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Supreme Court of New Jersey

DOCKET NO. 090118

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Leave to Appeal Granted from an Interlocutory Order of the Superior Court
v.	:	of New Jersey, Appellate Division.
	:	Sat Below:
FERNANDO J. GARCIA-MORONTA,	:	Hon. Katie A. Gummer, J.A.D.
		Hon. Adam E. Jacobs, J.A.D.
Defendant-Appellant.	:	

BRIEF ON BEHALF OF THE ATTORNEY GENERAL OF NEW JERSEY AMICUS CURIAE

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
AMICUS CURIAE
RICHARD J. HUGHES JUSTICE COMPLEX
TRENTON, NEW JERSEY 08625

JEREMY M. FEIGENBAUM – Solicitor General (No. 117762014)
NATHANIEL F. RUBIN – Deputy Attorney General (No. 524572025)

SARAH D. BRIGHAM – Deputy Attorney General (No. 184902016)
Division of Criminal Justice, Appellate Bureau
P.O. Box 086
Trenton, New Jersey 08625
(609) 376-2400; brighams@njdcj.org

OF COUNSEL AND ON THE AMICUS BRIEF

August 11, 2025

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"Db" refers to defendant's merits brief filed on July 11, 2025.
"Da" refers to the appendix to defendant's motion-for-leave-to-appeal brief filed on December 16, 2024.
"Pa" refers to the appendix to the State's motion-for-leave-to-appeal brief filed on January 9, 2025.
"1T" refers to the arraignment proceedings on October 7, 2024.

PRELIMINARY STATEMENT

This case, like the appeal before this Court in State v. Reyes-Rodriguez, presents a pair of questions about how our criminal justice system handles the practicalities of cases involving noncitizens who are detained—and sometimes, but not necessarily, deported—by U.S. Immigration and Customs Enforcement before trial. One question is whether and when a court can proceed with non-trial court events, from arraignments to sentencings, when detention makes the defendant's physical presence difficult or impossible. As in Reyes-Rodriguez, the answer here will lie within a trial court's discretion and depend on the facts of each case. The trial court must exercise that discretion with great sensitivity to the stage of the proceedings. In line with this Court's guidance about when proceedings should typically take place in-person or virtually, trial courts should be particularly careful when allowing defendants to make virtual appearances at court proceedings involving testimony or confrontation with any witnesses and victims. Critical phases of trials like arraignments and guilty pleas also demand adequate safeguards to ensure the integrity of a defendant's participation.

This amicus brief suggests a range of non-exhaustive factors that trial courts should consider when addressing these requests. They are drawn from this Court's own precedents, and the evolving precedents and experience of our Appellate Division. Many factors mirror those that courts should consider when

a deported defendant seeks to make a virtual appearance at trial. But the range of pre- and post-trial proceedings courts will need to address—as well as the types of immigration-processing postures in which a defendant might appear—mean that courts must continue to be vigilant to the facts of every case where a defendant seeks to appear remotely. Still, the factors and the suggestions the Attorney General offers for their application in this brief provide some broadly applicable principles, which the trial court should apply on remand.

Second, as in Reyes-Rodriguez, this case asks when a court may issue a bench warrant as a detainer for a defendant whom ICE makes unavailable. The facts here are slightly different: defendant was in ICE custody, and tried but failed to appear at the hearing from which the bench warrant was issued. But the trial court was correct to employ a bench warrant as a flexible tool to achieve the defendant's presence upon his release from ICE, either in this country or following removal and potential reentry. The traditional bench-warrant form in New Jersey remains poorly suited to this task: it is still designed for the fugitive who voluntarily fails to appear for court. So as in Reyes-Rodriguez, the Attorney General encourages the Court to adopt flexible language in bench warrants, so that they may better reflect the role they can play in obtaining the presence of any defendant who is unable to appear for court because of ongoing immigration detention.

QUESTIONS PRESENTED

1. Whether the trial court retains discretion to deny a criminal defendant's request to appear virtually or telephonically at an arraignment, and what factors the trial court must consider in its analysis.
2. Whether the trial court may issue a bench warrant for a defendant who is unable to appear because he is detained by U.S. Immigration and Customs Enforcement, for the purpose of allowing state authorities to be notified if defendant is released or is deported and re-enters the country.

STATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

The Attorney General adopts the procedural history and statement of facts set forth in the State's brief, adding only the following.

On May 3, 2024, defendant Fernando Garcia-Moronta was charged in Complaint No. W-2024-0853-2004 with five domestic-violence-related offenses against his ex-girlfriend, E.S., committed on May 2, 2024. Defendant was charged with second-degree aggravated assault strangulation, contrary to N.J.S.A. 2C:12-1(b)(13) (Count One); fourth-degree criminal mischief, contrary to N.J.S.A. 2C:17-3(a)(1) (Count Two); petty disorderly harassment, contrary to N.J.S.A. 2C:33-4(a) and (c) (Counts Three and Four); and disorderly simple

[1] Because the procedural history and facts are intertwined, the Attorney General has combined them into one section for clarity.

assault, contrary to N.J.S.A. 2C:12-1(a)(1) (Count Five). (Da20 to 29).

After defendant was charged by complaint-warrant, a first appearance was scheduled for May 7, 2024. (AGa2 to 3). On the same date, defendant was conditionally released pretrial on Pretrial Monitoring Level I. (Pa1 to 4). According to the conditional-release order, defendant was ordered to "appear for all scheduled court proceedings." (Pa3). Defendant also was expected to "notify the court immediately in writing if [he was] detained in jail or prison or otherwise [could not] appear at a court proceeding." (Pa4). Upon defendant's release, he was taken into custody by ICE. (Db1).

On September 18, 2024, a Union County Grand Jury returned Indictment No. 24-09-0885-I, charging defendant with second-degree aggravated assault strangulation (Count One) and fourth-degree criminal mischief (Count Two). (Da30 to 31). Two days later, on September 20, 2024, a court summons was issued ordering defendant "to appear in court for a post indictment arraignment" on October 7, 2024. (Pa6). The summons directed that defendant's "attorney must appear with you," and that defendant must "bring th[e] notice to court." (Pa6). The summons warned that "failure to appear will result in the issuance of a bench warrant for your arrest." (Pa6).

On October 7, 2024, counsel for defendant and the State appeared in person for defendant's arraignment before the Honorable Stacey K. Boretz,

J.S.C., but defendant did not. (1T). Instead, defense counsel explained to the court that he had tried to contact defendant by telephone to facilitate the arraignment, because defendant was being detained by ICE in Pennsylvania, at the Moshannon Valley Detention Center. (1T3-8 to 5-2). Defense counsel informed the court that arrangements were made with Moshannon for a telephonic appearance, and that counsel could provide emails confirming those arrangements to the court. (1T4-23 to 5-2). But for "technical reasons," the call was not possible, because defense counsel was "not getting a signal in the courtroom." (1T4-23 to 5-2).

