial are: length of the delay; reason for the delay; assertion of the right by a defendant; and prejudice to the defendant. Barker, 407 U.S. at 530; Cahill, 213 N.J. at 264.

From all the above, it follows that the global assertions put forth here regarding the ramifications of the public health emergency for detained defendants are not grounded in any arguments regarding actual prejudice to the right to a fair trial under Due Process, and do not address each of the four factors required to demonstrate a Sixth Amendment violation.[2]

Substantial deference to legislative judgments is appropriate in conducting due process analysis. Medina v. California, 505 U.S. 437, 445 (1992). To determine what federal protections are required when assessing a state criminal procedure rule, the Supreme Court has construed the federal due process clause narrowly, observing that, "[i]t goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government... and that [the Court] should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." Paterson v. New York, 432 U.S. 197, 201 (1977).

This Court has referred to the three-part balancing test first articulated in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), in some matters when it has considered claims regarding procedural due process. Poritz, 142 N.J. at 106-

[2] It would appear that the OPD could not offer case-specific defenses for non-indigent detained defendants. N.J.S.A. 2A:158A-5.

07. The U.S. Supreme Court has also used a general reasonableness test, in lieu of the Mathews test, in certain due process cases. See Dusenbery v. United States, 534 U.S. 161, 168 (2001).

However, this Court has applied the Mathews test to claims that might implicate a liberty interest under a state constitutional analysis. That test encompasses the following factors: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and 3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews, 424 U.S. at 335. See also Poritz, 142 N.J. at 106-07.

It is not necessary for the Court to determine in this case whether the Mathews test should continue as the sole basis for considering procedural due process claims in New Jersey. Movants fail to demonstrate under either a general reasonableness test, or the Mathews test, that a temporary delay of jury trials caused by the public health emergency renders pretrial detention illegal as mandated by either state or federal constitutional principles.

By framing the appropriate question, the contours that due process may require can be appropriately demarcated. As

this Court has recognized, any due process evaluation must accurately identify the nature of the inquiry. Here, it does not arise from any action of police or prosecutors in delaying the onset of a particular case. In fact, it stands to reason that the State is also prejudiced by trial delays as it complicates the manner in which the State may meet its burden of proving guilt beyond a reasonable doubt. See State v. Mitchell, 126 N.J. 565, 580 (1992).

As for factor one (the private interest at stake), it is not disputed that the defendants in question do indeed have a protectable liberty interest. The CPANJ acknowledges that this Court has identified a heightened liberty interest caused by the "widespread presence of COVID-19 in jail." OTSC State Inmates, 242 N.J. at 388. Yet the recognition of a heightened liberty interest neither ends the procedural due process analysis nor acts as the lever to mandate release to further that interest.

As to factor two (the risk of an erroneous deprivation and the probable value of additional or substitute safeguards), the original pretrial detention decision has been made in accordance with due process, with the full panoply of procedural guarantees. The request for new hearings flows entirely from concerns about this Court's Order delaying jury trials.

As for factor three, this Court must view pretrial detention in the context of its enacting legislation, and the manner in which it continues, as enacted.

According to a report issued by the Administrative Office of the Courts, as of October 31, 2020, there were 27,871 eligible defendants subject to an initial release decision in calendar year 2020, as opposed to 36,134 for the same period in 2019. Of those 2020 eligible defendants, 12,797 were subject to pretrial detention motions, of which 82.6% were eventually heard by a judge (10,571). 5,459, or 51.6% of those defendants, were ordered detained in the period of 1/1/20 to 10/30/20.

The number of detention motions denied totaled 5,112 (48.4%).[3] According to the same report, the number of detained defendants between 1/1/19 and 10/20/19 and the same period in 2020 dropped from the 2019 total of 7,152 to 5,459. Of particular note, the overall percentage of detention motions granted remained very similar. (51.9% to 51.6%).

According to eCourts, as of December 23, 2020, there were 5,558 eligible defendants subject to pretrial detention. Of those, 3,537 were pre-indictment, and 1,952 post-indictment. The highest charged degree of crime breakdown is

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[3] https://www.njcourts.gov/courts/assets/criminal/cjrreport2020.pdf?c=5QG (last accessed December 23, 2020).

first degree (2,002), second degree (1,944), third degree (1,302), fourth degree (299), and DP (41).[4]

It is certainly true that the Legislature enacted speedy trial provisions as part of the CJRA. And those provisions need to be assessed in any due process analysis, as the legislative choices are a profound expression of the Legislature's determination as to what constitutes sound, legal policy for New Jersey's pretrial detention regime.

If an eligible defendant is subject to detention prior to trial, the speedy trial requirements of N.J.S.A. 2A:162-22 govern the respective time frames in which an eligible defendant must be indicted and when trial must commence. The speedy trial requirements of N.J.S.A. 2A:162-22 apply only to those eligible defendants arrested on or after January 1, 2017. Thus, defendants who may be awaiting trial who are

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[4] The actual number of inmates may be slightly lower as the 5,558 number does not account for an eligible defendant detained on multiple cases within or without a county. That total is also far smaller than that which pre-existed the CJRA, where such populations over 2015 and 2016 consistently exceeded 8,000 and oftentimes went over 9,000 pretrial detainees. Criminal Justice Reform Report to the Governor and the Legislature for Calendar Year 2017, Glenn A. Grant, J.A.D., Acting Admin. Director of the Courts, at 20. It is also less than existed for the first year of CJRA. Ibid. See also Report of the Joint Committee on Criminal Justice (JCCJ Report), Mar. 10, 2014 at 28 (noting Dr. Van Nostrand's Jail Population Survey, involving a one-day "snapshot" of the county jail population for October 3, 2012, with 9,492 detainees awaiting trial in Superior or Municipal Court).

incarcerated for failure to make monetary bail that pre-existed the CJRA fall outside the proposed OTSC PTD.

Under the CJRA, if an eligible defendant is detained, the case must be indicted within ninety (90) days, not counting excludable time, as defined by the statute. N.J.S.A. 2A:162-22a(1)(a). A detained defendant shall be released unless commencement of trial occurs within one hundred and eighty (180) days, not counting excludable time, of the return or unsealing of an Indictment, whichever is later. N.J.S.A. 2A:162-22b(2)(a). Thus, the CJRA expressly allows a total of 270 days (both pre- and post-indictment) to theoretically elapse before its release provisions take effect.

"Commencement of trial" is defined as the time that a court determines the parties are present and directs them to proceed to *voir dire* or to opening argument. N.J.S.A. 2A:162-22b(1)(b)(2)(b)(i); R. 3:25-4(e). Commencement of trial also occurs if the Court directs the parties to the hearing on any motions that had been reserved for the time of trial. N.J.S.A. 2A:162-22b(1)(b)(2)(b)(i).

Importantly, the Legislature enacted N.J.S.A. 2A:162-22b(1)(f), which created an excludable time period for:

> The time resulting from exceptional circumstances including, but not limited to, a natural disaster, the unavoidable unavailability of an eligible defendant, material witness or other evidence, when there is a reasonable expectation that the eligible defendant, witness or evidence will become available in the near future. [Id. (Emphasis added)].

The CJRA also contains a catch-all excludable time period for good cause. N.J.S.A. 2A:162-22b(1)(l). That exception is to be narrowly construed. R. 3:25-4(i)(12).

The CJRA further provides that a defendant shall be released after a release hearing if, two years after the detention order, or two years after an eligible defendant is detained as a result of an inability to post monetary bail, absent delays attributable to the defendant, the prosecutor is not ready for trial or for hearings that had been reserved for trial. N.J.S.A. 2A:162-22a(2)(a); R. 3:25-4(d)(1). If the most serious offense a detainee is charged with is a fourth-degree crime, the maximum time for incarceration shall be eighteen (18) months. R. 3:25-4(d)(1), or for a disorderly persons offense involving domestic violence, six (6) months. R. 3:25-4(d)(1).

This Court exercised its proper constitutional authority to render a decision that the delays caused by the original cessation of in-person Grand Juries would be considered excludable time. This determination was made as to every detained defendant so there is no due process violation that any particular detainee suffered above any other. This again shows the staggered approach asserted by movants is more akin to an argument best made to the Legislature.

More telling, the Legislature has not adopted a strict temporal requirement for trials or indictments, which differs

markedly to the movants' six-month period as described in paragraph A. (CPANJa13). Instead, the statute creates periods of excludable time, including those statutory exemptions that would fit a situation like this public health emergency.

Significantly, the fact that the statute foresees the possibility of at least two years elapsing before the State announced readiness for trial is a strong indicator that the Legislature would not consider the nine months of the Public Health Emergency to be of such constitutional operative significance as to warrant wholesale scuttling of the CJRA's substantive provisions – provisions, it should be noted, that were enacted by the Legislature as a result of the state constitutional amendment which expressly granted that branch the power to fashion such procedural provisions in the CJRA. See N.J. Const. Art. I, ¶11.

To conclude, the legislative choice to precisely identify the parameters in which a pretrial detention hearing in New Jersey should be conducted, and the time frames as marked by the consideration of excludable time, are strong indicators that the circumstances of the public health emergency do not support, at this time, the potential release of possibly 1,000 defendants under Paragraph A of the OTSC PTD, and many more under Paragraph B, back into the relevant communities. These defendants have already been deemed to

pose a heightened risk. The remedies sought in the OTSC PTD must be denied.

