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SUPREME COURT OF NEW JERSEY
DOCKET NO. 090118

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

BRIEF ON BEHALF OF AMICUS CURIAE OFFICE OF THE PUBLIC DEFENDER

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July 24, 2025

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OTHER AUTHORITIES

PRELIMINARY STATEMENT

The use of bench warrants by trial courts in state criminal prosecutions where defendants are detained by the Department of Homeland Security ("DHS"), Immigration and Customs Enforcement ("ICE"), or who have been deported from the United States, has proliferated. While courts have the authority to issue a bench warrant where a defendant has not appeared in court by his own volition, this case raises the question of whether a bench warrant can be issued for a defendant who, despite having been detained by ICE or deported, seeks to participate in his state criminal case and defend against the charges lodged against him. In this case, Mr. Fernando J. Garcia-Moronta is represented by counsel and, despite his ICE detention and deportation, wants to participate in his state criminal matter. But, instead of permitting Mr. Garcia-Moronta's remote appearance, the trial court issued a bench warrant based solely on his inability to appear in-person in court.

Simply put, bench warrants are an ineffective and inappropriate tool to address situations in which a defendant has been detained or deported but wants to continue to defend against their state criminal case. Although prosecutors and trial courts may perceive bench warrants as place holders for the case until the defendant possibly becomes available in the United States, bench warrants do nothing to assure an ICE-detained or deported defendant's

appearance in state court. They are also improper under Rule 3:7-8 to address the defendant's non-volitional absence, frustrate the Criminal Justice Reform Act's dual mandate that detention should not be based on the acts of third parties or a defendant's immigration status, and unnecessarily stall prosecutions where detained or deported defendants want to participate.

Better tools exist to assure a detained or deported defendant's appearance in state court. Depending on whether the defendant is detained in an ICE detention facility or has been deported, tools including writs of habeas corpus ad prosequendum, administrative stays of removal, international extradition, and remote appearances, among others, can be utilized in cases where such defendants want to participate in their state criminal cases. Notably, ICE itself has encouraged prosecutors to utilize several of these tools.

This case provides this Court with an opportunity to craft a resolution that will allow detained or deported defendants the ability to participate in state court to resolve their criminal cases. The New Jersey Office of the Public Defender respectfully urges this Court to instruct trial courts that bench warrants are generally improper where a defendant is in ICE custody or has been deported. Instead, prosecutors must utilize the tools available to them to facilitate the defendant's in-person appearance in court when appropriate, and both prosecutors and our courts must be amenable to remote appearances or

waivers of appearances by detained or deported defendants where their physical appearance is otherwise not possible and where they have consented to virtual appearances or waivers. And where prosecutors refuse to utilize the tools available to them to assure a defendant's in-person appearance or oppose a defendant's remote or waiver of appearance, our trial courts should dismiss the case either sua sponte or on the motion of the defense for failure to prosecute or for a constitutional speedy trial violation. This proposal offers a workable solution, and it is respectfully requested that the Court implement it.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

For a complete recitation of the facts and procedure in this case, the New Jersey Office of the Public Defender ("OPD"), appearing as amicus curiae, relies on the Procedural History and Statement of Facts contained in defendant-movant's briefing filed with this Court.

Amicus highlights that Mr. Garcia-Moronta was taken into custody by ICE and detained in the Moshannon Valley Detention Center, located in Pennsylvania, upon his release from county jail pursuant to a pretrial release order issued in this case. As a result, he was unable to appear in-person in court for his arraignment for Union County Indictment No. 24-06-0885. (1T 3-8 to 14)[2] Despite his counsel's request that Mr. Garcia-Moronta be permitted to appear telephonically, waive his appearance, or that a writ be issued to produce him, the trial court issued a bench warrant at the State's request. (1T 3-15 to 6-22)

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[1] Due to the interrelated nature of the procedural history and statement of facts in this case, the two sections have been combined for clarity to the reader.

[2] The following abbreviations are used:
1T -- Arraignment transcript, dated October 7, 2024
Db -- Defendant's supplemental brief, filed with this Court on or about July 11, 2025
Da -- Appendix to defendant's motion for leave to appeal, filed with this Court on May 8, 2025
OPDa -- Appendix to OPD's amicus curiae brief

Mr. Garcia-Moronta filed a motion for leave to appeal with the Appellate Division, which was denied. He then filed a motion for leave to appeal with this Court, which was granted on May 8, 2025.

While the appeal was pending before this Court, Mr. Garcia-Moronta was deported from the United States and is currently residing in Ecuador. (Db 2)

LEGAL ARGUMENT

POINT I

BENCH WARRANTS ARE NOT THE CORRECT TOOL TO SECURE APPEARANCE OF NONCITIZENS WHO ARE IN ICE DETENTION OR HAVE BEEN DEPORTED.

A. As written, Rule 3:7-8 does not authorize a bench warrant in response to a defendant's non-volitional absence.

Rule 3:7-8 provides that a bench warrant should be issued when a defendant "fails to appear in response to a summons." The ordinary meaning of Rule 3:7-8 -- considering both its words and context -- requires a volitional and culpable omission of a defendant's knowing duty to come to court. Under the Rule, a bench warrant should not be issued if a defendant's absence is caused by factors outside the defendant's control -- including being placed in ICE detention or being deported. To interpret the Rule otherwise would distort the text and produce unjust results.