The State thus requested a bench warrant as a detainer. (1T3-15 to 16). Defense counsel requested the court to "reschedule the matter with the purpose of having a telephonic appearance, or issuing [a] writ for him to be produced" in person. (1T3-8 to 23). Defense counsel did not suggest a videoconference. (1T3-8 to 4-3).

Under the circumstances, Judge Boretz issued a bench warrant "as a detainer." (1T6-9 to 22; Da32). The trial court did not issue a writ to produce defendant in person, noting that the Union County Sheriff's Department "does not go out of [s]tate to pick up defendants to bring them here for an arraignment[,] so we do not have the ability to do that." (1T6-9 to 12). The judge explained that she was issuing the warrant as a detainer "not because Mr.

Garcia-Moronta has willfully absented himself from here, but [because] he is in ICE custody," and that a bench warrant as a detainer is issued "so that he doesn't get released without giving us the opportunity to, once he is going to be released, to bring him here so he can have his day in court[.]" (1T6-9 to 19). The warrant was written to note "warrant as a Detainer" and "*Defendant in ICE custody." (Da32). In eCourts, it was also denoted as a "warrant as detainer." (AGa1).

Judge Boretz did not set a rescheduled telephonic arraignment, but noted that the State objected to conducting the arraignment by telephone. (1T5-22 to 23). The basis of the State's objection was that "arraignment is a crucial step in the [criminal] process . . . and by doing just a telephonic conference the State ha[d] concerns as to confirming whether or not this is in fact the defendant on the other line." (1T5-22 to 6-8). Following the Court's order issuing the bench warrant, defense counsel did not press the Court to set a rescheduled arraignment by telephone or video.

Defendant filed a Motion for Leave to Appeal with the Appellate Division, to vacate the warrant, which that court denied on November 14, 2024. (Da1). On December 9, 2024, defendant filed a Notice of Motion for Leave to Appeal with this Court. The Court granted the motion on May 8, 2025.

While his motion for leave to appeal was pending, defendant was removed "in late March or early April 2025" from the United States. (Db1). The ground

for his removal was Immigration and Nationality Act (INA) § 212(a)(6)(A)(i), which covers a non-citizen "present in the United States without being [lawfully] admitted or paroled." Defendant has represented to this Court through his counsel that "he remains in contact with counsel and is ready to answer for [his] charges as soon as the court allows him to do so." (Db2). Defendant was removed to Venezuela, his country of birth, and his counsel has informed this Court that he is currently in Ecuador. (Db2).

On July 25, 2025, the Attorney General filed a Motion for Leave to Appear as Amicus Curiae in this case. This amicus brief follows.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT SHOULD BE GIVEN AN OPPORTUNITY TO CONSIDER WHETHER DEFENDANT MAY APPEAR VIRTUALLY.

As the Attorney General has likewise explained in Reyes-Rodriguez, New Jersey law gives our trial judges flexibility and discretion to "control courtroom proceedings at trial and sentencing." State v. Tedesco, 214 N.J. 177, 188-89 (2013). That flexibility includes the power—but not the duty—to excuse a defendant's physical presence at pretrial events, and to appear remotely instead. See R. 3:16(a) ("The defendant must be present for every scheduled event unless excused by the court for good cause shown."). Indeed, this Court's October 27, 2022 Order on Virtual Court Events makes clear that proceedings like the arraignment at issue here may take place virtually at the trial court's discretion, and that proceedings of any kind may allow a party to participate virtually "consistent with the principles of procedural fairness." Supreme Court of New Jersey, The Future of Court Operations—Updates to In-Person and Virtual Court Events at ¶¶ 3(c), 7(b) (Oct. 27, 2022) ("Virtual Courts Order") (AGa4 to 10). Here, the trial court appears to have summarily denied defendant's request to proceed with a telephonic arraignment, (1T5-22 to 6-22), and appears not to have considered whether a rescheduled arraignment via videoconference was possible, ibid. These questions should be considered anew by the trial court on

remand, which should use its discretion to determine whether good cause existed to excuse defendant from an in-person arraignment so that he could appear remotely. See R. 3:16(a). This brief also lays out the factors and safeguards for trial courts (on remand and in future cases) to consider in exercising their discretion over whether to allow a defendant to appear at arraignments and pre- and post-trial criminal proceedings remotely. These factors are relevant not only in cases where a defendant is held in federal Immigration and Customs Enforcement (ICE) custody, but also where, as here, a defendant has subsequently been deported.

1. Trial courts have substantial discretion to allow a defendant to appear remotely for pre- and post-trial criminal proceedings, including arraignments. This power stems from the broad discretion trial judges have to control their courtrooms and the proceedings therein. Tedesco, 214 N.J. at 188-89. The Rules of Court and the Virtual Courts Order structure that discretion, and reaffirm trial courts' powers to facilitate remote pretrial appearances. So although Rule 3:16(a) provides that, in general, "[t]he defendant must be present for every scheduled event," a court may excuse the defendant's presence "for good cause shown." Under the Virtual Courts Order, "[f]or all types of matters," "[i]n individual cases, all judges will continue to have discretion to grant an attorney or party's reasonable request . . . to participate virtually in a matter

being conducted in person." Virtual Courts Order at ¶ 7(b). And while an arraignment is not itself a testimonial proceeding, see State v. Caraballo, 330 N.J. Super. 545, 556 (App. Div. 2000) ("'Testimony' is generally defined as a particular kind of evidence that comes to a tribunal through live witnesses speaking under oath or affirmation…"), a trial court "may permit testimony in open court by contemporaneous transmission from a different location for good cause and with appropriate safeguards." R. 1:2-1(b).

That discretion applies to proceedings like arraignment and sentencing, where a defendant typically has a right to be present. See, e.g., State v. Grenci, 197 N.J. 604, 619 & n.6 (2009) (holding that before trial "a defendant first must receive actual notice of the charges contained in the indictment at an arraignment or some other court proceeding," and reserving decision on whether a defendant may, sans appearance, "expressly waive his presence at an arraignment"); R. 3:21-4(b) (providing that "[s]entence shall not be imposed unless the defendant is present or has filed a written waiver of the right to be present"). A virtual appearance, particularly in an otherwise in-person proceeding, is distinct from no appearance at all. Virtual appearances can have unwarranted advantages for defendants: in an evidentiary hearing, a criminal defendant who presents virtual testimony may be able to offer his preferred account of the facts while making it more difficult for the judge to assess his credibility, demeanor, and identity in

comparison to the State's in-person witnesses. See infra, at 14-15. And in a virtual sentencing, a defendant's reaction may be harder to gauge when confronted by the defendant's victims.