POINT III

PRETRIAL DETENTION HAS NOT MORPHED INTO PUNISHMENT AS A RESULT OF THE TEMPORARY SUSPENSION OF CRIMINAL JURY TRIALS. (ADDRESSING MB-POINT I)

Movants allege that the delay in jury trials ordered by this Court has resulted in a due process violation by converting detention as duly ordered, pursuant to CJRA, into a punitive measure. Movants are wrong.

Since a pretrial detainee has a cognizable liberty interest, state and federal due process principles are potentially applicable. Federal courts recognize limits placed on detention by application of the Fifth Amendment's Due Process Clause.

"Because due process is a flexible concept, arbitrary lines should not be drawn regarding precisely when defendants adjudged to be flight risks or dangers to the community should be released pending trial." United States v. Accetturo, 783 F.2d 382, 388 (3d Cir. 1986).

As the Third Circuit has recognized:

> (D)ue process judgments should be made on the facts of individual cases, and should reflect the factors relevant in the initial detention decision, 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. Moreover, these

> judgments should reflect such additional factors as the length of the detention that has in fact occurred, the complexity of the case, and whether the strategy of one side or the other has added needlessly to that complexity. In some cases, the evidence admitted at the initial detention hearing, evaluated against the background of the duration of pretrial incarceration and the causes of that duration, may no longer justify detention. [Ibid.]

In order to determine whether the length of pretrial confinement violates due process, those courts "consider the strength of the evidence justifying detention, the government's responsibility for the delay in proceeding to trial, and the length of the detention itself." United States v. Briggs, 697 F.3d 98, 101 (2d Cir. 2012). The presence of those factors thus makes plain that "the length of detention alone is not dispositive." United States v. El-Hage, 213 F.3d 74, 79 (2d Cir. 2000).

It is also evident from the above standard that determination of any due process violation requires a case-specific analysis. Accetturo, 783 F.2d at 388. Thus, such a due process claim is particularly unsuitable for any across-the-board determination, as suggested by the proposed OTSC PTD.

The mere fact that pretrial detainees are held in custody is not dispositive of whether the length of continued incarceration violates due process. Anyawu v. Anyawu, 339 N.J. Super. 278, 290 (App. Div.), certif. denied, 170 N.J. 388 (2001)(discussing civil contempt power).

The risk of COVID-19 as a potential circumstance does not convert pretrial detention into a form of unconstitutional punishment. A claim regarding the confinement conditions for pretrial detainees is governed by due process principles and not the Eighth Amendment. Hubbard v. Taylor, 399 F.3d 150, 157-58 (3d Cir. 2008) (Hubbard I).

The substantive constitutional provision relating to conditions of confinement for the punishment of prisoners is the Eighth Amendment's cruel and unusual punishment clause, which applies to the States through the Due Process Clause of the Fourteenth Amendment, Robinson v. California, 370 U.S. 660, 666 (1962), and prohibits the infliction of "cruel and unusual punishments" on those convicted of crimes. The United States Supreme Court has acknowledged that the provision could be applied to some deprivations that were not specifically part of the sentence but were suffered during imprisonment. Wilson v. Seiter, 501 U.S. 294, 296-97 (1991).

An Eighth Amendment claim against a prison official must meet two requirements: (1) the deprivation alleged must be, objectively, sufficiently serious, and (2) the official must have a sufficiently culpable state of mind that rises to a level of deliberate indifference. Farmer v. Brennan, 511 U.S. 825, 834 (1994). In the Eighth Amendment context "deliberate indifference" is "a subjective standard of liability consistent with recklessness as that term is defined in

criminal law." Nicini v. Morra, 212 F.3d 798, 811 (3d Cir. 2000) (en banc). To find a constitutional violation relating to prison conditions, "[i]t is not enough merely to find that a reasonable person would have known, or that the defendant should have known. . . ." Farmer, 511 U.S. at 843 n.8.

The CPANJ recognizes that a county prosecutor would not be subject to any civil liability as it related to such an Eighth Amendment cause of action. We only note that consideration of allegations of jail or prison conditions may provide an individual inmate other potential avenues of fact-specific relief outside the context of this proposed generally-applicable order to show cause.

Under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. Bell v. Wolfish, 441 U.S. 520, 531 (1979). In order to determine whether the challenged conditions of pre-trial confinement amount to punishment, the Third Circuit has stated:

> [A] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of the detention facility officials, that determination generally will turn on whether [it has] an alternative purpose ... and whether it appears excessive in relation to [that] purpose.... Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate

> goal—if it is arbitrary or purposeless—a court may permissibly infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.
>
> [(Hubbard I), 399 F.3d at 158 (Internal citations omitted), citing Wolfish].

It is evident that the purpose of this Court's Order to temporarily delay jury trials was not "imposed for the purpose of punishment." And, of course, through each underlying detention decision, a court already has determined that "pretrial detention is reasonably related to a legitimate governmental objective."

Likewise, judicial surgery is not an appropriate judicial remedy in this case, contrary to movants' request. First, there is no constitutional doubt to the validity of the CJRA, unless this Court determines its own Order might violate due process. The most obvious way to remove constitutional doubt would be to allow for in-person jury trials, as opposed to the potential release of 1,000 defendants who have been determined by judges to present otherwise unmanageable risks to the community.

Pursuant to N.J.S.A. 1:1-10, a court has the power to declare a portion of a statute unconstitutional, while leaving the remainder of the law intact. A court may engage in judicial surgery to free a statute from constitutional doubt by its construction. State v. Grate, 220 N.J. 317, 335 (2015). A court has the power to engage in judicial surgery, or to narrow construction of a statute, to free it from

constitutional doubt or defect. Ibid. This Court will sever a statutory provision "where the invalid portion is independent and the remaining portion forms a complete act within itself." Inganamort v. Borough of Fort Lee, 72 N.J. 412, 423 (1977).

Such measures are not needed. The Legislature enacted a statute that allowed for excludable time caused by events extrinsic to the prosecution, including natural disasters. The delay in jury trials here is entirely engendered by a public health emergency.

It must also be stressed that the situation at the end of 2020 is dramatically different from when EO 103 was issued, or when this Court issued its first Omnibus Order as a result of COVID-19. Virtual court proceedings occur daily. Virtual Grand Juries have been empaneled. And significantly (but finds no mention in movants' brief), vaccinations have begun in New Jersey, with incarcerated inmates among those slated for priority as Phase 1 recipients.[5] Social distancing measures are well-known and have become part of the zeitgeist. Through it all, the Legislature has not acted to amend the CJRA. That inaction should be a klaxon that signals the Legislature would not want this Court to rewrite the CJRA as movants request.

[5]https://www.nj.gov/health/cd/documents/topics/NCOV/PriorityGroups_English.pdf (last accessed December 26, 2020).

To the extent movants reference the March 22, 2020 Consent Order, the CPANJ notes that the pandemic is a constantly evolving circumstance with new insights and developments occurring daily, if not more frequently. In March, the COVID-19 impact on the United States, and New Jersey in particular, had just begun. At that time, it was uncertain what the future would hold, as the situation was entirely unprecedented and so little was known scientifically and medically about the virus. In an effort to "flatten the curve" and stem the tide of COVID-19, the parties agreed to the release of non-violent offenders serving county jail terms as a condition of probation; as the result of a municipal conviction; as the result of resentencing from a violation of probation; or as a result of a sentence for a fourth-degree crime, disorderly persons conviction or petty disorderly persons offense in Superior Court. See OTSC County Inmates, 240 N.J. at 404.

The inmates released under the Consent Order were, by definition, non-violent, low-level offenders who had already served portions of their custodial sentences, and are expected to resume the imposed sentence once the public health emergency subsides. Of the estimated 1,000 eligible inmates housed in the county jails statewide, county prosecutors objected to release in only 260 cases. By contrast, the category of prisoners movants seek to reach through the

proposed order to show cause have been determined to place the community at risk. They stand in an entirely different posture.

In light of the above, movants cannot demonstrate that continued detention under duly-entered orders imposed under the regulatory framework of the CJRA constitutes punishment, simply because this Court has acted with due caution in temporarily suspending jury trials. Thus, their application must be denied.

POINT IV

MOVANTS' PROPOSED REMEDY IS UNWORKABLE, UNNECESSARY AND IS BAD PUBLIC POLICY.

(ADDRESSING MB-POINT I and POINT II)

A. Courts Can Only Incarcerate Defendants Pretrial Following a Rigorous Process Unique to Each Defendant.

Movants' request calls not only for bad law, but bad public policy this Court must reject. These normative arguments derive naturally and unavoidably from the legal arguments above. From the start, movants' brief mischaracterizes the process by which defendants are detained pretrial and ignores the precise mechanisms in place to make that determination. Detention under the CJRA is by no means the "fait accompli" movants disparage.

Indeed, far from a "one-way ratchet, whereby people get arrested, booked, and ordered detained in jails but have no reasonable prospect of release" (Mb1), the CJRA demands a

rigorous appraisal of each defendant's background and circumstances before confinement can be ordered. As noted, this appraisal begins at arrest with the entry of objective criteria into the PSA platform. Enumerated criteria are objectively processed, with mathematical rigor, to identify objective determinations of the risk that a defendant will fail to appear or reoffend. The DMF also indicates whether an objective offender-based risk that new violent criminal activity might be committed exists for a particular defendant. The PSA algorithm then produces a score, and in concert with the objective risk factors identified by the judicial DMF, a recommendation is made based on the data provided, spanning from "Release on Own Recognizance" to "No Release Recommended" with varying levels of pre-trial monitoring between.