Start with the text itself. This Court "review[s] the meaning or scope of a court rule de novo, applying 'ordinary principles of statutory construction to interpret the court rules.'" DiFiore v. Pezic, 254 N.J. 212, 228 (2023) (quoting State v. Robinson, 229 N.J. 44, 67 (2017)). The textual analysis should "begin with the plain language of the rule, and 'ascribe to the words of the rule their ordinary meaning and significance and read them in context with related

provisions so as to give sense to the court rules as a whole.'" Ibid. (quoting Wiese v. Dedhia, 188 N.J. 587, 592 (2006)) (cleaned up). In addition to its responsibility to interpret the rules, this Court also has the authority to adjust existing rules and create new "rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts." N.J. Const. art. VI, § 2, ¶ 3. This Court exercises its rulemaking "authority to 'ensure greater fairness in the administration of justice' -- to make our civil [and criminal] justice system more fair." DiFiore, 254 N.J. at 228 (quoting Orientale v. Jennings, 239 N.J. 569, 592 (2019)).

Rule 3:7-8 provides that, "[i]f the defendant fails to appear in response to a summons, a bench warrant shall issue." Ibid.; see also Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 3:7-8 (2025) ("'Bench warrants' are warrants that issue on failure to appear for a summons."); see also R. 3:7-9 (detailing the bench warrant's form). "A bench warrant is 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." R. 7:2-3. Rule 3:7-8's plain text requires that the defendant has chosen, based on their own desire, to not physically come to court. Indeed, the three constituent elements of the Rule -- "defendant fails to appear in response to a summons" -- each indicate that the defendant must have chosen not to bring themself to court.

To begin, the use of "fails" implies fault, shortcoming, or neglect of a duty on the defendant's part. It connotes that the defendant's absence was a deliberate choice, not an uncontrollable result of external forces. See Webster's New Universal Int'l Dictionary (Unabridged) 657 (1983) ("to become deficient").

Likewise, the phrase "to appear" also requires a volitional act. In State v. Lopez-Carrera, 245 N.J. 596 (2021), this Court considered the meaning of the phrase "appearance in court" as used in the Criminal Justice Reform Act ("CJRA"). The CJRA provides for pretrial detention when no combination of conditions "would reasonably assure the eligible defendant's appearance in court when required." N.J.S.A. 2A:162-18(a)(1) (emphasis added). Looking to the "plain language of the Act," this Court explained that

> "Appearance" commonly involves action. Webster's Third New International Dictionary, for example, defines the term as "the act, action or process of appearing" -- as in, "the act or action of coming before the public," "the act or action of coming formally before an authoritative body," "the coming into court of either of the parties to a suit," and "the coming into court of a party summoned in an action." Webster's Third New Int'l Dictionary (Unabridged) 103 (1981); see also Black's Law Dictionary 122 (11th ed. 2019) (defining "appearance" as "[a] coming into court as a party or interested person . . . esp., a defendant's act of taking part in a lawsuit"); Ballentine's Law Dictionary 82 (3d ed. 1969) (defining "appearance" as "the overt act by which [a defendant] submits himself to the court's jurisdiction").

[Id. at 613-14.]

Thus, this Court concluded that "[t]he key word, 'appearance,' commonly points to acts or actions people choose to take, not decisions by others that may prevent someone from acting." Id. at 602. Put differently, "[a] defendant's 'appearance in court' thus commonly refers to the voluntary act of showing up." Id. at 614.

The same reasoning applies to Rule 3:7-8's requirement that a bench warrant shall issue "[i]f the defendant fails to appear[.]" Ibid. (emphasis added). The verb "to appear" is the base word from which the noun "appearance" is derived. "Appearance" is formed from the verb "appear" and the suffix "-ance," which forms abstract nouns indicating a state, quality, or action. When "-ance" is added to "appear," it creates a noun that refers to the act of appearing. Indeed, the most relevant definition of "appear" is "to present oneself formally in a court as attorney, plaintiff, etc." Webster's New Universal Int'l Dictionary (Unabridged) 88 (1983).

Further, the final part of Rule 3:7-8 -- "in response to a summons" -- reinforces the volitional act requirement. A defendant's "response" is a volitional performance, defined as "something said or done in answer to something else; an answer; reply." Webster's New Universal Int'l Dictionary (Unabridged) 1543 (1983). A defendant who is in ICE detention or is deported

is not absent from court "in response to a summons"; rather, he or she remains in ICE detention or outside the country because of circumstances beyond their control. This phrase independently creates a volition requirement -- the non-appearance must be a chosen reaction (or lack thereof) to the summons, not an absence due to external and uncontrollable circumstances.

The plain language of the Rule provides that a bench warrant is appropriate if a defendant (1) is in receipt of a summons; and (2) chooses to absent themself from the court proceedings. The defendant must have the ability to make a conscious decision regarding their appearance. So, a bench warrant is not proper under the Rule if the defendant is unable to come to court because of circumstances outside of his or her control.[3]

In addition to Rule 3:7-8's plain language, the context of trial court practice confirms the commonsense application of a volitional act requirement. It is common practice for our trial courts to withhold bench warrants in situations where a defendant does not physically stand in court because of

[3] New York's bench warrant statute specifically includes a voluntariness requirement: "absent relevant, credible evidence demonstrating that a principal's failure to appear for a scheduled court appearance was willful, the court, prior to issuing a bench warrant for a failure to appear for a scheduled court appearance, shall provide at least forty-eight hours notice to the principal or the principal's counsel that the principal is required to appear, in order to give the principal an opportunity to appear voluntarily." N.Y. Crim. Proc. Law § 510.50(2).

reasons outside his or her control, especially if their whereabouts are known. For example, a bench warrant typically would not be issued where a defendant is unable to get to court because he or she is hospitalized, is in another state's custody, cannot travel because of a natural disaster, or is deployed as a member of the military. See, e.g., State v. Hoimes, 214 N.J. Super. 195, 198 (App. Div. 1986) (noting that the trial court vacated its bench warrant "when the State learned that defendant had again been hospitalized").