Of course, one reason for in-person proceedings can also serve to protect a defendant. See, e.g., State v. Santos, 210 N.J. 129, 141 (2012) (emphasizing importance of ascertaining witness's identity). But the cross-cutting nature of these considerations serves to underscore the context-dependent nature of what constitutes "good cause" for a defendant to make a pre- or post-trial virtual appearance. In some cases, like a guilty plea, the virtual appearance may require waiving a right to physical presence meant primarily to benefit the defendant. In others, like a sentencing hearing, that waiver might impact the judge's ability to test veracity. And in still others, like an evidentiary hearing, a defendant's virtual appearance will necessarily implicate the credibility determinations and require particularly stringent technological safeguards.

2. Because this matter remains within the discretion of the trial court, this amicus brief offers non-exhaustive factors that trial courts should consider when addressing a defendant's request to appear virtually at a hearing before or after trial. Amicus offers suggestions for how to consider these factors in the case of a prospective virtual arraignment like the one here, but also in a range of other non-trial criminal proceedings. These considerations are grounded in the ones

that courts apply where a defendant waives a physical appearance at sentencing, see Tedesco, 214 N.J. at 192-93, as well as where parties seek to offer virtual testimony or otherwise make virtual appearances in other contexts, see Santos, 210 N.J. at 141-42; Pathri v. Kakarlamath, 462 N.J. Super. 208, 216-21 (App. Div. 2020). Accordingly, while each of the factors will likely have some role, they will vary substantially in their direction and weight depending on the stage of the proceedings, in addition to the facts surrounding each case.[2]

The first set of considerations are similar to those that this Court already recognized in cases like Tedesco and State v. Dunne, 124 N.J. 303 (1991)—where defendants respectively sought to waive rights to be present at sentencing, Tedesco, 214 N.J. at 182, and to be tried by a jury, Dunne, 124 N.J. at 306. Under Dunne and Tedesco, a court should consider (1) "'whether a defendant has voluntarily, knowingly, and competently'" sought or consented to appear virtually rather than in person, (2) whether a request made by the defendant is done so "'in good faith or … to procure an otherwise impermissible advantage,'" and (3) "'whether, considering all relevant factors,' the court 'should grant or deny the defendant's request in the circumstances of the case.'" Tedesco, 214 N.J. at 192-93 (quoting Dunne, 124 N.J. at 317).

[2] These considerations are substantially similar, in principle, to those Amicus advances in its brief in State v. Reyes-Rodriguez, No. 090313, filed August 11, 2025. Their application, however, differs outside the trial context.

As this Court put it in Tedesco, the voluntary-knowing-competent inquiry may itself require a "live video, digital, or equivalent connection," so that the trial judge can question the defendant to ensure the waiver is a willing one. 214 N.J. at 193. Determining the voluntariness of a waiver will require the court to "examine the totality of the facts," State v. Morton, 155 N.J. 383, 441 (1998), and where there is reason to do so, "question defendants about their understanding of the nature and consequences of their" waiver, ibid. This factor has its origins in proceedings where a defendant seeks to waive a right to appear in person—*e.g.*, a sentencing hearing. And in deriving from proceedings where consent is required to waive an appearance, it operationalizes the Virtual Courts Order's consent requirement for virtual appearances at bench trials, evidentiary hearings, and sentencing hearings. See Virtual Courts Order at ¶ 2(a).

The voluntariness factor retains value for other proceedings that may take place virtually without the consent of the parties, including arraignments like this one, plea hearings, pretrial conferences, and legal motion hearings. See Virtual Courts Order at ¶¶ 3(c), 4(a). Here, the inquiry need not necessarily be an extensive one, or in the case of matters presumed to take place virtually, an affirmative one the trial court undertakes. See id. at ¶ 4(a). But if a defendant does not consent to proceeding virtually where the court would typically choose to do so, the court should consider whether objections raised by the defendant

or defendant's counsel suggest some further impact to the defendant's rights—for example, that a defendant appearing at a virtual guilty plea might be subject to improper external influence that could affect the integrity of the plea.

The trial court must also consider whether the request by a defendant to appear remotely is made in good faith, "or as a stratagem to procure an otherwise impermissible advantage." Dunne, 124 N.J. at 317. The weight of this factor will vary depending on the stage of proceeding. At an arraignment, for example, an in-person appearance benefits the defendant, because the greater degree of interaction between judge, defendant, and counsel helps ensure the defendant's identity and confirms that the defendant understands the charges. It is therefore quite unlikely that a defendant could obtain a strategic advantage by appearing remotely for an arraignment, or for other proceedings principally focused around ensuring the defendant is apprised of his rights, such as a guilty plea or a pretrial conference. Similarly, for case management conferences and motion arguments that are presumed to be virtual, a defendant necessarily is unlikely to be seeking an impermissible advantage by not appearing in person.

But a court should be careful to assess a defendant's motives underlying a virtual appearance at sentencing or an evidentiary hearing. Sentencing often puts a defendant's statements at issue, both to address the sentencing judge, see R. 3:21-4(b), and to "reply to claims that relate to aggravating and mitigating

factors and the overall imposition of sentence." Tedesco, 214 N.J. at 193-94. Evidentiary hearings present largely similar risks to trials: a defendant's request to appear virtually may benefit defenses like misidentification, while electronic transmission could distort proofs by the State that rest on biometric features. And a low-fidelity connection could frustrate the State's ability to spot and cross-examine a defendant about attempts to obfuscate marks and features through makeup, or alter the voice in which the defendant testifies.[3] Just as with a jury, so long as the judge plays the role of factfinder who must "observ[e] the demeanor and evaluat[e] the credibility of each witness that comes before the court," Santos, 210 N.J. at 139, the defendant should not be able to gain an impermissible advantage by appearing remotely to avoid that scrutiny.

The final Dunne/Tedesco factor—whether the court should grant or deny the request considering "all relevant factors"—is expansive. The elaboration of sentencing-specific factors in Tedesco itself underscores that the relevance of each factor depends on the stage of the proceedings in addition to the facts of

[3] Like with a remote appearance at trial, additional special considerations might also arise when a defendant requests to testify virtually because of his absence from the trial court's jurisdiction—a defendant "unable" to appear in court may choose to remain outside of the jurisdiction of the court to avoid any punishment that may result from a conviction. "The public [] has an interest in holding defendants publicly accountable for their actions once they have been convicted at a fair trial," Tedesco, 214 N.J. at 193, and courts should therefore not accede to such bad-faith requests.

the case. See 214 N.J. at 192-97. Amicus offers the following, second group of considerations for use when courts consider virtual appearances in the pre- and post-trial context—including at arraignments, guilty plea hearings, evidentiary hearings, motion hearings and status conferences, and sentencing.[4] These non-exhaustive factors are informed by the guidance this Court has had a chance to offer on remote appearances to date, and the Appellate Division's guidance on remote appearances and testimony in recent years. Here, too, the factors the Attorney General proposes are not exhaustive, but they offer broad principles and practical guideposts for implementing the Virtual Courts Order's and the Rules of Court's structures for remote criminal appearances.