However, the determination is not simply mathematical, and PSA findings do not substitute for individual judicial-decision making. They are recommendations. Following a determination of a defendant's risk, a court then follows the Decision Making Framework, which guides it through a specific formula that also relies on facts pertinent to the defendant in question. The Court must consider arguments made by defense counsel. From all of this, it follows that it is difficult under the CJRA to be detained pre-trial; any notion to the contrary is belied by law and fact.

Indeed, as noted above, the opposite is true. The AOC's own data demonstrates that approximately only 20% of defendants charged between January 1 and October 31, 2020, have been detained. Further, in that same period for 2020, only 51% of the State's detention motions were granted - making it apparent that courts are, sua sponte, exercising restraint in detaining defendants during the pandemic.

The sensitivity - and specificity - of this process is critical for two reasons: 1) movants' illustration of pre-trial detention as an irreversible certainty is fallacious; and 2) those being housed under CJRA are no longer those who simply cannot afford release but those objectively, and then judicially, were determined to be either an unmanageable risk of flight or a danger to their community.

B. Movants Rely on a False Assumption That County Jails Cannot Protect Inmates From Infection; The Proposal Provides No System for Monitoring Compliance, Health or Safety of Releasees; Jails Are Provably Safer.

Executive Order 124 was signed by Governor Murphy on April 10, 2020. It provided for the review and potential release of inmates who were then housed in State Correctional Facilities. It allowed the Department of Corrections, cooperatively with the State's various law enforcement agencies, to survey potentially vulnerable inmates and make recommendations regarding their suitability to be placed on temporary home confinement.

In making that determination, EO 124 demanded that reviewing bodies consider the following: 1) whether a plan exists to supervise the inmate while on home confinement; 2) whether the inmate would have access to appropriate medical and social services; 3) whether the inmate would have access to appropriate housing; and 4) whether the inmate has a lower risk of contracting COVID-19 in the community than in DOC custody.

Movants' request is not so thoughtful: it demands the across-the-board release of defendants already determined to be unreliable or dangerous while offering no supervisory system or structure. It provides no workable, functional method as to the manner in which the Pretrial Services Program might monitor these defendants, nor any sureties for securing future appearances.

In addition, while movants provide the COVID-19 pandemic as a reason to release these inmates, movants make no efforts to review, nor any arrangements to ensure, that those released will be any safer out of jail than within. Put plainly, movants' strategy is release now, plan later. This is the sort of haste our Courts are designed to restrain, and here must restrain.

Equally unsupported is movants' analysis of the actual threat posed by COVID-19 to those housed in our county jails. As of December 23, 2020, 9,847 active inmates were are being

held in county correctional facilities, either pretrial or serving a sentence of some sort. (CPANJa12; Certification of SDAG/Acting Assistant Prosecutor Jessica Marshall (CPANJa7-8)).

As of December 23, 2020, results of a survey requested by CPANJ of the county correctional facilities, revealed that 160 inmates had been reported, as of the date of the survey response, which varied as to each county's reporting date. While it is difficult to obtain a snapshot at a singular moment in time due to the fluctuation of the daily data, this amounts to just 1.6% of the jail population as reported; hardly sufficient to force an exodus of this size and complexity. (CPANJa1-CPANJa6; Certification of First Assistant Prosecutor (Warren County) Anthony Robinson).

Further, with the advent of COVID-19 vaccines, this risk is expected to be considerably reduced: as discussed above, the at-risk populations within the jails are to be among the first to receive inoculation - a priority status shared by only 7% of the state's overall population.

As evidenced in the Wardens' Certifications and other supporting submissions, outside contact is limited or restricted entirely, employees and inmates are screened, and quarantines enforced. Inmates have 24/7 access to healthcare and fully-equipped medical facilities, and movants have not relied upon an argument that the county jails are not

providing adequate care for any inmate who contracts COVID-19. These preparations have resulted in several of our county detention facilities reporting zero (0) infections among inmates.

The data below[6] may provide confident assurance that the safety of inmates from COVID-19 is far more secure than movants allege:

Atlantic: 0 of 573 inmates; 0%

Bergen: 2 of 530 inmates; .03%

Burlington: 7 of 378 inmates; 2%

Camden: 7 of 1154 inmates; .06%

Cape May: 0 of 195 inmates; 0%

Cumberland: 50 of 285 total inmates; 18%

Essex: 30 of 2,358 total inmates; 1%

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[6] The numbers are based on submissions and certifications provided by the various County Jails as to the state of the facility on the date of the submission of the results of the survey, so these numbers are not offered as a total for any particular day. The number represents the known number of infected inmates who became infected in the facility during their incarceration as of the reporting. See Certification of FAP Anthony J. Robinson, Esq. (CPANJa1; CPANJa19-CPANJa32). The CPANJ recognizes, as all the parties do, that the actual numbers fluctuate on a daily basis. For example, after the completion of the survey, media reports indicate that Hudson County may now have a higher number of inmates (17) as of December 24, 2020, than reported on December 23, 2020. However, the percentage change rendered by these increases is minimal when compared to the entire county jail population. The data certainly allows this Court a basis to conclude the measures taken by the correctional facilities allow for the control and close monitoring of the inmate population, as best that one could expect within the realities and risks that the virus presents.

Gloucester: (Jail closed; inmates lodged in Salem)

Hudson: 9 of 908 total inmates; 1%

Hunterdon: (Jail closed; inmates lodged in Warren)

Mercer: 3 of 424 total inmates; .07%

Middlesex: 13 of 407 total inmates; 3%

Monmouth: 16 of 414 total inmates; 4%

Morris: 0 of 181 total inmates; 0%

Ocean: Not reported in response to survey.

Passaic: 10 of 648 total inmates; 2%

Salem: 4 of 153 total inmates: 2.6%

Somerset: 0 of 122 total inmates; 0%

Sussex: (Jail closed; inmates lodged in Morris)

Union: 9 of 431 total inmates; 2%

Warren: 0 of 85 total inmates; 0%

Total: 160 cases out of 9,868 current inmates: 1.6%

The question must be asked: how can a controlled environment that is given priority status for vaccinations and provides access to healthcare present a demonstrably greater risk to inmate health than release? If the health and safety of inmate populations was truly a concern, movants would give more thought to the benefits of seeking removal from environments that are empirically safer than they allege.[7]

[7] Movants paint a misleading, alarmist picture in their brief when citing statistics of deaths in New Jersey prisons (as opposed to county jails) from the outset of the pandemic. The vast majority of inmate deaths from COVID-19 in New Jersey occurred during the first three months of the pandemic. According to the Marshall Project (movants' source for its statistics), there has not been a death of an inmate in a New Jersey prison since September 22, and there have been three

Even if it were otherwise, there is no equivalency from county to county. If one county was hypothetically experiencing an unmanageable outbreak of COVID-19 cases among its inmates, the remedy would not be to release all inmates held in every other county.

Certainly, if the sort of danger movants suggest exists in the jail system actually existed, movants would jump to make such an argument. However, the data does not support it and such a claim could not be sustained.

Logistically, movants seek to shift the burden of managing the welfare of these inmates from county detention facilities (which are designed, equipped and staffed for that purpose) to the counties' Pre-Trial Services which are not. Inexorably, the result of release will strain pre-trial services beyond operational capacity, multiplying the odds that defendants will (once again in many instances) fail to abide by their release conditions, needlessly endangering their communities and interfering with the administration of justice. It must again be reiterated that these defendants have already been found to be either dangerous or unreliable - thus putting the safety of case workers and the public itself at risk.

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(3) inmate deaths from COVID since the beginning of July. https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons#prisoner-deaths. (last accessed December 29, 2020).

As of December 23, 2020, according to data on eCourts, 3,586 defendants are detained in county jails pre-trial for second-degree charges and lower. Of that number, 1,333 have been in custody for six months or longer. (CPANJa10). Movants are therefore asking this court to potentially release thousands of inmates who have already had the benefit of a detention hearing and have been found to present an intolerable risk if released.

This Court must not view movants' request in the abstract, as an academic exercise of the Court's interpretative function. Movants are asking this Court to release thousands of defendants who have a proven history of ignoring court orders by failing to appear or an equally troubling penchant for endangering their communities. Public safety must factor into this Court's analysis.

To ask that these individuals be released on what is effectively "the honor system" is irresponsible and disproportionate to the alleged harm as a result from a judicially-ordered delay in jury trials.

C. Movants' Request is Overbroad and Asks this Court to Release Inmates Using a Different Standard Than That Used to Detain Them.

Movants request the release of defendants in Paragraph A of the OTSC PTD that fall into two broad and legally-irrelevant categories: 1) those whose most serious offense is of the second degree; and 2) those who have been incarcerated

for 180 days or longer. With respect to the former, the detention decision-making process does not consider only the degree of offense, for good reason. Degrees are broad, statutory determinations of severity. By contrast, the CJRA analysis is more granular to each defendant and also incorporates that defendant's past, related behaviors as they pertain to the objective determination of the risks of flight or new criminal activity if released. The degree of the present crime is but one factor. Movants' logic for release is incongruous to that which authorized detention.