When a trial court knows that a defendant cannot come to court because he or she is in ICE custody or has been deported to a foreign country, no bench warrant is necessary because the defendant's location is known. The defendant has not absconded. Rather, the defendant is unable to come to appear physically in court because of circumstances outside of their control. Here, the court's bench warrant noted that Mr. Garcia-Moronta was "in ICE custody." (Da 13); see also OPDa17-21 (examples of bench warrants indicating that individual is in ICE custody; further examples that indicate individual was deported).

In short, Rule 3:7-8's text and context require a volitional and culpable omission of a defendant's knowing duty to come to court before a bench warrant is issued.

B. Bench warrants for ICE detainees frustrate the CJRA's dual mandate: that detention should not be based on the acts of third parties or because of a defendant's immigration status.

The Legislature's enactment of the CJRA, N.J.S.A. 2A:162-15 to -26, prompted by a voter-approved constitutional amendment, N.J. Const. art. I, ¶ 11, was the most significant reorientation of our State's criminal justice system in decades. It was a collaborative achievement by all three branches of government. Studies have revealed that the reforms have worked[4] and the CJRA's success has been lauded by criminal justice stakeholders in New Jersey and nationally.

Although the CJRA does not directly address bench warrants, it does envision a criminal justice system that is free from detention based on acts of third parties or because of a defendant's immigration status.

As this Court observed in Lopez-Carrera, the "CJRA ties detention to a defendant's voluntary acts and related factors." 245 N.J. at 617. "In the

[4] See, e.g., Jaquelyn L. Jahn, et al., Evaluating Firearm Violence After New Jersey's Cash Bail Reform, JAMA Network Open (May 2024) (concluding that "New Jersey's pretrial detention population dramatically decreased under bail reform" and that there was no "evidence of increases in overall firearm mortality" or "gun violence"), www.pubmed.ncbi.nlm.nih.gov/38776084; Taylor Riley, et al., Examining Changes in Fatal Violence Against Women After Bail Reform in New Jersey, Am. J. of Preventive Med. (Apr. 2025) (concluding that "[t]here were no significant changes in the rates of intimate partner violence-related homicide," "pregnancy-associated homicide," "and overall homicide" after the CJRA took effect), www.ajpmonline.org/article/S0749-3797(25)00007-8/fulltext.

language, structure, and purpose of the CJRA," this Court found "evidence that the Legislature intended to authorize pretrial detention when there is clear and convincing evidence that individual defendants pose a serious risk of nonappearance based on their own conduct, not the acts of third parties like ICE." Ibid. This Court specifically rejected the argument that "acts and decisions of others can provide a basis to detain a defendant[.]" Id. at 617. The upshot is straightforward: the Legislature expressed a view that defendants should not be detained based on factors outside their control.

The CJRA also envisions a criminal justice system that is free from status-based detention. "Courts must engage in a fact-specific inquiry that looks beyond status because each person's circumstances -- citizens and non-citizens alike -- are different." Id. at 625. "[T]he key question for the court is whether a defendant will choose to appear, not what the person's immigration status is." Ibid.

Those same principles from the CJRA -- that a defendant should not be held based on a third party's actions or the defendant's own immigration status -- weigh against bench warrants being issued for defendants who are detained by ICE or deported. Contrary to the CJRA's purpose, issuing a bench warrant because a defendant is in ICE custody or has been deported fails to consider their individual circumstances. Instead, the bench warrant is issued on the

basis of ICE's action and the defendant's immigration status -- two things barred by the CJRA and expressly rejected by this Court in Lopez-Carrera.

Ultimately, issuing bench warrants because a defendant is in ICE custody or has been deported frustrates the purposes of the CJRA. For that reason, this Court should provide guidance to trial courts that bench warrants are not generally appropriate when the court knows that the defendant is in ICE custody or has been deported.

C. In any event, a bench warrant is not effective in bringing a defendant who is in ICE detention or who has been deported into New Jersey state court.

For defendants currently in ICE custody, a bench warrant only frustrates the goal of getting the defendant out of ICE custody and into state court. When determining whether an individual should be granted bond from ICE custody, the Immigration and Nationality Act ("INA") provides the Attorney General with broad authority and discretion to detain any non-citizen. See 8 U.S.C. § 1226(a) (specifying that the Attorney General "may" arrest and detain a non-citizen "pending a decision on whether the alien is to be removed from the United States" or the Attorney General "may release" a non-citizen on bond or conditional parole); Matter of Guerra, 24 I&N Dec. 37, 38 (BIA 2006) ("An alien in a custody determination under th[is] section must establish . . . that he or she does not present a danger to persons or property, is not a threat

to the national security, and does not pose a risk of flight."). The Attorney General's powers have been delegated to federal immigration judges, who in turn apply federal laws and regulations. See 8 C.F.R. § 1003.10(b) (providing that "immigration judges shall exercise the powers and duties delegated to them by the [INA] and by the Attorney General through regulation").