Although this Court has not yet had the opportunity to determine which factors should govern each type of remote appearance under the Virtual Courts Order or Rule 1:2-1(b), State v. Santos, 210 N.J. 129 (2012) offers high-level guidance from the post-conviction context. Although it predates Rule 1:2-1(b), Santos anticipated key contours of the Rule by adopting a two-part test for whether a defendant in Santos's position could testify telephonically. Id. at 141. First, absent consent of all parties, an "exigency" or "special circumstance" must

[4] Tedesco, of course, addressed a defendant's request that he be sentenced in absentia. See 214 N.J. at 182. Because a remote sentencing implicates a distinct factual and procedural posture, it informs, but does not per se control, the question of when a court may proceed with a defendant's virtual presence at sentencing under the Virtual Courts Order.

"compel[] the taking of telephone testimony." Ibid. Second, the court must "be satisfied that 'the witness' identity and credentials are known quantities' and that there is some 'circumstantial voucher of the integrity of the testimony.'" Ibid. (citation omitted). Those principles are consistent with the ones that this Court has adopted for proceedings that depend on a defendant's testimony. Rule 1:2-1(b) demands that remote testimony be premised on "good cause" and be accompanied by "appropriate safeguards," and the Virtual Court Order provides that even apart from jury trials, bench trials and evidentiary hearings generally be in person. See Virtual Courts Order at ¶ 2(a). Indeed, Santos contemplated the possibility of video testimony and emphasized such testimony would have to be accompanied by a "satisfactory demonstration that the means to be used will ensure the essential integrity of the testimony for factfinding purposes." 210 N.J. at 142-43. So Santos offers key principles that this Court maintains for remote testimony, even beyond trials: that it not become the norm, and that introduction must still adequately allow for the factfinder to fulfill its role.

Santos's logic means that remote appearances should be accompanied by good reasons and appropriate safeguards even in the non-custodial context. The decision recognized that in-person appearances are important not just for testing a speaker's credibility, but for basic procedural steps like verifying a witness's identity. Id. at 140-41. So even in proceedings like arraignments and guilty

pleas, it can be important for the judge and attorneys to see a defendant and verify his identity, as well as to observe the defendant's demeanor to ensure any waiver of rights is willing, and that he understands the information. See id. at 141. A defendant must also understand instructions and questions from the judge and counsel, which a sufficiently poor electronic link may not be able to convey. So even if the reasons need not be as strong as in the trial or hearing contexts, trial courts should not allow a defendant to be arraigned, enter a plea, or appear at a pretrial conference remotely without good reason—and the Virtual Courts Order counsels that such proceedings "generally proceed in person." Virtual Courts Order at ¶ 3(c). And in no case should courts allow a virtual appearance that fails to "ensure the essential integrity" of the defendant's appearance, 210 N.J. at 141-42—at minimum, an assurance that the defendant is correctly identified, is able to answer the court's questions, and understands his rights.

On the other side of the ledger, the Virtual Courts Order's presumption in favor of virtual case management conferences and virtual motion arguments is also consistent with Santos and these broad principles. See Virtual Courts Order at ¶ 4(a). These conferences and legal arguments require the least participation from a defendant. So while courts should not proceed with a defendant's virtual appearance if they have reason to doubt the defendant's identity or ability to

understand the proceedings, the typical case will not give reason to do so, with the typical remote connection able to provide adequate safeguards.

While Santos constitutes this Court's most recent word on a defendant's remote testimony, the Appellate Division offered more detailed guidance in pre- and post-pandemic decisions for modern videoconferencing technology. It did so at the greatest length in Pathri v. Kakarlamath, 462 N.J. Super. 208 (App. Div. 2020), which addressed a plaintiff's request to provide remote testimony from India in a divorce trial, id. at 212. Relying on Santos and Federal Rule of Civil Procedure 43(a)'s provisions on remote testimony, the Appellate Division concluded that trial judges should consider the following factors:

> [1] the [witness's] importance to the proceeding;
>
> [2] the severity of the factual dispute to which the witness will testify;
>
> [3] whether the factfinder is a judge or a jury;
>
> [4] the cost of requiring the [witness's] physical appearance in court versus the cost of transmitting the [witness's] testimony in some other form;
>
> [5] the delay caused by insisting on the [witness's] physical appearance in court versus the speed and convenience of allowing the transmission in some other manner;
>
> [6] whether the [witness's] inability to be present in court at the time of trial was foreseeable or preventable; and

> [7] the [witness's] difficulty in appearing in person."
>
> [Pathri, 462 N.J. Super. at 216.]

And it went on to hold that even if a court has carefully considered these factors to find they favored permitting virtual testimony, the court could still deny the request if appropriate safeguards were unavailable to protect the integrity of the witness's testimony. Id. at 220-21. Those safeguards included, *e.g.*, adequate technology available at both ends of the virtual testimony, an appropriate location for the witness to testify from remotely, and the ability to provide the witness with the documents expected to be used. Ibid.

Pathri also extends beyond witness testimony. Its flexibility for broader litigation context is clear from the coherence between its factors and this Court's own decision in State v. Juracan-Juracan, 255 N.J. 241 (2023), which offers several parallels from the context of virtual interpretation at a jury trial. There this Court rejected a one-size-fits-all rule, and instructed courts to ask practical questions such as "whether an interpreter is available to interpret in person," "the impact any substantial delay in obtaining an in-person interpreter would have on the defendant and on third-parties such as co-defendants or victims," and "the financial costs associated with in-person interpreting as compared to remote interpreting." Id. at 259. The Pathri factors likewise offer a particularly helpful baseline of considerations for whether a defendant has established good

cause to testify—or simply to appear—remotely, as well as certain suggestions about which safeguards are required.

3. As applied to non-trial criminal proceedings, the Pathri factors provide a non-exhaustive yardstick by which courts can effectuate the goals and values of the Virtual Courts Order and Rule 1:2-1(b). They will disfavor proceeding virtually in proceedings that involve disputed evidence, but will still allow doing so in extraordinary circumstances—including in some cases where a defendant has been detained by ICE or deported. By contrast, they will tend to endorse remote non-testimonial appearances, such as status conferences and purely legal argument, particularly where the federal government has made the defendant's physical appearance impractical or impossible.

The first three Pathri factors will largely track the structure of the Virtual Courts Order: they will disfavor remote testimonial appearances, endorse remote appearances with a limited role for the defendant, and resolve in equipoise for "mixed" procedures like arraignments. Consistent with the Virtual Courts Order at ¶ 2(a), these factors counsel in favor of in-person evidentiary and sentencing hearings. These hearings may not be quite as important as a trial on the ultimate issue of a defendant's guilt or innocence, but they still carry great weight: the admission or denial of evidence at a suppression hearing can become dispositive at trial, and "[t]he '[p]ronouncement of judgment of sentence is among the most

solemn and serious responsibilities of a trial court,'" State v. Coviello, 252 N.J. 539, 553 (2023). Similarly, the defendant plays an important role at many of those proceedings, but is not always the most important person from whom the court hears—there may be cases where statements of a law enforcement officer or a victim prove more important. And unlike with jury trials, the third Pathri factor—who serves as the factfinder—will not weigh so heavily against the defendant's virtual appearance. Because the judge will make determinations, rather than a jury, there is less risk of "extraneous influence" on the proceeding. State v. Bisaccia, 319 N.J. Super. 1, 13 (App. Div. 1999).