And as noted, in the present cases, the defendants encompassed by movants' request have already been determined, by a competent court, to represent either an intolerable risk to their communities or an unwillingness to abide by court orders as seen through a history of flight. During those hearings, defendants were afforded every opportunity to demonstrate otherwise, as well as the right to appeal the decision to detain them.

In order for these defendants to have been detained therefore, they must represent the sort of danger that cannot be adequately expressed by mere reference to the label or legislative classification of the degree of the crime alleged to be committed. To then demand their release based on that single component is legally dissonant and defies the purpose of the CJRA. After all, Shoplifting, N.J.S.A. 2C:20-11c(1),

can be of the second degree, as can Sexual Assault, N.J.S.A. 2C:14-2. To treat those charged with these crimes similarly based only on an equal degree of offense is irrational. It could not be used solely as a means to detain, and therefore cannot be used as a means for release. Parity is imperative.

Using six months as a touchstone is similarly problematic.[8] While N.J.S.A. 2A:162-22 mentions a 180-day cap on pretrial detention following indictment (to say nothing of the additional 90 days permitted before indictment), that number is itself flexible based on excludable time not attributable to the State. Further, the CJRA allows for defendants to remain detained upwards of two years or more. N.J.S.A. 2A:162-22. However, that period is not rigid either. Indeed, the only mechanism by which a defendant could be released is upon demonstration that the State is unprepared to advance to trial or to outstanding motions. Movants have made no showing that the State, in any single case now suggested for release, is unprepared or unwilling to proceed.

Despite that fact, two exceptionable demands are made: 1) Movants ask this Court to set a lower duration on a defendant's maximum incarceration than the Legislature specified in the CJRA; and 2) they ask this Court to ignore the CJRA's statutory text regarding necessary judicial findings before release may be granted.

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[8] Not every six-month calendar period totals 180 days.

Indeed, movants ask not for "judicial surgery" but a broad policy-level rewrite of the law contrary to all notions of separation of powers; it would create an unmanageable load for pretrial services and needlessly risk nonappearance, or potential increased risk of harm to victims and communities.

D. A Mechanism For Revisiting the Propriety of Detention Already Exists; Movants Seek to Impose an Ersatz Exception to Policy That Does Not Constitute "New Information" as Contemplated by the CJRA.

Movants not only ask this Court to circumvent the CJRA, but the very rules of court themselves. Rule 3:4A regulates the pretrial detention process. Subsection (b)(3) of that Rule provides:

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

This rule provides the mechanism for relief movants seek- an opportunity to reopen detention proceedings. However, fully cognizant that those targeted by the OTSC PTD are no less liable to flee or reoffend, movants request that this Court ignore the rule altogether.

The language of the rule prescribes specific and finite categories of information courts should consider when

deciding to entertain renewed arguments for release. Once again, there is no mention of any circumstance not related to assuring a defendant's appearance in court, the safety of the victim and community or protecting the criminal justice process.

This makes sense. The standard applied to the initial detention of a defendant should only be disturbed when there is evidence that alters that very same equation. The statistics cited by movants that only 33 motions to re-open detention have been granted among 550 motions filed, rather than signifying that the system somehow is broken, instead reaffirm this principle. Yet, movants ask this Court to ignore its own rules and to consider factors not contemplated by the Legislature or the courts when the CJRA was implemented.

While neither entity may have foreseen the current public health crisis, it matters little: whether or not such a state of emergency exists is not material to whether a defendant can safely be released pending trial. Indeed, defendants with the sort of criminal histories necessary to earn pretrial detention are not likely to begin obeying conditions of release because of a public health emergency. Trial court determinations to incarcerate these defendants are firmly rooted in fact and must not be disrupted absent a showing that changes those same facts.

E. The Court Cannot Prevent the State From Proceeding to Trial And Then Invoke a Remedy Reserved Only for When the State Is Not Prepared for Trial; An Appropriate Resolution is Immediately Available to This Court and Falls Within the Court's Prerogative.

The delays experienced by the trial system are not attributable to the State and therefore cannot provide the sort of relief requested by movants. From the First Omnibus Order to the Ninth, this Court has deemed it necessary to suspend jury trials because of an ongoing public health crisis. Under N.J.S.A. 2A:162-22, however, delays - of any length - not resulting from State action (or inaction) cannot prompt the release of a defendant held pretrial.

It cannot be, then, that the Court makes impossible that which must occur to justify continued detention, that is, the trial, and then hold the absence of that trial against the State. The CJRA properly holds the State accountable for needless delays. But the Court should not penalize the State or jeopardize public safety when the State is not at fault. Ordering the sort of relief requested by movants would achieve just that effect and lead to three tangible and worrisome outcomes.

The first would witness the release of a huge number of defendants contrary to the provisions of law and without a finding that the State unnecessarily delayed prosecution. Indeed, despite the State having done everything it was bound by law to do, these defendants would nevertheless be released.

The second concern would ratify the notion that an arbitrary amount of time in county jail makes these defendants less liable to flee or any less dangerous to their communities. This is in contravention not only of common sense, but judicial determinations to the contrary. It is imperative to remember that those currently detained pretrial are there for a reason: a demonstrated propensity to flout court authority and/or commit new offenses and create new victims.

In the same vein, the third concern would have this Court potentially upend over a thousand rulings made by competent, locally-seated and fully-informed trial courts that determined that the risks posed by releasing these defendants were unacceptable.

It is inappropriate, however, to denounce one proposed remedy without acknowledging the potential for another. The power to rectify these delays can be achieved by ordering the revival of jury trials with appropriate safety protocols if the Court were to conclude due process may be offended. Defendants can be moved through the trial system and any delays actually attributable to the State can be appropriately calculated and redressed.

Moreover, this Court would not be alone in recognizing the unique role of the justice system. Executive Order 192, enacted on October 28, 2020, specifically exempts the courts

from the otherwise universal restrictions on employment operations. Executive Order 192 provides, in pertinent part:

> The provisions included in Paragraph 1 of (EO 192) do not apply when they interfere with the discharge of the operational duties of...court personnel...[.] [Executive Order 192 (Murphy)(October 28, 2020].

The "operational duties" of court personnel incorporates the trial of cases. Movants' have raised a challenge that the present restrictions derivative of COVID-19 interfere with the discharge of those very same duties to a level of a constitutional violation. However, by Executive Order, those restrictions do not pertain to the judiciary when they become intrusive. If Movants' concern springs from the inability to host trials, the cure is to simply resume those trials; the Court is not overextending by availing itself of this exception.

The cost of Movants' proposed reformation would break the judiciary, endanger our communities, and jeopardize the integrity of the criminal justice system. The State's solution invites no such hardship. It ensures that these defendants are given their day in court and can, with a reasonable degree of accommodation, do so within the existing functional capacity of the system. No more is asked and no more is necessary.

The Ninth Omnibus Order of October 8, 2020, provided for the reinstatement of in-person Grand Jury presentations at off-site, non-Judiciary locations:

> (f) County Prosecutors also may submit a proposal to conduct grand jury sessions in a non-judiciary location where (a) there is no reasonable or sufficient Judiciary location available or (b) use of Judiciary facilities would reduce capacity for handling jury trials or other court proceedings. Consistent with those criteria, it is expected that Bergen, Burlington, Camden, Cumberland, Essex, Gloucester, Hunterdon, Morris, Passaic, Salem, Sussex, and Warren Counties may pursue use of non-court locations for grand jury meetings. Any proposal to convene an in-person grand jury panel in a non-Judiciary location must be approved by the Assignment Judge and the Administrative Director of the Courts[.]

There is no reason that similar arrangements could not be made to host petit jury trials. A site capable of hosting 23 grand jurors, counsel, and a witness, should be expected to be able to sustain 14 to 16 jurors, counsel, judge, and witness. Jury selection, as currently ordered by this Court, may be performed remotely and courtrooms can be arranged to accommodate whatever social distance restrictions are prudent, while protecting the right to a public trial.

Release is not the appropriate response to delays that can be rectified with logistics. Moreover, onsite court facilities that can safely accommodate all trial participants also exist, as this Court's prior order allowing for in-court socially-distanced jury trials recognized.

This Court should, in this case, invoke its characteristic caution; to achieve the most productive result with the least disruption to legislative purpose and judicial operation. Movants' attempts to the contrary must be rejected: wholesale upheaval of the pre-trial detention system cannot be justified and must not be allowed.

CONCLUSION

For all the reasons stated above, the County Prosecutors Association of New Jersey (CPANJ) respectfully requests that this Court DENY in its entirety the application to issue an Order to Show Cause entitled In the Matter of the Request to Release Certain Pretrial Detainees.

Respectfully submitted,

ESTHER SUAREZ, HUDSON COUNTY PROSECUTOR
PRESIDENT
COUNTY PROSECUTORS ASSOCIATION OF NEW JERSEY
/s/ Hudson County Prosecutor Esther Suarez

By: /s/ John McNamara, Jr.

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Attorney ID Number: 308312019

DATED: December 30, 2020

(STATE OF NEW JERSEY

COUNTY OF WARREN)

CERTIFICATION OF

ANTHONY J. ROBINSON, ESQ.
(Atty. ID# 059632013)

I, Anthony J. Robinson, Esq., being of full age, certify as follows:

1. I am an attorney-at-law in the State of New Jersey and have been so licensed since 2013.

2. I currently serve as the First Assistant Prosecutor for the Warren County Prosecutor's Office and have held that post since October, 2020.

3. On December 18, 2020, I was tasked by the County Prosecutor's Association of New Jersey ("CPANJ") with authoring a portion of the brief now before this Court.