A pending bench warrant functions as a significant hurdle to release from ICE detention. Immigration judges and ICE often deny release from ICE custody based on a pending state court bench warrant. See, e.g., Brevil v. Jones, 283 F. Supp. 3d 205, 209 (S.D.N.Y. 2018) (describing that immigration judge found the individual subject to discretionary detention, in part, because the individual "had an existing bench warrant against him for failure to appear at the local criminal court"); Oyedeji v. Ashcroft, 332 F. Supp. 2d 747, 751 (M.D. Pa. 2004) (describing that ICE's "decision to continue detention was based upon [the individual's] prior record, including the fact that three bench warrants had been issued for his failure to appear at criminal proceedings"); see also 8 C.F.R. § 1236.1(c)(4)(iii) (requiring that "[a]n alien, other than an alien lawfully admitted for permanent residence, . . . is ineligible to be considered for release if the alien: . . . has been subject to a bench warrant or similar legal process (unless quashed, withdrawn, or cancelled as improvidently issued)[.]"). So, rather than facilitate a defendant's transfer into

state custody, a bench warrant has the opposite effect: it keeps the defendant in ICE detention. See Certification of Annie Woronecki, Esq. (OPDa5-7 ¶ 12 (describing that client's bench warrant will harm bond chances)).

A bench warrant also makes it more difficult for the detained defendant to defend against deportation. As discussed later in Subsection I.D., an outstanding bench warrant effectively halts state criminal proceedings. Such a pause can prove calamitous because unresolved state charges -- even when not yet proven -- often result in deportation. See Mendoza v. Attorney Gen., 198 Fed. App'x. 175, 177 (3d Cir. 2006) ("[I]mmigration judges are authorized to consider allegations of criminal conduct when deciding whether to grant a discretionary remedy such as cancellation of removal." (citing In re Thomas, 21 I&N Dec. 20, 23 (BIA 1995)). For example, in State v. Reyes Rodriguez, a similar appeal pending before this Court, the immigration judge heavily relied on the defendant's unresolved state charges to justify his deportation. 480 N.J. Super. 526, 553 (App. Div. 2025)

It is worth noting that, even if a defendant is eventually released from ICE custody, a bench warrant does not facilitate transfer to New Jersey state custody. As discussed in Point II, there are several useful tools to obtain the defendant's physical appearance in state court, with none of the harmful unintended side effects.

Bench warrants are no more useful after a defendant has been deported. Most important, an outstanding bench warrant makes it more difficult for an individual who has been deported to return legally to the United States to defend against the state charges. See Certification of Anna Gee, Esq. (OPDa13-15 ¶ 8 (acknowledging this hardship)). Plus, outstanding bench warrants cause other significant harm for deported individuals.

Consider the far-reaching consequences of a bench warrant for the following individual. The defendant is charged with a third-degree state crime. The Superior Court, finding no flight risk or danger, releases him pretrial and schedules a mandatory case conference. Soon after, ICE arrests the defendant. Despite not being subject to mandatory immigration detention, he is held in an ICE facility while awaiting a bond hearing. Defense counsel alerts the trial court that defendant is in ICE detention and asks that the court withhold a bench warrant. Nonetheless, the trial court issues a bench warrant due to the defendant's absence from the case conference. The criminal proceeding is effectively put on hold. When the defendant later appears before an immigration judge seeking bond, the judge cites the bench warrant as grounds for denying release. The State's inaction in filing a writ or seeking the defendant's transfer from ICE custody results in his continued detention and his criminal case remaining on hold. Eventually, the immigration judge rules,

based on their discretion, that the defendant's application for cancellation of removal should be denied, based in large part on the defendant's pending criminal charges. Consequently, the defendant is deported. The defendant wants to participate in his criminal case and resolve his charges so he can reunite with his family in the United States, but the trial court will not permit him to appear remotely, and the bench warrant makes it more difficult to enter the country legally.

Now consider an alternative path where the trial court refrained from issuing a bench warrant. Without the impediment of the bench warrant, the immigration judge grants the defendant's release from ICE detention on bond, allowing him to litigate his criminal case. He receives a favorable disposition in the criminal case, pleading guilty to a disorderly persons offense. Because his criminal charges have been resolved, he is able to successfully defend against his deportation and remain in the United States with his family.

In the end, bench warrants are not the right tool to ensure that a defendant who is in ICE detention or has been deported is brought to New Jersey state court.

D. Bench warrants frustrate prosecutions in cases where detained or deported defendants want to participate in the proceedings.

Bench warrants also stall the progression of criminal prosecutions in cases where detained or deported defendants want to participate in the

proceedings, but where the State has failed to utilize the tools available to obtain their appearance, or where the court has expressed an unwillingness to permit a remote appearance or waiver of appearance. Typically, a bench warrant is issued when a defendant has willfully failed to appear for court as required and who is, for all intents and purposes, unable to participate in their defense through their own volitional act. In practice, until that warrant is executed or vacated through the defendant's appearance in court, the case remains at a standstill on the trial court's docket and the prosecution will not meaningfully move forward -- hearings will not be held, motions will not be decided, and the case will not be adjudicated to completion through either a plea agreement or trial.

When a bench warrant is issued under those circumstances, the prosecution is paused because the defendant's constitutional right to be present at critical stages of the criminal proceeding cannot be honored. See Certification of Anna Gee, Esq. (OPDa13-15 ¶ 6); Certification of Annie Woronecki, Esq. (OPDa5-7 ¶ 11) (both describing that their individual client's case has halted as a result of being detained by ICE); see also State v. Grenci, 197 N.J. 604, 614-15 (2009) ("The right of a person accused of a crime to be present at his or her trial is among the most fundamental of constitutional rights. That right finds its source in the federal and state constitutional right of

a criminal defendant 'to be confronted with the witnesses against him,' and in the right to due process of law[.]" (quoting U.S. Const. amend. VI and N.J. Const. art. I, ¶ 10; citing Illinois v. Allen, 397 U.S. 337, 338 (1970); State v. Luna, 193 N.J. 202, 209-10 (2007); U.S. Const. amend. XIV; N.J. Const. art. I, ¶ 1)); see also State v. Reevey, 417 N.J. Super. 134, 149-50 (App. Div. 2010) (noting federal and state constitutions guarantee a criminal defendant the right to confrontation; that "[i]ncluded within that guarantee, is a criminal defendant's right to be present in the courtroom during every 'critical stage' of the trial"; that a "defendant's right to be present at trial is also protected by the Due Process Clause of the Fourteenth Amendment to the extent that a defendant's absence would hinder a fair and just hearing"; and that "[t]his constitutional right applies to pretrial proceedings" (quotations and citations omitted)); R. 3:16(a) (stating that pretrial "[t]he defendant must be present for every scheduled event unless excused by the court for good cause shown"); R. 3:16(b) (stating, in pertinent part, that at trial or post-conviction proceedings, "[t]he defendant shall be present at every stage of the trial, including the impaneling of the jury and the return of the verdict, and at the imposition of sentence unless otherwise provided by Rule").