The same factors counsel in favor of remote status conferences and motion hearings. These court events tend at most to implicate legal disputes rather than factual ones, where the statements of counsel are more important than statements from the defendant himself (or even from other witnesses). They accordingly lack even the need for factfinding per se. See Alicia L. Bannon, Douglas Keith, Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond, 115 Nw. U. L. Rev. 1875, 1914 (2021) (distinguishing "a hearing where purely legal questions are at issue" from "instances where a fact finder must make credibility assessments").

Arraignments, pleas, and pretrial conferences present a mixed case. They are typically critical phases of a prosecution. Missouri v. Frye, 566 U.S. 134,

140 (2012). And they can implicate factual questions, including the defendant's identity, his understanding of his rights and the proceedings, and whether any waiver of rights is knowing, voluntary, competent, and counseled. See Tedesco, 214 N.J. at 192-93. But they do not require the adversarial fact-finding common to evidentiary hearings or sentencings, so there is less need for in-person testing of a defendant's credibility. Because the equities underlying these proceedings can cut in multiple directions, whether "good cause" exists for a defendant to appear remotely will often depend on the other Pathri factors.

Of those, Pathri factor seven—a defendant's difficulty in appearing in person—will generally illuminate the atypical evidentiary hearings, sentencings, pretrial conferences, and arraignments and pleas where a defendant may not be able to appear in person. See also Santos, 210 N.J. at 141-43 (requiring exigency for telephonic testimony at post-conviction hearing without consent of all parties).[5] Like with trials, a court must carefully consider a specific defendant's situation: even though some cases of physical inability might prove obvious, incarceration or deportation may not necessarily be dispositive of a defendant's inability to appear. See, e.g., State v. Luna, 193 N.J. 202, 214 (2007) (where

[5] For ordinarily-remote proceedings like motion hearings and status conferences, this factor is straightforward—the modest inconvenience of appearing in-person in almost any case is sufficient to justify a remote appearance. A court should, of course, consider the difficulty in an in-person appearance if it is assessing whether good reason exists to depart from the virtual norm.

defendant fails to appear, "[w]e do not equate a defendant's incarceration with involuntariness in all situations"). And of course, even where an appearance is not literally impossible, the costs of facilitating that appearance can factor in—as part of Pathri's fourth factor. So when a defendant is held in ICE custody or deported, the costs and the degree of practicality of an in-person appearance will increase if the defendant is confined outside of New Jersey or deported.

For a defendant in ICE custody within the State, an in-person appearance will typically be practical. ICE usually will honor a state judge's writ directing an in-court appearance of an ICE detainee. See U.S. Immigration & Customs Enforcement, Protecting the Homeland: Tool Kit for Prosecutors 8-9 (Apr. 2011), https://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf. But the agency is not bound to do so, and will sometimes not honor requests. Id. at 9; see also, e.g., Doe v. U.S. Dep't of Homeland Sec., No. 3:24-cv-0259, 2025 WL 949846, at *7 (W.D. Pa. Mar. 28, 2025) (explaining that preliminary injunction required ICE's Moshannon Valley Detention Center to honor writs requiring in-person proceedings), appeal docketed, No. 25-1628 (3d Cir. Apr. 4, 2025); (AGa13 to 14; AGa30; AGa33 to 34). As a result, certain instances of in-state custody may still render a defendant's physical appearance difficult or impossible.

Out-of-state custody, however, favors a remote appearance. ICE transfers

many New Jersey detainees—like defendant here—to facilities elsewhere in the United States. Those can include facilities in Pennsylvania and New York, or even further distances. (AGa40 to 41; AGa46). Moshannon, where defendant was confined, can be a 300-mile one-way drive. See Doe, 2025 WL 949846, at *5; (AGa13; AGa33). And while ICE will release a defendant to state criminal custody, it requires the receiving State to cover the cost of retrieving the defendant. ICE Tool Kit for Prosecutors at 8-9. In contrast to these significant costs and practical challenges, numerous ICE facilities—including, as relevant to this case Moshannon—are equipped with videoconferencing equipment that can allow virtual appearances.[6] The upshot of out-of-state detention is thus straightforward: virtual appearances allow a case to move forward without subjecting the State to enormous expenses or drains on officers' time—particularly for matters like pretrial conferences, arraignments, and pleas, where videoconferencing technology is often available and sufficient. Sentencings and evidentiary hearings will present closer cases, but likewise call for the trial court to conduct a fact-based weighing of difficulty and cost involved in a defendant's in-person versus virtual appearance.

[6] See U.S. Immigration & Customs Enforcement, Tablets at ICE Facilities (May 13, 2025), https://www.ice.gov/detain/detention-facilities/tablets; U.S. Immigration & Customs Enforcement, Contacting a Detainee, https://www.ice.gov/detain/detention-facilities/delaney-hall-detention-facility (last visited July 23, 2025); (AGa33 to 34; AGa44 to 45).

Much the same goes for a defendant who, as has since occurred here, been deported. Although many may be unable to appear for court, doing so may not be impossible. Federal officials can consent to a defendant's readmission or engage in specialized forms of prosecutorial cooperation or sponsorship with state officials. State officials can also pursue international extradition with the cooperation of the U.S. Department of Justice and U.S. Department of State.[7] The availability of these options, their relative cost, and whether either the defendant, the State, or both have attempted to pursue them will of course depend on the facts of each case. But in any case, the trial court should consider whether a witness who seeks to testify remotely has attempted the legal options he might have to physically appear, and it should also consider whether, if the

[7] Although the tools the State may employ in any case can vary—justifying a case-specific analysis—ample bases exist for each option laid out here. Federal law authorizes the U.S. Attorney General to consent to readmission for an alien, see 8 U.S.C. 1182(a)(9)(A)(iii), and USCIS Form I-212 allows an alien to seek it. See Form I-212, Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal, https://www.uscis.gov/i-212 (last visited July 31, 2025). DHS can likewise seek Significant Public Benefit Parole as a form of cooperation or sponsorship to allow a prosecution to proceed. See 8 U.S.C. 1182(d)(5)(A); ICE Tool Kit for Prosecutors at 24. And prosecutors can also pursue international extradition with the cooperation of the Department of Justice and Department of State. See 18 U.S.C. 3184; U.S. Department of State, 7 Foreign Affairs Manual §1615(b) (Aug. 6, 2015), https://fam.state.gov/fam/07fam/07fam1610.html ("The extradition process begins when a state or federal prosecutor requests that a fugitive known or believed to be located in a foreign country be returned for prosecution or punishment.").

State objects to a defendant's attempt to make a virtual appearance, the State made efforts to ensure that the defendant can appear in person.