4. As part of that assignment, I requested that CPANJ obtain data from the County Correctional Facilities relevant to inmate population and the COVID-19/coronavirus infection rates therein.

5. As a result, I received a spreadsheet from representatives of CPANJ which provided various statistics including how many inmates were housed in a particular facility, how many inmates had tested positive for COVID-19, and how many were presently infected. This spreadsheet is attached as Exhibit A. Gloucester County is not included on the spreadsheet because its numbers are merged with Salem County's. Ocean County has not reported. The number for Essex County was obtained from a certification of that jail's Warden, Alfaro Ortiz, dated October 28, 2020. Attached as Exhibit B.

6. The numbers I relied upon in supporting the brief now before this Court included the numbers of currently infected inmates that were, to the best of my knowledge, infected after being admitted into a County Correctional Facility.

7. Inmates that were discovered to be infected prior to their admission into a County Correctional Facility are not represented in the data included in the brief.

8. I certify that the foregoing statements by me are true. I am aware that if any of the foregoing statements by me are willfully false, I am subject to punishment.

/s/ Anthony J. Robinson

Dated: December 23, 2020

Anthony J. Robinson, Esq.
First Assistant Prosecutor
Warren County

CPANJa 1

EXHIBIT A (1)

	Atlantic County	Bergen County	Burlington County	Camden County
Total Inmates	551	530	340	124
Inmate Covid-19 Positives	3	19	7	
Total Staff	251			
Staff Covid-19 Positives	26	47	20	
Notes:	All 3 inmates who contracted COVID did so prior to September and were all new commitments - one from Ancora. **No inmate contracted COVID in this facility.** Of 26 infected Staff Members - 23 contracted Covid prior to September - 3 were infected after September.	Of postive inmate tests - 7 were ICE detainees, 12 were county detainees. There are currently one ICE detainee and one inmate who are positive for Covid housed in the facility. Of the 47 positive staff members - 34 have returned to work. Remaining are not currently working within the facility. A total of 1721 tests have been administered	Before 12/1 there were zero positive inmate cases. Staff numbers are accurate since Sept. Note that of the 20 positives, 11 are since the Thanksgiving holiday. Update/clarification as of 12/21: total of 7 positive inmates since September 1; 20 positive CO's since September 1.	May 2020 thru December 17 - 124 inmates tested positive. On 11/3/2020 796 inmates were tested - 17 were positive. Since December 4th 142 inmates were tested. 7 were postivive. These numbers include all admissions, State transfers and county transfers.

CPANJ 2

12/22/2020

CPANJ 2

EXHIBIT A (2)

Cape May County	Cumberland County		Essex County	Gloucester County
195		Total Inmates		
3	51	Inmate Covid-19 Positives		
93		Total Staff		
5	34	Staff Covid-19 Positives		
Of the 3 positive inmates - 1 was prior to September. He did not have COVID when arrested but contracted it while on 48 hour furlough. The 2 inmates who contracted post September were both new arrests. **No inmate contacted COVID in this facility.** Of the 5 Staff positives - all were after September.	First waive (March 2020) 1 inmate and 14 staff members tested positive. Second waive (October 2020) 50 inmates and 20 staff members tested positive.	Notes:		

CPANJa 3

CPANJa 3

Exhibit A (3)

Hudson County	Hunterdon and Warren Counties	Mercer County	Middlesex County	
863	90-95	376		Total Inmates
56	0	5	65	Inmate Covid-19 Positives
341	89	204		Total Staff
123	8	44	19	Staff Covid-19 Positives
Of Inmate positives: 44 were proir to September. 12 inmates contracted COVID since September and all were new arrests. That's **1.3% of the total number of inmates and ALL were new arrests** - meaning they did not contract COVID in the facility. Of the Staff positives: 114 contacted prior to September. 9 contracted since Septmeber. **That's 2.6% of the total number of correctional officers.** **percentages were calculated using post September numbers only.	Numbers are from March 2020 - current date. **No inmate has tested postive for COVID.**	5 inmates have had COVID since 6/26. 2 of the 5 were discharged. 2 of the 5 were new commitments. Of Staff postives: 36 were before September. 8 were reported after. 3 of were civilian employees.	Numbers above are total cases from May to present. There are currently 13 inmate cases of COVID and 8 Staff members with COVID.	Notes:

CPANJ v. 4

CPANJ v. 4

Exhibit A (4)

Monmouth County	Morris and Sussex Counties	Ocean County	Passaic County	Salem County
420				331
19	19		86	4
308				201
37	35		75	13
Of the 19 postive COVID cases, 3 were prior to September - the remaining 16 were since September. Of the 37 postitive staff cases, 14 were prior to September - the remaining 20 were since September.	First Staff Positive was March 22. First inmate March 24. 3/22-6/15 Staff 30 positives (all cleared and back to work by 5/16) Inmates 19 positives (all covid restrictions lifted for them by 6/15) 5/15 - 11/12 Staff had ZERO positives. 11/12 - 12/8 - Staff had 5 positives (4 returned to work - 1 on quarentine) **There have been ZERO inmates test positive since those who were cleared on 6/15.**		Totals: 86 – inmates with positive results 740 – inmates with negative results 75 – staff with positive results 147 – staff out due to Covid-19 As of 12/22/20: 10 – Covid-19 Positive inmates (These 10 have been retested and waiting for hopefully negative results) 25 – Covid-19 Positive staff 10 – inmates in medical quarantine waiting on test results 10 – inmates in medical isolation	Of the 4 positive inmates - 2 have been released. All 4 were new commitments. **No inmate contracted COVID in facility.** There are 4 Staff tests pending results as of 12/10

CPANJ a 5

CPANJ a 5

EXHIBIT A (5)

Somerset County		Union County
96	Total Inmates	see notes below
	Inmate Covid-19 Positives	
	Total Staff	
	Staff Covid-19 Positives	
There are currently no COVID positive inmates in the county jail.	Notes:	Inmate stats: May: 25 out of 232 inmates June: 0 July: 0 August: 0 September: 0 October: 2 out of 265 inmates November 16th: 4 out of 264 inmates November 30th: 4 out of 255 inmates December 14th: 9 out of 274 inmates **The Union County Jail's COVID-19 positivity rate ranges between 1.5% and 1.75%, which is lower than many metropolitan areas.**

CPANJ 2 6

CPANJ 2 6

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SUPREME COURT OF NEW JERSEY
085186

ORDER TO SHOW CAUSE

In the Matter of the
Request to Release
Certain Pretrial Detainees

CERTIFICATION

I, JESSICA L. MARSHALL, ESQ., do hereby certify:

1. I am a Special Deputy Attorney General/Acting Assistant Prosecutor with the Morris County Prosecutor's Office, assigned to handle this matter.

2. On December 23, 2020, I downloaded via the eCourts Open Cases function, individual spreadsheets listing all speedy trial cases involving active non-fugitive, detained defendants for each of the 21 counties, each sorted by highest degree charged. Using the data contained therein, I calculated the total number of matters with First-, Second-, Third-, and Fourth-degree offenses and disorderly persons offenses for each county respectively.

CPANJ a7

3. On December 23, 2020, I then used the data outlined above to calculate the total number of matters in each county involving a defendant who: (1) is charged with a Second-, Third-, or Fourth-degree crime, or a disorderly persons offense; and (2) has a commitment date on or before June 30, 2020.

4. On December 23, 2020, I accessed via the Administrative Office of the Courts Mainframe database the County Correctional Information System (CCIS) and utilized the Active Inmate Population function to obtain the total number of inmates in each county correctional facility.

5. I certify that the foregoing statements made by me are true. I know that if any of these statements are willfully false, I am subject to punishment.

JESSICA L. MARSHALL, ESQ.
Acting Assistant Prosecutor
Morris County Prosecutor's Office
(#308312019)
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Date: 12/23/2020

CPANJ 8

	1st	2nd	3rd	4th	DP	TOTAL	Pre-Ind.	Post-Ind.	Max Term	2 Year	120-Day	TOTAL
Atlantic	142	153	72	13	5	385	180	200	0	5	0	385
Bergen	75	49	27	6	0	157	53	101	1	0	2	157
Burlington	56	79	87	12	5	239	196	40	0	2	1	239
Camden	209	205	117	21	0	552	356	187	1	6	2	552
Cape May	30	39	41	8	0	118	52	62	1	3	0	118
Cumberland	80	76	59	12	3	230	85	139	1	5	0	230
Essex	322	459	269	81	16	1,147	768	363	7	5	4	1,147
Gloucester	44	39	33	19	0	135	98	37	0	0	0	135
Hudson	231	156	208	44	4	643	438	201	0	2	2	643
Hunterdon	5	8	7	1	0	21	16	4	1	0	0	21
Mercer	161	72	27	5	0	265	184	75	0	6	0	265
Middlesex	72	74	33	17	0	196	76	118	2	0	0	196
Monmouth	101	72	47	8	1	229	168	59	0	2	0	229
Morris	23	34	20	5	1	83	50	31	1	1	0	83
Ocean	51	44	63	17	2	177	143	33	0	1	0	177
Passaic	189	170	68	7	0	434	292	137	0	1	4	434
Salem	35	33	19	1	0	88	43	45	0	0	0	88
Somerset	35	27	28	5	1	96	55	41	0	0	0	96
Sussex	7	13	7	1	0	28	22	5	0	1	0	28
Union	125	133	66	15	2	341	246	89	1	5	0	341
Warren	9	9	4	1	1	24	16	8	0	0	0	24
	2,002	1,944	1,302	299	41	5,588	3,537	1,975	16	45	15	5,588