However, where a defendant is detained or deported and wants to participate in the proceedings -- whether in-person or remotely -- the issuance

of a bench warrant unnecessarily pauses the prosecution that could otherwise effectively move toward resolution. In such cases, the only barrier to the defendant's ability to participate during the proceedings is ICE's actions in detaining or deporting them. See Lopez-Carrera, 245 N.J. at 601 (acts by third parties such as ICE against defendants that thwart their appearance in court cannot be considered willful non-appearance by defendants for purposes of pretrial detention). The issuance of bench warrants in these cases treats these defendants as if they have intentionally absconded and are unwilling to participate in their cases -- a blatant misnomer.[5]

And, as discussed above, bench warrants do not ensure a detained or deported defendant's appearance in court. In most cases where a defendant is in ICE custody or has been deported, it is unlikely that a bench warrant would result in their return to state court to answer the criminal charges against them. Typically, the practice of vacating a bench warrant requires a defendant's physical appearance in court. Moreover, an active bench warrant for a deported defendant in no way promotes the appearance of the defendant in

[5] Informal data collected by the OPD from OPD trial attorneys throughout the state demonstrates that in most counties, Superior Court judges have issued bench warrants based solely on a defendant's custody in an ICE detention facility or a defendant's deportation from the United States. Notably, OPD trial attorneys in the Cumberland and Mercer County trial regions have reported that trial judges in their vicinages do not issue bench warrants when it is known that the defendant is in ICE custody or has been deported. (OPDa1).

state court; instead the bench warrant will actually serve as a barrier for the defendant to ever lawfully reenter the United States in the future. The bottom line is that bench warrants do nothing to ensure the appearance of detained or deported defendants and are not an effective tool to move state criminal prosecutions forward for detained or deported defendants.

POINT II

BETTER TOOLS EXIST TO ENSURE AN ICE-DETAINED OR DEPORTED DEFENDANT'S APPEARANCE AND PARTICIPATION IN COURT.

State prosecutions of ICE-detained or deported defendants do not need to be placed on pause indefinitely. Where such defendants want to actively participate in defending against state criminal charges, these prosecutions can move forward to resolution. Better tools exist to ensure a detained or deported defendant's access to and appearance in court -- whether that be in-person or remote. Instead of relying wholesale on bench warrants that act only as ineffective place holders for prosecutions, prosecutors must utilize the appropriate tools that exist to assist with ensuring a defendant's appearance in court when required. These tools are discussed in turn.

A. Writ of habeas corpus ad prosequendum.

A writ of habeas corpus ad prosequendum ("writ") is an order to produce that is "used in 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." Black's Law Dictionary (12th ed. 2024); see also State v. Baker, 198 N.J. 189, 192 (2009) (same). In other words, a writ of habeas corpus ad prosequendum permits the transfer of custody of a criminal defendant from one jurisdiction (e.g., a federal ICE detention facility) to another (e.g., a state court) so that the individual can be prosecuted.

A writ is a tool that can facilitate an ICE-detained defendant's physical appearance in state court. ICE itself has acknowledged as much:

> Many aliens enter ICE custody each year while they have pending criminal proceedings or are needed to provide testimony in a criminal matter. Once an alien is placed in custody, the ICE Field Office Director (FOD) for that area has general responsibility for that individual. In many cases, the FOD has broad discretion and several legal mechanisms available to him/her that could help facilitate the release of detained aliens. Among those tools, the FOD could agree to release an alien to state or local authorities under a state writ or may exercise his/her prosecutorial discretion by granting a request for deferred action (DA) in an alien's case.
>
> [U.S. Immigration and Customs Enforcement, Protecting the Homeland: Tool Kit for Prosecutors (April 2011) 8, www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf ("Tool Kit for Prosecutors").]

ICE's Tool Kit for Prosecutors explains that if an ICE detainee is needed as a defendant in a criminal proceeding, prosecutors "may obtain a writ from

an appropriate state or local judge ordering the alien's appearance in court on a specific date." Id. at 8-9. Although it acknowledges that "federal agencies are not bound by state court orders, ICE will generally honor the writ of a state or local judge directing the appearance of a detainee in court." Id. at 9. Once a writ is obtained and ICE has approved it, prosecutors are to contact the area FOD in writing and request that he or she facilitate the detainee's transfer to state or local custody and arrange for the detainee's transportation. Ibid.