Finally, Pathri's factor five—considering delays resulting from requiring a defendant to physically appear—ensures our courts can consider a defendant's speedy-trial equities without drawing a bright line that sacrifices trial integrity. After all, responsible judicial administration requires both avoiding delay and avoiding the premature dispensation of justice that disserves "both [] the litigants and those irrevocably affected by the outcome of the litigation." Fehnel v. Fehnel, 186 N.J. Super. 209, 215 (App. Div. 1982). So although any particular speedy-trial issues defendant has raised here are best addressed by the trial court on remand, see infra at 39, many such equities can counsel in favor of allowing a virtual appearance at any stage if necessary to avoid indefinite delays. Trial courts should be cognizant of the uncertainty and anxiety unresolved charges cause to a defendant, see State v. Cahill, 213 N.J. 253, 275 (2013), the decay of memories and evidence over time, see Barker v. Wingo, 407 U.S. 514, 521 (1972), and the dignitary interests for victims in seeing a case resolved, see Tedesco, 214 N.J. at 195-96. They should also consider that delay can beget delay. This case poses a good example: when a defendant is unable to proceed virtually in immigration custody, it may prove even harder for a defendant to do so once he has been deported. Those considerations are particularly strong in

non-testimonial contexts like the arraignment here—where the parties have little to gain by proceeding virtually in person, but much to lose by continued delay. Pathri's solution—to consider these delays as part of a broader test, one that also considers the integrity of the proceedings—is thus salutary.

Beyond the Pathri factors, which are non-exhaustive and originate in the civil context, courts considering a defendant's virtual appearance in a criminal case should also consider the views of the victim on whether the defendant may make a virtual appearance—particularly in sentencing hearings. See Tedesco, 214 N.J. at 195-96. The Crime Victim's Bill of Rights (CVBR) and the Victim's Rights Amendment afford victims the right to be treated with fairness, compassion, respect, and dignity; to be present at most public judicial proceedings; and to have standing to file motions in proceedings impacting their rights. See id. at 195-96; N.J.S.A. 52:4B-36; N.J. Const., Art. I, Para. 22. To the extent that "confrontation through a video monitor is not the same as physical face-to-face confrontation," United States v. Yates, 438 F.3d 1307, 1315 (11th Cir. 2006), victims may rationally believe there to be greater integrity in a proceeding involving a confrontation with an attacker in person with the possibility of immediate incarceration thereafter—or, in the alternative, in a proceeding that brings a defendant to court sooner, even if the defendant appears remotely. The victim's interests should be given weight—especially for

any sentencing hearings or evidentiary hearings where a victim may testify, in contrast to status conferences and motion hearings.

4. Finally, even where remote testimony is potentially warranted, the trial court must consider the availability of—and impose—additional safeguards that ensure such the integrity of remote testimony or other elements of a defendant's virtual participation. These safeguards protect the interests of the defendant and the State by ensuring a defendant can convey his testimony and have it subjected to rigorous cross-examination, and is able to participate in his defense and waive any applicable rights in an informed way. And they also help to "'legitimately preserve public confidence' in the administration of justice." Dunne, 124 N.J. at 315. Like trials, evidentiary proceedings and sentencings conducted with all parties present in the courtroom typically "enhance[] the reliability of the fact-finding process and promote[] 'society's interest in having the accused and accuser engage in an open and even contest[.]'" State v. Reevey, 417 N.J. Super. 134, 150 (App. Div. 2010) (quoting Lee v. Illinois, 476 U.S. 530, 540 (1986)). And even for proceedings like arraignments, pretrial conferences, and sentencings, a norm of in-court proceedings assures the public that the criminal justice system prioritizes protections for verifying a defendant's identity and his informed participation. So virtual appearances at pre- and post-trial proceedings must occur with sufficient integrity to reassure the public that the virtual

appearance has not altered the fairness of a prosecution to all parties.

Some safeguards will be universal. The defendant must have adequate technological accommodations to respect the rights and responsibilities of the courtroom proceeding. A defendant must have private, secure accommodations when making any appearance at which he participates, in order to ensure that he is not hindered or helped by a third party. Accordingly, in any sentencing or evidentiary hearing, as well as any pretrial conference, arraignment, or plea hearing where the defendant appears by videoconference, the judge must be able to request on demand the defendant rotate his computer around the room to confirm he is not accompanied by anyone whose presence would compromise the integrity of his testimony. See State v. Vega-Larregui, 246 N.J. 94, 126-27 (2021) (recounting efforts by Judiciary staff to ensure secrecy of virtual grand jury proceedings, "such as requiring jurors to perform a 360-degree scan of their location with their electronic devices").

The virtual appearance must also be facilitated by adequate technology to permit the defendant to communicate privately with his attorney and assist in his own defense, because physical presence is usually key to "enabl[ing] the defendant to communicate with his attorney, [and to] assist counsel in the presentation of a defense," Reevey, 417 N.J. Super. at 150—even if a defendant is not appearing before a jury and no witnesses will be cross-examined. To that

end, defense counsel may, for example, have to wear a Bluetooth device that enables communication to mimic the defendant's presence in the courtroom. Similarly, the defendant must be informed that he could consult privately with counsel when he wishes to do so—as at an in-person hearing.

Other safeguards will vary from proceeding to proceeding. If a defendant testifies at an evidentiary hearing, the defendant must agree to take an oath that is sufficient under the circumstances to constitute "a commitment to speak the truth 'on pain of future punishment of any kind.'" Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. on N.J.R.E. 603 (2022) (quoting State in Interest of R.R., 79 N.J. 97, 110-11 (1979)). That may require taking an oath administered by the court, and if a defendant has been deported or is out of the court's reach, conditions will be more favorable to virtual testimony if the parties can agree in advance on the consequences should a defendant commit perjury. Similarly, any virtual appearance must be consistent with the adequate provision of any necessary interpretive services. Although proceedings other than jury trials do not have the same presumption of in-person interpreting, see Supreme Court of New Jersey, N.J. Judiciary Language Access Plan ¶¶ 1.8.1, 1.8.2 (Nov. 14, 2023), they can raise similar complications where a defendant appears virtually and an interpreter is involved. The delays that accompany an interpreter's translations may be exacerbated by technology. And a second

interpreter may be necessary, devoted to interpreting the defendant's questions or comments for the attorney, to ensure that the defendant can communicate with his attorney in confidence.

Sentencings, evidentiary hearings, and other critical phases of a criminal case—including arraignments and guilty pleas, see Frye, 566 U.S. at 140—should be accompanied by adequate videoconferencing technology, and disfavor virtual appearances via telephone. Because the law gives victims the right "[t]o make, prior to [a defendant's] sentencing, an in-person statement directly to the sentencing court concerning the impact of the crime," N.J.S.A. 52:4B-36(n), and the public has an interest in "[a] solemn sentencing proceeding, with all parties present," Tedesco, 214 N.J. at 193-94, a phone conference will fail to preserve the solemnity and confrontation this Court demands. And the court must have a large-enough screen to allow the court to assess the credibility of a defendant. See Anne Bowen Poulin, Criminal Justice and Videoconferencing Technology: The Remote Defendant, 78 Tul. L. Rev. 1089, 1108-09 (2004). Those needs should preclude the possibility of allowing a defendant to appear by phone in order to testify.