All Counties

PRETRIAL DETAINEES

CPANJ 9 e Courts

	1st	2nd	3rd	4th	DP	TOTAL (2nd, 3rd, 4th, DP)	All ≥ 6 mo.	All < 6 mo.
Atlantic	142	153	72	13	5	243	102	141
Bergen	75	49	27	6	0	82	36	46
Burlington	56	79	87	12	5	183	54	129
Camden	209	205	117	21	0	343	108	235
Cape May	30	39	41	8	0	88	35	53
Cumberland	80	76	59	12	3	150	64	86
Essex	322	459	269	81	16	825	335	490
Gloucester	44	39	33	19	0	91	22	69
Hudson	231	156	208	44	4	412	143	269
Hunterdon	5	8	7	1	0	16	7	9
Mercer	161	72	27	5	0	104	35	69
Middlesex	72	74	33	17	0	124	59	65
Monmouth	101	72	47	8	1	128	34	94
Morris	23	34	20	5	1	60	19	41
Ocean	51	44	63	17	2	126	23	103
Passaic	189	170	68	7	0	245	128	117
Salem	35	33	19	1	0	53	17	36
Somerset	35	27	28	5	1	61	25	36
Sussex	7	13	7	1	0	21	9	12
Union	125	133	66	15	2	216	73	143
Warren	9	9	4	1	1	15	5	10
TOTAL	2,002	1,944	1,302	299	41	3,586	1,333	2,253

Commit date on or BEFORE 6/30/2020

Commit date AFTER 6/30/2020

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Detained ≥ 6 months

≥ 6 months

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	1st	2nd	3rd	4th	DP	TOTAL (2nd, 3rd, 4th, DP)	ACTIVE INMATES	SSP	TOTAL INMATES
Atlantic	142	153	72	13	5	243	573	7	580
Bergen	75	49	27	6	0	82	562	0	562
Burlington	56	79	87	12	5	183	378	0	378
Camden	209	205	117	21	0	343	1,154	2	1,156
Cape May	30	39	41	8	0	88	195	12	207
Cumberland	80	76	59	12	3	150	285	0	285
Essex	322	459	269	81	16	825	2,358	0	2,358
Gloucester	44	39	33	19	0	91	153	0	153
Hudson	231	156	208	44	4	412	908	0	908
Hunterdon	5	8	7	1	0	16	32	0	32
Mercer	161	72	27	5	0	104	424	0	424
Middlesex	72	74	33	17	0	124	407	0	407
Monmouth	101	72	47	8	1	128	414	0	414
Morris	23	34	20	5	1	60	181	0	181
Ocean	51	44	63	17	2	126	295	0	295
Passaic	189	170	68	7	0	245	648	0	648
Salem	35	33	19	1	0	53	186	0	186
Somerset	35	27	28	5	1	61	122	0	122
Sussex	7	13	7	1	0	21	56	0	56
Union	125	133	56	15	2	216	431	0	431
Warren	9	9	4	1	1	15	85	0	85
	2,002	1,944	1,302	299	41	3,586	9,847	21	9,868

CPANJa 11

Active Inmates

CPANJa 11

JAM0034 NEW JERSEY COUNTY CORRECTION INFORMATION SYSTEM 12/23/20
ACTIVE INMATE POPULATION 11:49

COUNTY	ACTIVE	SSP	TOTAL	COUNTY	ACTIVE	SSP	TOTAL
ATLANTIC	573	7	580	MIDDLESEX	407	0	407
BERGEN	562	0	562	MONMOUTH	414	0	414
BURLINGTON	378	0	378	MORRIS	181	0	181
CAMDEN	1154	2	1156	OCEAN	295	0	295
CAPE MAY	195	12	207	PASSAIC	648	0	648
CUMBERLAND	285	0	285	SALEM	186	0	186
ESSEX	2358	0	2358	SOMERSET	122	0	122
GLOUCESTER	153	0	153	SUSSEX	56	0	56
HUDSON	908	0	908	UNION	431	0	431
HUNTERDON	32	0	32	WARREN	85	0	85
MERCER	424	0	424				

TOTAL NUMBER OF ACTIVE INMATES 9847
TOTAL NUMBER OF SPECIAL SENTENCE 21

GRAND TOTAL INMATE POPULATION 9868

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CPANJa12

SUPREME COURT OF NEW JERSEY
085186

FILED

DEC 16 2020

CLERK

In the Matter of the :

Request to Release :

Certain Pretrial Detainees :

ORDER TO SHOW CAUSE

This matter having come before the Court on the request for relief filed jointly by the New Jersey Office of the Public Defender and the American Civil Liberties Union of New Jersey, seeking the Court's consideration of a proposed Order to Show Cause (see attached) designed to address, among other relief requested, the release of certain individuals who have been detained under the Criminal Justice Reform Act (CJRA) for six months or longer and whose most serious pending charge is a second-degree offense or lower, and the granting of new detention hearings for certain other defendants; and

The Court, on its own motion, having relaxed the Rules of Court to permit the filing of this request for relief directly with the Supreme Court, based on the statewide impact of the request to release certain individuals detained pretrial, and in light of the ongoing risks posed by the COVID-19 pandemic, see, e.g., Executive Order No. 103 (Mar. 9, 2020) (Public Health Emergency and State of Emergency declared by Governor Murphy); Executive Order No. 200 (Nov. 22,

CPANJa13

2020) (further extending Public Health Emergency and State of Emergency); and

The Court having requested that the Office of the Public Defender and the American Civil Liberties Union of New Jersey file a brief setting forth the legal authority supporting the relief requested in the proposed Order to Show Cause, and the Court having reviewed the submission;

And for good cause shown; it is

ORDERED that the Office of the Public Defender, the American Civil Liberties Union of New Jersey, the Attorney General, and the County Prosecutors Association of New Jersey shall file briefs on the schedule set forth below addressing the issue of why an Order should not be entered granting the relief requested in paragraphs A through C of the proposed order, specifically:

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 release and has demonstrated beyond a reasonable doubt that no set of conditions can reasonably assure a defendant's appearance

CPANJa 14

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*

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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.*

The Office of the Attorney General and the County Prosecutors Association of New Jersey shall file responsive briefs on or before December

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30, 2020. The Office of the Public Defender and the American Civil Liberties Union of New Jersey may file reply briefs by January 5, 2021. All briefs shall be submitted in PDF format and emailed to the dedicated brief submission inbox (SupremeCTBrief.mbx@njcourts.gov).

In addition to addressing the points enumerated above, the parties' briefs should set forth their positions on the Court's authority to grant the relief requested.

The Clerk of Court shall set this matter down for argument on the session of January 19-20, 2021.

For the Court,

Chief Justice Stuart Rabner

Date: December 16, 2020

CPANJa18

THEODORE N. STEPHENS, II
ACTING ESSEX COUNTY PROSECUTOR
ESSEX COUNTY VETERANS COURTHOUSE
NEWARK, NEW JERSEY 07102
(973) 621-4700

IN THE MATTER OF COVID-19 PROTOCOLS AT THE ESSEX COUNTY CORRECTIONAL FACILITY	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – ESSEX COUNTY **CERTIFICATION OF ALFARO ORTIZ**

I, Alfaro Ortiz, hereby certify the following:

1. I am the Director of the Essex County Correctional Facility ("ECCF"), which is located at 354 Doremus Avenue, Newark, New Jersey. In November 2006, I was hired by Essex County as Deputy Director at ECCF. In 2009, I became the Director and have served in that capacity to date. As Director, my areas of responsibility include, among other things, custodial operations, special investigations division, training division, business office, outside vendor contracts, policy and procedure, scheduling, facility maintenance, and information technology.

2. The mission of ECCF is to ensure that all persons committed to ECCF are confined with the level of custody necessary to protect the public while providing care, discipline, training, and treatment in preparation for reintegration into the community.

3. ECCF houses male and female adult inmates whose incarceration is necessary to ensure a court appearance. In addition, ECCF houses federal inmates and U.S. Immigration and Customs Enforcement ("ICE") detainees pursuant to an Inter-Governmental Service Agreement. ECCF houses inmates and detainees in four separate buildings. ICE detainees are housed

CPANJ 19

separately from inmates. Inmates and detainees do not come into contact with each other inside the facility.

4. ECCF can house a maximum capacity of 2368 inmates and detainees. During the year 2019, ECCF housed on average 2000 inmates and detainees per day. As of September 13, 2020, ECCF's total population was 1915. ECCF is not overcrowded.

5. Where possible in light of the number of detainees or inmates housed at ECCF, ECCF is spacing detainees and inmates out by skipping over beds when assigning individuals to beds, in order to create additional distance between occupied beds. Detainees and inmates may also sleep in a head to foot configuration, which provides six feet of horizontal distance between bunkmates.

6. ECCF staff regularly reminds detainees and inmates to maintain social distance if they observe detainees who are not remaining socially distant.

7. I am familiar with the measures that ECCF has taken in response to the global pandemic of Coronavirus Disease 2019 (COVID-19).

8. Each inmate and detainee is screened for disabilities upon admission and their temperatures are checked. Identified disabilities are further evaluated and reasonable accommodations are provided as medically appropriate.