To be sure, ICE "reserves the right not to honor a state court writ, or other request for an alien's release." Id. at 11. However, ICE has expressed that it "is committed to supporting the efforts of prosecutors to bring criminals to justice" and has emphasized that its "prosecutor partners are encouraged to engage ICE officers, special agents, and attorneys and seek their assistance and expertise." Id. at 2. Therefore, obtaining and presenting a writ for an ICE-detained defendant's physical appearance in state court is a good first step.[6]

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[6] In 2018, New York's Office of Court Administration issued an advisory to trial courts that, "[w]hen the Court is made aware that ICE has taken a defendant with an active, open case into custody, judges need not issue a bench warrant" and should instead "direct[ ] the prosecutor to issue a writ to produce the defendant on his/her next court appearance." Immigrant Defense Project, Guide for Criminal Defense Counsel: Representing Clients Detained by ICE 19, www.immigrantdefenseproject.org/wp-content/uploads/ Guide-Crim-Defense-ICE-custody.pdf; see also New York City Bar, Recommendations Regarding Federal Immigration Enforcement in New York State Courthouses, 16-17 n.80 ("The instructions also inform judges that they need not issue a bench warrant if they are aware that ICE has taken a defendant with an open

ICE has previously honored these writs in state prosecutions involving OPD-represented defendants and continues to do so in pending cases. See Certification of Susannah Volpe, Esq. (OPDa2-4 ¶¶ 2-5 (discussing successful use of writs in cases involving defendants represented by the OPD in state court)).

B. Deferred Action.

"Deferred Action (DA) is not a specific form of relief but rather a term used to describe the decision-making authority of ICE to allocate resources in the best possible manner to focus on high priority cases, potentially deferring action on cases with a lower priority." Tool Kit for Prosecutors at 4. Although there is no statutory definition of deferred action, federal regulations provide a description: "[D]eferred action [is] 'an act of administrative convenience to the government which gives some cases lower priority[.]'" Ibid. (quoting 8 C.F.R. §274a.12(c)(14)). In other words, deferred action is an exercise of federal prosecutorial discretion to defer a removal action against a person for a certain period of time. Ibid. ("Basically, DA means the government has decided that it is not in its interest to arrest, charge, prosecute or remove an individual at that time for a specific, articulable reason.").

New York City case into custody."), www.nycbar.org/wp-content/uploads/2023/05/2017291-ICEcourthouse.pdf.

A prosecutor can seek deferred action for a defendant who is the subject of their state prosecution, and "ICE gives [law enforcement agency] requests to exercise DA the utmost consideration as part of its commitment to assist its law enforcement partners[.]" Id. at 5. "ICE considers deferred action requests based on a variety of factors, including whether the individual's presence is needed for an ongoing prosecution, and balances those interests against its core mission to remove persons illegally present in the United States." Ibid. Per the Tool Kit for Prosecutors, a sponsoring law enforcement agency, including state and local law enforcement, is responsible for initiating the process to receive a deferred action and for transporting and monitoring a defendant who has received a deferred action. See id. at 5-6 (describing application process).

C. Administrative Stay of Removal.

Where an order of removal has been entered but physical removal of an ICE-detained defendant has not yet been accomplished, an administrative stay of removal may be obtained to temporarily suspend the defendant's removal. "Administrative Stay of Removal (ASR) is a discretionary tool that permits ICE to temporarily delay the removal of an alien. Any alien, or law enforcement agency (LEA) on behalf of an alien, who is the subject of a final order of removal may request ASR from ICE." Id. at 6. "Virtually any alien under a final order of removal may be a candidate for ASR." Id. at 7.

The Tool Kit for Prosecutors outlines how a prosecutor may request an administrative stay of removal, id. at 6-8, and notes that if a "prosecutor. . . [is] aware that an alien, either in ICE custody or at-large, is needed for an upcoming criminal proceeding as a defendant or witness, [he or she] may request ASR from the FOD with authority over [their] area. The request should contain the exact reasons for the request and any date the alien is needed in court," id. at 8. The Tool Kit for Prosecutors goes on to note that there are two forms of an administrative stay of removal -- "one for admitted aliens ordered removed (aliens who actually presented documents to an immigration officer when they came to the United States) and one for inadmissible aliens ordered removed (aliens who were not approved for legal admission at the port of entry or aliens who entered the United States without going to a port of entry)." Id. at 6-7. That distinction matters because the considerations for granting ASR are different under each circumstance:

> If the final order of removal is based on a ground of removability, the FOD has wide discretion to grant a stay of removal. In this instance, ASR is typically granted in a case involving compelling humanitarian factors or a case where a stay is deemed to be in the best interest of the government. . . .
>
> Alternatively, if the final order of removal is based on a ground of inadmissibility, section 241(c)(2) of the Immigration and Nationality Act (INA) authorizes ICE to stay removal of an arriving alien in two limited circumstances: (i) where immediate removal is not

> practicable or proper, or (ii) where the alien is needed to testify in the prosecution of a case involving a violation of federal or state law. INA § 241(c)(2)(A), 8 U.S.C. § 1231(c)(2)(A). FODs and other designated ICE officials have discretion to grant ASRs to arriving aliens based on the parole factors described in 8 C.F.R. § 212.5, as well as the provisions of section 241(c)(2) of the INA.
>
> [Id. at 7.]

ICE has acknowledged that "[p]rosecutors should note that ASR may not be the most appropriate method for securing the appearance of an alien in ICE custody at a future criminal proceeding or to act as a confidential informant," but the Tool Kit for Prosecutors nonetheless urges prosecutors to contact their local ICE Office of Chief or local ICE Enforcement and Removal Operations Field Office for assistance. Ibid.