Similar considerations apply to arraignments and pleas. Arraignments require a judge not only to "advise the defendant of the substance of the charge," but also to confirm the status of discovery and plea negotiations, and that the

defendant has reviewed the indictment with counsel. R. 3:9-1(b)(2) and (b)(3); see also Grenci, 197 N.J. at 618. An arraignment can also be a defendant's first appearance, see, e.g., State v. Crisafi, 128 N.J. 499, 504 (1992), requiring the court to confirm the defendant's identity. And a guilty plea—whether undertaken at an arraignment or a later hearing—"is a grave and solemn act to be accepted only with care and discernment," including that the defendant's waiver of rights is "voluntary," and "knowing, intelligent," and "done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970). Like sentencing and evidentiary hearings, the defendant's need to confer with counsel and the court's oversight function already disfavor holding these events virtually. See Jenia I. Turner, Virtual Guilty Pleas, 24 U. Pa. J. Const. L. 211, 217-19, 262-68, 273 (2022). Courts should approach telephonic arraignments with extreme caution and almost never accept a telephonic guilty plea.

On the other hand, the need for safeguards will be less pressing at routine status conferences or arguments on purely legal motions. Videoconferencing technology is still preferable as a higher-fidelity way to ensure a defendant's remote presence—and is helpful in case a defendant's presence should become important at a hearing. But if necessary to avoid extensive delays, a defendant's telephonic appearance may adequately protect all parties' interests.

POINT II

TRIAL COURTS MAY PROPERLY ISSUE BENCH WARRRANTS WHEN DEFENDANTS ARE DETAINED BY ICE.

Additional flexibility is also warranted on the second issue in this case—whether and when a bench warrant may issue because a defendant did not appear at a hearing because he is held in federal immigration detention. Bench warrants can be appropriate in such circumstances, not as a punishment but to serve as a detainer to ensure either that ICE remands the defendant to state custody, or that the State is notified if the defendant is released and subsequently apprehended—either by ICE within the United States, or following the defendant's deportation and reentry into this country. The trial court therefore acted within its discretion in issuing the bench warrant for defendant where it took steps to ensure that the warrant appropriately functioned as a detainer. Defendant's arguments that the bench warrant violated his rights are accordingly misplaced. But to the extent that it motivates defendant's appeal, amicus recognizes the inflexibility of New Jersey's current bench-warrant form, which fails to reflect the dual role that such bench warrants can play in serving as detainers. This brief thus recommends that, going forward, the bench-warrant template be updated to more accurately reflect the basis for its issuance in such cases.

To understand the practical problem, some context on bench warrants and

detainers is in order. The typical New Jersey bench warrant is "[a]n order from the court giving legal authority to law enforcement to arrest a person for failure to appear for a court hearing or failure to comply with a court order." N.J. Courts, Bench Warrant, https://www.njcourts.gov/glossary/bench-warrant (last visited July 31, 2025); see also R. 7:2-3(a) (describing municipal-court bench warrants as "any warrant, other than a Complaint-Warrant (CDR-2), that is issued by the court that orders a law enforcement officer to take the defendant into custody"). The warrant is marked executed on its subject's arrest, see, e.g., State v. Paley, 461 N.J. Super. 310, 313 (App. Div. 2019), and the underlying case proceeds.

In New Jersey, bench warrants serve a dual role: they can also function as detainers. A detainer is, broadly speaking, any "warrant or formal authorization to hold an inmate for prosecution or detention by a Federal, State or local law enforcement agency or [ICE]." N.J.A.C. 10A:9-1.3.[8] While some other jurisdictions choose to use specialized forms for some or all of their detainer

[8] Although some detainers also constitute formal "'legal order[s] that require[] a State in which an individual is currently imprisoned to hold that individual when he has finished serving his sentence so that he may be tried by a different State for a different crime,'" under the Interstate Agreement on Detainers (IAD), State v. Baker, 198 N.J. 189, 191-92 (2009) (per curiam) (quoting Alabama v. Bozeman, 533 U.S. 146, 148 (2001)), a detainer can be any official request from New Jersey asking that it take custody over a defendant who is currently detained by another State or by the federal government.

requests, see, e.g., District of Columbia Dep't of Corrs., Policy and Procedure No. 4356.1D at Attachment 10 (July 20, 2023), https://tinyurl.com/yh9khr3y (specialized detainer notice for sentenced prisoners delivered to another state), New Jersey prosecutors and judges instead typically use a bench-warrant form that, as here, is accompanied by indications on the warrant and associated case-management software that the warrant is issued as a detainer. See (Da32; AGa1).

Issuing detainers as bench warrants has benefits, particularly where a defendant is held in ICE custody. New Jersey cannot be certain that other sovereigns will honor its detainer requests, especially those issued for defendants who are not sentenced prisoners and accordingly not subject to the IAD. See United States v. Dobson, 585 F.2d 55, 58-59 (3d Cir. 1978). Indeed, ICE makes clear that it may refuse to do so. See ICE Tool Kit for Prosecutors at 9. If ICE so chooses, then ICE custody will ultimately result either in the defendant's deportation (rather than remand to state custody) or to the defendant being released freely within the United States. Either way, a dual detainer-bench warrant serves as a legal basis to bring a defendant into New Jersey's custody if ICE chooses not to honor the detainer. [9]

[9] As an alternative to a detainer, prosecutors may also seek a writ of habeas corpus *ad prosequendum*—or "order to produce"—in order to obtain a defendant's physical presence. This is a judicially issued device "'used in

In either case, bench warrants serve a useful function. As detailed at more length in the Attorney General's brief in State v. Reyes-Rodriguez, No. 090313, bench warrants have historical support as a tool to obtain custody over a deported defendant, and are frequently treaty-mandated conditions to extradite a defendant from a foreign country to New Jersey, see id. at 29-31. Defendant's deportation to Venezuela and current presence in Ecuador is no exception. See Ecuador-U.S. Extradition Treaty, Art. V, 18 Stat. 756 (June 28, 1872) ("[W]hen the fugitive is merely charged with crime, a duly authenticated copy of the warrant for his arrest in the country where the crime has been committed, and of any evidence in writing upon which such warrant may have been issued, must accompany the aforesaid requisition.").