9. The health care of our inmates and detainees is now, and has since March 2008, been administered by CFG Health Systems under the supervision of Dr. Anicette, the on-site facility physician. Due to the COVID-19 outbreak, additional Essex County medical staff are now on-site 24/7 to provide full coverage for all detainee/inmate medical needs. In addition, there is an on-site medical 42-bed infirmary supervised by Dr. Anicette.

CPANJG20

10. Medical personnel at ECCF consist of a staff composed of medical doctors, RNs, LPNs, nurse practitioners, and physician assistants. There are always two RNs and LPNs in the building. There is also a nurse practitioner in the facility 24 hours a day, seven days a week. A physician is at the facility 16 hours a day, seven days a week. A physician is on-call on a 24-hour basis for any emergency needs.

11. A nurse visits every housing unit twice daily, at which time detainees or inmates may report any health problems. If a detainee or inmate reports experiencing COVID-19 symptoms to a staff member outside of those times, then depending on the severity of the symptoms, the staff member can call the nurse's office for an immediate triage assessment. The nurse will then decide whether the detainee or inmate should be seen by medical immediately or whether the person can wait to be assessed until the twice-day nurse rounds.

12. Since early February 2020, ECCF correctional and medical staff, in conjunction with the New Jersey Department of Health, Centers for Disease Control and other public health and correctional institutions, have been tracking the outbreak, regularly updating infection prevention and control protocols, and issuing guidance to all staff on screening and management of potential exposure among detainees/inmates.

ECCF COVID-19 Protocols

13. In early March 2020, ECCF began to take several measures to ensure the health and safety of all inmates, detainees, and staff in light of the COVID-19 global pandemic. ECCF has continued to develop these measures as the situation surrounding COVID-19 continues to rapidly develop.

14. The ECCF facility was designed with air handlers and a purge system in every housing unit, which enables ECCF to re-circulate the air within the facility every four hours.

CPANJ a 21

The air handler brings in 100% outside air into the unit and the purge system exhausts 100% of the air in the unit out. Fresh air is circulated in the housing units throughout the day.

15. The ECCF facility has four negative pressure rooms that are available in the ECCF infirmary to house any individuals affected by COVID-19, or a variety of health conditions including tuberculosis.

16. Since on or about the first week March, ECCF took the following measures regarding COVID-19:

a. Suspended all classes being conducted by volunteers or part-time workers;

b. Transitioned from a three-month to a six-month inventory of supplies for all needed items;

c. Educated ECCF staff regarding protocols and best practices to prevent the spread of COVID-19;

d. Educated inmates and detainees on the importance of hand washing and best practices to prevent the spread of COVID-19 including covering coughs with the elbow instead of with hands, practicing social distancing, and requesting to seek medical care if they feel ill. ECCF provides detainees daily access to sick call;

e. Established a new protocol in conjunction with the Port Authority Police for the handling of prisoners from Newark Airport;

f. Established a new protocol to be followed by the ECCF Medical Department for the handling of inmates or detainees who may suffer from health conditions identified by the CDC as putting them at a high risk of developing serious complications from COVID-19. This protocol includes daily monitoring of these inmates and detainees and the establishment of a plan to remove the inmates from the rest of the population should the need arise. The Medical Department has further transitioned to telemedicine for all outside consultations and has postponed all elective Medical Procedures;

g. Increased monitoring of all inmates and detainees for symptoms or signs of illness;

h. Established and cleared a designated quarantine area;

i. Worked with ECCF's food service provider to ensure the following:

CPANJ 22

1. 30 days of meals will be on hand at the facility;
2. Available freezer space for 14 days of frozen meals;
3. Extra staff to work in the ECCF kitchen;
4. Sanitization of the ECCF kitchen every hour;
5. All items in the Officers Dining Room are "grab and go." There are no longer self-serve items;
6. Established a transportation plan for employees in the event public transportation is curtailed.

j. Provided meals to inmates and detainees within their pods. Meals are eaten within the cell or in passive recreation areas. Inmates and detainees are encouraged to avoid congregating.

k. Suspended all outside work programs for inmates and detainees, such as the SLAP program;

l. Suspended all religious services conducted by outside volunteers;

m. Hired additional staff to provide additional cleaning and sanitizing of the facility, and implemented all CDC recommended cleaning and disinfection protocols beyond normal activity. All housing units are sanitized no less than three times per day including at the change of every shift. Staff work through the late-night hours to ensure that the facility is cleaned and disinfected including all high touch surfaces. After every court movement, the intake/property area is cleaned and sanitized;

n. Transitioned all attorney and contact visits to window visits only and expanded the window visit schedule. All detainees and inmates were separated from visitors by a glass partition;

o. Limited entrance to ECCF for staff and employees to a single, monitored door;

p. Initiated health screening for all Corrections Officers, civilians, and outside vendor staff every time they enter the building. Prior to entering the facility, staff members and vendors must receive medical screening by the medical staff, which includes having their temperatures checked. These medical screenings are conducted outside of the facility. Anyone who exhibits any signs is not allowed to enter the facility;

q. Posted CDC and Department of Health signs throughout ECCF, including all housing units, employee entrances, workstations and the visitor lobby area. These signs provide educational information encouraging proper washing of hands and other infection avoidance best practices such as social distancing;

r. Added a nurse to the pre-booking process so that every detainee and inmate who enters the facility is given a health check that includes taking his or her

CPANT. 23

temperature before entering the building. This pre-booking process also includes a full screening including travel and medical histories.

17. Following the implementation of the measures described above, ECCF has continued to establish additional precautionary measures as the situation regarding COVID-19 continued to develop. For example:

a. During the week of March 16, 2020, ECCF contracted with a lab vendor to acquire 50 testing kits for COVID-19. ECCF anticipates that this will be an initial order with additional testing kits to be provided to ECCF as kits become available;

b. On or about March 19, 2020, ECCF (a) implemented a regular call amongst all County Wardens to discuss best practices; and (b) canceled all assembled "roll calls" for officers at the start of their shifts;

c. On or about March 21, 2020, the ECCF office of Inmate/Detainee Advocate began relaying email messages from attorneys directly to their clients to set up phone conferences;

d. As of March 22, 2020, ECCF disallowed visitation for all family and friends of ECCF inmates and detainees;

e. On or about March 23, 2020, ECCF implemented the following:

i. Assigned an officer at the Facility's Visitor entrance to ensure that only Lawyers, ECCF staff and Newark City Buses enter and exit the grounds;

ii. Established a policy that any newly confined inmates and detainees entering the facility will be quarantined for 14 days, as opposed to the original three days, to ensure they do not display any symptoms related to COVID-19 before being assigned to a housing unit. These inmates and detainees have their temperatures taken twice daily;

iii. Modified inmate and detainee recreation groups to limit close interaction with other inmates and detainees. Reduced the number of inmates having recreation at the same time by one half to foster social distancing;

iv. Implemented further actions regarding the ECCF kitchen area to ensure food safety;

v. Implemented video conferencing within ECCF, within proximity to inmates and detainees, so that they can continue to have their cases heard. This will further minimize movement and contribute to social distancing.

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vi. Allowed all inmates and detainees a free daily five (5) minute telephone call.

f. On or about March 24, 2020, ECCF began operating its kitchen using all civilians and stopped using detainee/inmate labor.

g. ECCF facilitates confidential telephone calls between detainees and inmates and their attorneys. Every housing area has a set of tablets that inmates and detainees can use to make telephone calls. Attorneys may contact the Inmate/Detainee Advocate to arrange for a telephone call with their client. The inmate or detainee can use headphones while speaking with their attorney.

h. On or about March 25, 2020, ECCF ordered an additional storage unit to be placed on the premises to hold supplies.

i. On or about March 26, 2020, ECCF received 1008 Tyvek suits. ECCF has also received 1,200 N95 masks, and 29,900 blue surgical masks.

j. On or about April 1, 2020, ECCF opened a dedicated room within the visitor's lobby wired to support video conferencing capability between inmates and detainees and their attorneys at the facility.

k. From the POD, inmates and detainees can make non-confidential calls to attorneys for 15 minutes. Advocates can initiate calls to inmates or detainees on a confidential line for up to 99 minutes.

l. As of June 30, 2020, ECCF is conducting COVID-19 antibody testing on all new inmates entering the facility. If inmates test positive for COVID-19, they are quarantined in single cells. If they test negative and are cleared by ECCF medical staff, they are cohorted and housed in single cells with double bunks.

m. As directed by the County Administrator, the Essex County Health Department was on site at ECCF providing mandatory COVID-19 testing to all ECCF county employees on July 7, 2020 from 0500 hours to 1500 hours. Non-county employee civilians, medical staff and vendors were also tested if they registered in advance.

18. All staff members are provided with surgical masks and gloves when they report to work. Staff wear masks at all times at ECCF. Staff have also been provided with safety goggles, for use at their discretion.

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19. Detainees and inmates are provided masks if they exhibit symptoms consistent with COVID-19. Detainees and inmates who perform facility cleaning on work detail are provided gloves.

20. N95 masks are reserved for higher risk situations. N95 masks are worn by: (1) detainees or inmates with moderate to severe COVID-19 symptoms who are being transported to the hospital; (2) staff members transporting such detainees or inmates; (3) medical staff working with detainees or inmates with moderate to severe symptoms; (4) detainee or inmate workers who perform cleaning of rooms that housed persons with moderate to severe symptoms; (5) officers who transport or come into contact with inmates or detainees who are being admitted to the facility; and (6) staff working in the lobby area or who otherwise interact with any members of the public coming to the facility.