D. International extradition.

International extradition is "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." In re Extradition of Rana, 673 F. Supp. 3d 1109, 1123 (C.D. Cal. 2023) (quoting Terlinden v. Ames, 184 U.S. 270, 289 (1902)). In other words, "extradition is a legal process by which one country (the requesting country) may seek from another country (the requested country) the surrender of a person who is wanted for prosecution, or to serve a

sentence following conviction, for a criminal offense." U.S. Department of Justice -- Criminal Division, "Frequently Asked Questions Regarding Extradition," www.justice.gov/criminal/criminal-oia/frequently-asked-questions-regarding-extradition (last visited July 22, 2025). Extradition proceedings are governed by 18 U.S.C. § 3181, et seq. The process for international extradition is fully detailed by the U.S. Department of Justice's Justice Manual. See U.S. Department of Justice, Justice Manual, §§ 9-15.100 to 9-15.900, www.justice.gov/jm/jm-9-15000-international-extradition-and-related-matters ("Justice Manual").

Certainly, extradition is not a tool that can be utilized in every case where a defendant has been deported. There are two main barriers. First, international extradition is treaty based. Every extradition treaty is negotiated separately, and each contains different provisions. Justice Manual at § 9-15.210. Pursuant to 18 U.S.C. § 3184, a defendant typically may be extradited where an extradition treaty exists between the United States and the requested foreign country. In some instances, countries will grant extradition without a treaty where an offer of reciprocity is made by the United States. Justice Manual § 9-15.100.

Second, extradition is not available for every crime. International extradition is typically reserved for serious criminal charges, and each treaty

dictates which crimes are extraditable between the treaty parties. See Justice Manual § 9-15.210. For example, the extradition treaty between the United States and Mexico lists the offenses that are extraditable; murder, kidnapping, aggravated sexual assault, robbery, arson, drug offenses, and certain financial offenses are among the crimes listed. See Extradition Treaty, U.S.-Mex., May 4, 1978, 31 U.S.T. 5059, T.I.A.S. No. 9656, Art. 2, § 1 and Appendix ("U.S.-Mex. Extradition Treaty").

Where extradition is possible, under some circumstances, a warrant is required to support the extradition request. See Justice Manual § 9-15.240 (extradition requests are generally composed of (1) an affidavit by the prosecutor explaining the facts of the case and the charges; (2) copies of the statutes alleged to have been violated and the statute of limitations; (3) if the fugitive has not been prosecuted, certified copies of the arrest warrant and complaint or indictment; (4) evidence relevant to the case and to the defendant's identity; and (5) if the defendant has been convicted, a certified judgment of conviction and an affidavit stating that the sentence has not been served or was only partially served). For example, the extradition treaty between the United States and Mexico requires "[a] certified copy of the warrant of arrest issued by a judge[.]" U.S.-Mex. Extradition Treaty, Art. 10, § 3.

To the extent a bench warrant is necessary to achieve international extradition of a deported defendant, so long as the State is serious in its efforts to extradite, the issuance of such a warrant under those narrow circumstances is acceptable; in such circumstances, the bench warrant would be issued with the explicit purpose of obtaining the defendant's in-person appearance in court to advance the state prosecution, and not simply as a place holder that stalls the prosecution.

To be sure, international extradition is not a tool fit for every case where a defendant has been deported. But it is a tool worth exploring by prosecutors where the charges are serious and an extradition treaty exists.

E. Significant Public Benefit Parole.

For individuals who have been deported, "Significant Public Benefit Parole" (SPBP) may be utilized to bring an alien witness, defendant, or cooperating source . . . into the United States for up to one year." Tool Kit for Prosecutors at 24. It has been described by ICE as "a critical enforcement tool that enhances a law enforcement agency's ability to conduct operations and protect the American people" and provides a "legal mechanism" to allow the presence of otherwise inadmissible defendants in the United States "to assist with ongoing investigation, prosecutions, or other activities necessary to protect national security and that are beneficial to the United States. Id. at 24-

25. "There is no statutory or regulatory definition of 'significant public benefit.' Parole based on significant public benefit includes, but is not limited to, law enforcement and national security reasons or foreign or domestic policy considerations." U.S. Citizenship and Immigration Services, "Humanitarian or Significant Public Benefit Parole for Aliens Outside the United States," www.uscis.gov/humanitarian/humanitarian_parole (last visited July 22, 2025). "For example, a beneficiary's participation in legal proceedings may be a significant public benefit, because the opportunity for all relevant parties to participate in legal proceedings may be required for justice to be served." Ibid.

SPBP is a temporary measure that allows a defendant who is otherwise inadmissible entry into the country for a period of time required to accomplish the purpose of the request, i.e., the prosecution. Tool Kit for Prosecutors at 24 (citing 8 U.S.C. § 1182(d)(5)(A)). SPBP requests may be submitted by federal, state, and local law enforcement agencies in accordance with ICE policy and procedure, as described in the Tool Kit for Prosecutors, id. at 25, and on ICE's website, see www.uscis.gov/humanitarian/humanitarian_parole. Such parole can be granted for up to one year, with a one-year extension option. Ibid. There are few legal bars to eligibility for SPBP; those deemed to present a security risk or risk of absconding may be denied parole. Tool Kit

for Prosecutors at 26 (citing 8 C.F.R. § 212.5). "However, the sponsoring law enforcement agency (LEA) is responsible for closely monitoring paroled aliens and thus must consider the alien's criminal history, likelihood to re-offend, any possible threat to public safety and national security and whether such information outweighs the necessity to have the alien remain in the U.S. for the investigation and prosecution[.]" Ibid.

F. Remote appearance through virtual options.

As a result of the unprecedented disruptions caused by the COVID-19 pandemic, the use of technology has been expanded and embraced by our courts, and remote options, including videoconferencing and virtual witness testimony, have supplemented traditional in-person court proceedings. Where in-person production of an ICE-detained or deported defendant is not a possibility, video-conferencing technology is another tool that can facilitate a defendant's appearance in court, albeit remotely.