Whether or not a defendant has been deported, a warrant also allows a defendant to be entered into the "Wanted Persons" National Crime Information Center (NCIC), the FBI's nationwide database of missing and wanted persons that allows the vast majority of law-enforcement agencies nationwide to check the defendant's outstanding warrant status should he reenter the country. See

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criminal cases to bring before a court a prisoner to be tried on charges other than those for which the prisoner is currently being confined.'" Baker, 198 N.J. at 192 (quoting Black's Law Dictionary 715 (7th ed. 1999)). As with a detainer, a jurisdiction holding a defendant in immigration or pretrial detention will not necessarily honor the order to produce. But unlike a detainer issued as a bench warrant, the order to produce does not give the State a tool to obtain custody over a defendant if the other jurisdiction releases him.

National Crime Information Center, Fed. Bureau of Investigation, https://le.fbi.gov/informational-tools/ncic (last visited Aug. 1, 2025); Entering Wanted Person Records in NCIC, https://justice.gov/otj/page/file/1349411/dl (last visited July 8, 2025). That wide-ranging searchability ensures that the defendant can be returned to New Jersey forthwith for an in-person trial if he either remains present in the United States, or makes himself present again in the country.

None of these factors render the issuance of the bench warrant in this case a violation of defendant's due process or fundamental fairness rights. Defendant has offered only cursory assertions about any liberty or property interests that the mere existence of a bench warrant in a country from which he has been deported affects. See (Db15). Moreover, to the extent that the issuance of a bench warrant gives a defendant the opportunity to appeal, the appeal protections also constitute sufficient due process under the U.S. Constitution. See Mendoza v. Larotonda, No. 07-4626, 2008 U.S. App. LEXIS 5857, at *2-4 (3d Cir. Mar. 19, 2008) (citing DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 597 (3d Cir. 1995), overruled on other grounds, United Artists Theatre Cir., Inc. v. Twp. Of Warrington, 316 F.3d 392 (3d Cir. 2003)) (rejecting due-process challenge to bench warrant). Nor does the record reflect the "inequitable and arbitrary decisionmaking" that would be needed to support a fundamental-

fairness violation. State v. Njango, 247 N.J. 533, 550 (2021). Instead, the record reflects that this bench warrant accurately recorded that it was meant to serve as a detainer, a device well-suited to this situation.

Defendant's speedy-trial concerns are also misplaced. Setting aside that defendant raises the issue now, rather than before a trial court best positioned to evaluate the "facts of an individual case [as] the best indicators of whether a right to a speedy trial has been violated," Cahill, 213 N.J. at 271, nothing about the bench warrant delays defendant's trial. Any delay is the result of ICE's detention and deportation. And despite defendant's assertions to the contrary, see (Db22), there is no evidence in this case that the State cooperated with ICE to have defendant detained and deported.

Still, looking forward to future cases, certain aspects of New Jersey's bench warrant do make it an imperfect fit for this function. That is because a warrant for a defendant's failure to appear can affect the defendant's ability to be released following an arrest on a future complaint-warrant. Such an arrest prompts a pretrial risk assessment score for a defendant pursuant to N.J.S.A. 2A:162-25 and a risk assessment instrument approved by the Administrative Director of the Courts. Under the current version of the State's Public Safety Assessment (PSA), issuance of a bench warrant for failure to appear can be counted against the defendant and in favor of pretrial detention. See N.J. Courts,

Public Safety Assessment: New Jersey Risk Factor Definitions 3-4 (Dec. 2018), https://www.njcourts.gov/sites/default/files/psariskfactor.pdf. That said, the risk factors exempt missed appearances if "the defendant was in custody (jail or prison) when the failure to appear occurred." Ibid. So in a case like this one, the pretrial risk assessment should avoid being scored against a defendant.

Still, the need for a correct PSA adjustment highlights another weakness of the current bench-warrant form: the current standard form fails to distinguish between the reasons a court issues the warrant. Even though a court can issue a warrant as a detainer before a defendant in fact misses an appearance, the form contains language only for a defendant's failure to appear:

> It is on this ___ day of _____ ORDERED that **this warrant be issued for the Defendant's failure to appear** before the Honorable _____ for:
>
> _ Initial Disposition Conf. _ Final Disposition Conf.
> _ Discretionary Conf. _ Arraignment _ Pre Trial Conf.
> _ Trial _ Sentence _ VOP _ Other
>
> It is further ORDERED that the court is satisfied that a condition of the recognizance in this case has been breached by the defendant's failure to appear at the above court event and the recognizance is hereby forfeited.
>
> [See (Da32) (emphasis added).]

That formatting fits oddly with the role of the bench warrant here, where defendant did try to appear at his arraignment.

But in other cases, the answer cannot be to cast aside the role of the bench

warrant entirely, given its many salutary roles described above. So recognizing the apparent inflexibility of the current bench-warrant form and PSA guidelines, amicus offers a pair of recommendations for the Administrative Director of the Courts to implement at this Court's direction. First, the current bench-warrant form should be modified to avoid repeating the issue present in this case, by including language in the existing bench-warrant form, or creating an entirely separate form, to encapsulate the situation present in this case, where a defendant is unable to physically appear in court because he is held in another institution or in another jurisdiction without the ability to appear in court. For example, the following could distinguish between the two types of warrants:

> It is on this ___ day of _____, ____ ORDERED that this warrant be issued for the Defendant's inability to appear before the Honorable _____ for
>
> _ Initial Disposition Conf. _ Final Disposition Conf.
> _ Discretionary Conf. _ Arraignment _ Pre Trial Conf.
> _ Trial _ Sentence _ VOP _ Other
>
> due to defendant's
> __ incarceration/detention at _____ in _____ state/county
> __ deportation to _____
> __ other: _____
>
> Defendant is ORDERED to surrender to New Jersey authorities upon his release or return to the United States.

Creation of this additional warrant form, or the addition of this language in the current form, would help clarify the court's purpose in issuing the warrant, help

return defendant to New Jersey's jurisdiction, and ensure that a defendant is not penalized because an inability to appear is treated as a failure to appear.

Second, the Attorney General recommends that the PSA guidelines be slightly modified to recognize federal immigration detention as similar grounds to custody for a defendant's failure to appear: both say more about other legal proceedings a defendant is facing, rather than a defendant's likelihood of posing a risk of flight or danger to the public during pretrial release. Taken together, these twin recommendations address any concerns about conflating the inability to appear with the failure to appear raised below, while nevertheless ensuring that trial courts can use the bench warrant device as a detainer—as this trial court did here—as a key tool for cases where a defendant has been removed, whether as a tool for extradition or for notification if and when a defendant returns.

CONCLUSION

The Court should affirm the trial court's issuance of a bench warrant and remand the matter back to the trial court to implement its additional guidance on the use of remote appearances. This Court should direct the Administrative Director of the Courts to modify the standard bench-warrant form.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
AMICUS CURIAE

BY: /s/ *Sarah D. Brigham*
Sarah D. Brigham
Deputy Attorney General
brighams@njdcj.org

SARAH D. BRIGHAM
ATTORNEY NO. 184902016
DEPUTY ATTORNEY GENERAL
DIVISION OF CRIMINAL JUSTICE
APPELLATE BUREAU

OF COUNSEL AND ON THE AMICUS BRIEF

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