21. Staff is provided alcohol-based hand sanitizer. For safety reasons, the facility is unable to provide alcohol-based hand sanitizer to detainees or inmates. However, detainees and inmates have free access to soap. It is ECCF's understanding, consistent with guidance provided by the CDC and the New Jersey Department of Health, that soap is at least as preferable, if not more effective, than alcohol-based sanitizer at protecting against COVID-19 infection.

22. As of September 8, 2020, ECCF had the following cleaning supplies and personal protective equipment in stock, as part of its COVID-19 efforts:

a. 1,409 cases of soap;

b. 40,200 surgical masks;

c. 1,050 N95 masks;

d. 1,030 face shields;

e. 248 cases of Envirox sanitizer;

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f. 58 cases of Envirox critical care sanitizer;

g. 879 cases of single-ply paper towels;

h. 124 cases of trifold paper towels;

i. 1126 cases of bleach;

j. 522 cases of size XL rubber gloves;

k. 262 cases of size L rubber gloves;

l. 40 cases of Clorox Disinfectant Spray; and

m. 4750 coverall suits.

23. Common spaces and equipment are sanitized regularly. ECCF has both telephones and tablets available for detainee and inmate use. The telephones and tablets are cleaned between uses by designated detainee or inmate workers, who are supervised by ECCF staff. Toilets are similarly cleaned between uses by designated cleaners. The detainees and inmates who are assigned to perform these cleaning tasks are provided with gloves and masks. Cleaning agents are available in the showers for detainees and inmates to clean those areas themselves between uses.

24. ECCF has provided education to detainees and inmates about COVID-19 in multiple formats and languages. Signs are posted throughout the facility in English and Spanish with educational information. ECCF has also provided live and video presentations about COVID-19, including by bringing in a representative from the New Jersey Department of Health. During live presentations, individuals are spaced six or more feet apart.

25. In testing for COVID-19, ECCF is following guidance issued by the Centers for Disease Control to safeguard those in its custody and care. As such, inmates and detainees who complain of illness are immediately evaluated by medical staff. Detainees and inmates who feel

CPANJa 27

any symptoms of illness can make daily sick calls as needed; they can submit requests via tablet or to a nurse that comes in the unit twice per day. If an inmate or detainee exhibits signs or symptoms of COVID-19, including respiratory illness, they will be provided a surgical mask.

26. Detainees or inmates with mild symptoms, i.e., those that can be managed at ECCF, will be clinically assessed and treated at ECCF as presumptively positive for COVID-19. Diagnostic swab testing for COVID-19 is not performed in-house at ECCF. Detainees or inmates with moderate to severe symptoms (for example, oxygen levels or temperatures that cannot be medically managed at ECCF) are sent to the local hospital. The hospital will perform a diagnostic test for such patients upon admission.

27. ECCF uses University Hospital to test any detainees who require testing for COVID-19. Moderate to severely symptomatic detainees are immediately transported to the hospital for medical evaluation. In accordance with the hospital's policy, mildly symptomatic detainees are transferred to the quarantine area within ECCF. If an inmate or detainee is positive for COVID-19, and does not require hospitalization, the detainee will return to ECCF and be isolated in a cell in a designated area to house individuals who have tested positive for COVID-19.

28. Those inmates and detainees who are symptomatic pending testing results are evaluated by the medical severity and started on anti-viral medications. Vitals including temperatures are monitored on a daily basis and inmates and detainees are evaluated for hospital placement. Inmates or detainees who are placed in quarantine stay there for 14 days. Currently, there is a combined total of 30 inmates and detainees in quarantine.[1] None of those individuals

[1] ECCF is taking a proactive approach to the use of quarantine to contain the spread of COVID-19. An inmate or detainee could be placed in quarantine for any of the following reasons: (1) close contact with an officer or staff member who is reported positive; (2) close contact with a detainee or inmate who is reported positive; (3) close contact with a detainee or inmate who

CPANJ ¶ 28

have exhibited symptoms that require a higher level of care at this time. Due to logistical and personnel constraints, ECCF does not take daily temperature readings of the remainder of the detainee / inmate population, unless an individual is reporting symptoms that would require a medical screening.

29. The inmates and detainees who are placed in quarantine at ECCF are placed in single-occupancy cells. Those cells have closed walls and doors. There is also a food port with a flap, through which food can be passed in and out.

30. Detainees who have had a known exposure to a confirmed case of COVID-19, but are asymptomatic, will be housed together. This process is known as cohorting. Cohorted detainees remain isolated for a period of 14 days. If no new COVID-19 case develops in 14 days, the cohorting of these detainees will terminate. This unit is operating under capacity, and therefore allows ample room for social distancing for any detainees who must be cohorted in this unit. In addition to the cohorting described above, new admissions to the facility who enter with a group are housed together, in single occupancy cells, for a period of 14 days.

31. Any detainee or inmate who is symptomatic of COVID-19 is placed in a special unit. Within that unit, these individuals are housed separately and isolated from one another.

32. Our medical provider has assured ECCF that we have on hand the appropriate personal protective equipment and other equipment to meet our needs to combat COVID-19 and protect health care workers and other staff.

33. ECCF is receiving additional deliveries of soap every three days. Every housing unit at ECCF receives two boxes of soap containing 120 bars. This is far in excess of the number of persons in each unit. ECCF's warehouse currently has an eleven-month supply of soap.

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reported symptoms; (4) the detainee or inmate is showing mild symptoms; or (5) based on the results of ECCF's rapid antibody screening test discussed in paragraphs 45 and 46 below.

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34. There are never more than 64 federal criminal inmates in a unit. There is enough soap for each inmate or detainee to have at least three bars at all times. Moreover, ECCF does not wait until the soap is gone before giving inmates and detainees new soap. Inmates and detainees can request soap at any time, and they are provided soap upon request.

35. Historically, inmates and detainees have been limited to three bars of soap and any additional soap would be confiscated. ECCF now allows all inmates and detainees to have four or five bars of soap at a time. ECCF is not confiscating soap or writing anyone up for having extra soap. ECCF is encouraging inmates and detainees to use soap as frequently as possible.

36. At ECCF there are three shifts per day. At the beginning of each shift, each officer is issued a spray bottle with a disinfectant that is comprised of two parts water and one part bleach. That spray bottle is refilled and replenished throughout the shift as necessary. Throughout the shift, porous surfaces and frequently touched items are disinfected – first with sprays of solution and wiped down, and second with a spray that is left to air dry.

37. The disinfectant cleaning solution is prepared twice a day and delivered to every housing unit at 6 a.m. and 2 p.m. The administration is encouraging both staff and the facility general population to use these tools often and liberally.

ECCF COVID-19 Cases

38. As of 9:00 a.m. on September 14, 2020, ECCF has identified the following cases of COVID-19, confirmed by laboratory testing, amongst ECCF inmates, detainees, and staff: (a) 8 ICE detainees[2], there were no new positive test results the past 15 weeks; (b) 4 county inmates one of whom is currently housed at ECCF, the other 3 have been released, there were no new

[2] One of the ICE detainees was sent to the hospital after he was in an altercation and required sutures for a laceration in his lip. All of his vitals at that time were well within normal limits.

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positive test results the past 9 weeks; (c) a cumulative total of 17 county inmates at Delaney Hall; 9 of those inmates are no longer in custody. Delaney Hall is located across the street from the ECCF facility and is not part of the same building where ICE detainees are currently housed; (d) 97 members of the ECCF correctional staff, 95 of whom have been cleared and returned to work, there were no new positive test result during the past 5 weeks; and (e) 4 members of the civilian staff, all of whom have been cleared and returned to work, there have been no new positive test results since the week of May 11, 2020.

39. As of today, there is no mandate for testing the entire ECCF population by any federal, state or county health agency. Until April 10, 2020, ECCF's testing focused on people with symptoms consistent with a COVID-19 infection and first responders at the hospital. Nevertheless, ECCF is testing its entire population using rapid testing antibody screening. Rapid testing for antibodies is different from laboratory testing for COVID-19. The expanded testing is part of ECCF's containment and quarantine strategy. The testing is a supplementary screening tool done through a blood test to minimize the risk to healthcare providers. ECCF is housing inmates and detainees based on the results of the antibody screening.

40. Currently, if a detainee or inmate in a housing unit shows symptoms of COVID-19 or tests positive for COVID-19, then ECCF will perform antibody testing on all other detainees or inmates who were housed with that individual. Further treatment and housing decisions will be made based on those test results in accordance with the procedures described in the Declaration of Dr. Lionel Anicette dated May 4, 2020.

41. ECCF has conducted medical reviews for each of the detainees and inmates housed at ECCF. Detainees or inmates with chronic conditions that place them at higher risk for COVID-19 are placed in a special needs unit if those conditions are not well-controlled.

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Individuals with chronic conditions, such as diabetes, that are well-controlled remain in the general population.

42. The correctional officers who work with those detainees or inmates at higher risk for COVID-19 use full PPE including Tyvek suits, N95 masks and gloves.

I certify that the foregoing statements are true to the best of my knowledge and belief. I am aware that if any statement made herein is willfully false, I am subject to punishment.

Alfaro Ortiz, Director 10/28/20
Essex County Department of Corrections

DATED:

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