Prompted by the pandemic, beginning in 2020 this Court issued several orders regarding remote proceedings, repeatedly authorizing novel uses of "technology to preserve, not to undermine, the constitutional right[s] of defendant[s.]" State v. Vega-Larregui, 246 N.J. 94, 102 (2021) (upholding validity of virtual grand jury presentations where all testimony was given

remotely). In its most recent order of October 27, 2022, this Court continued to authorize remote proceedings even as the pandemic was waning, explaining:

> This Order updates the framework for those court events that are to be conducted in person and those that in general will proceed in a virtual format. Informed by experience, it establishes a more sustainable approach to court operations in order to optimize access, participation, and the timely administration of justice.
>
> [Supreme Court's October 27, 2022 Order, "The Future of Court Operations -- Updates to In-Person and Virtual Court Events" 1, www.njcourts.gov/sites/default/files/notices/2022/11/ n221027a.pdf ("Virtual Order").]

Per the Virtual Order, several proceedings are now routinely held virtually, including case management and status conferences, motion arguments, and involuntary inpatient or outpatient commitment review hearings. Id. at 2-4. Bench trials, evidentiary hearings, and sentencing hearings can also proceed virtually with consent of the parties (and consent will not be required from a party that is absent and unreachable). Id. at 2. Trial courts also retain the discretion to conduct arraignments, pretrial and other conferences, plea hearings, non-routine motions, and orientation phases of Recovery Court virtually. Id. at 3-4.

The Virtual Order also explains that "[c]ourt events will be scheduled and conducted consistent with the principles of procedural fairness." Id. at 5. And, significantly, the Virtual Order specifies that "[i]n individual cases, all

judges will continue to have discretion to grant an attorney or party's reasonable request to participate in person in a virtual proceeding or to participate virtually in a matter being conducted in person." Id. at 5-6.

In September 2021, about a year before the Virtual Order was issued, Rule 1:2-1 was modified to add a subsection specifically permitting virtual testimony. Rule 1:2-1(b) now states:

> Contemporaneous Transmission of Testimony. Upon application in advance of appearance, unless otherwise provided by statute, the court may permit testimony in open court by contemporaneous transmission from a different location for good cause and with appropriate safeguards.

The comments to the Rule state that "[e]xperience with the various video conferencing and live streaming applications employed during [the COVID-19] emergency laid the groundwork for rule adoptions providing for the use of these technologies in appropriate circumstances." Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 1:2-1 (2025). They further state that what constitutes good cause under Rule 1:2-1(b) "almost certainly will evolve with further experience with contemporaneous proceedings."[7] Id. at cmt. 2.6.

[7] The issue of whether "good cause" permits an expert to testify virtually is currently pending before this Court in State v. Tyrell S. Lansing, Docket No. 090121. In Lansing, the Appellate Division affirmed the trial court's order denying defendant's motion to allow his expert witness to testify remotely at an evidentiary hearing and at trial. 479 N.J. Super. 565 (App. Div. 2024).

Although the Virtual Order does not explicitly mention the Rule, it indirectly references a judge's authority to allow virtual testimony, pointing out that "judges also routinely exercise discretion to permit individuals to participate virtually as necessary for health and other reasons." Virtual Order at 1.

Undeniably, a trial court has broad discretion in controlling the courtroom and court proceedings. State v. Pinkston, 233 N.J. 495, 511 (2018). Based on the guidance offered by both the Virtual Order and Rule 1:2-1(b), remote appearance is an option that is available to facilitate an ICE-detained or deported defendant's appearance throughout the course of a prosecution. Case management conferences, arraignments, and motion, plea, and sentencing hearings can all be heard virtually. Even for court events where in-person appearance is preferred, such as evidentiary hearings and jury trials, in most cases involving an ICE-detained or deported defendant, the only individual who would appear virtually would be the defendant. The proceeding itself would not be held remotely. In other words, the court, counsel, witnesses, and jurors would all continue to participate in-person in court for such proceedings. See Lansing, 479 N.J. Super. at 575 (the defendant's request that his expert be permitted to testify remotely at an evidentiary hearing and at trial did not transform the otherwise in-person proceedings into virtual proceedings).

Defendants can even testify remotely; "good cause" exists under Rule 1:2-1(b) to allow for such testimony where the defendant is detained by ICE or has been deported, and therefore, has no ability to legally appear in-person in court as required. See State v. Del Fino, 100 N.J. 154, 160 (1985) (what constitutes good cause "will depend upon the circumstances"); Delaware Valley Wholesale Florist, Inc. v. Addalia, 349 N.J. Super. 228, 232 (App. Div. 2002) ("Its application requires the exercise of sound discretion in light of the facts and circumstances of the particular case considered in the context of the purposes of the Court Rule being applied."); Templeton Arms v. Feins, 220 N.J. Super. 1, 21 (App. Div. 1987) ("The good cause standard, then, is flexible, taking its shape from the particular facts to which it is applied."). Although a defendant's remote appearance may not be ideal and may offer certain challenges, including coordination with an interpreter, remote appearance is a tool that can assist in moving a prosecution along, and undeniably provides for a better solution than a bench warrant, which does nothing to assure a detained or deported defendant's appearance in court.[8]

[8] In January 2025, a federal court issued a preliminary injunction ordering the Department of Homeland Security to provide the following relief concerning New Jersey criminal defendants detained at Moshannon Valley Detention Center: "honor writs that require in-person proceedings;" "virtually produce individuals via video conference;" and "authorize and support GEO in the purchase and maintenance of sufficient technology[.]" Doe v. D.H.S., 3:24-259, 2025 WL 360534 (W.D. Pa. Jan. 31, 2025), opinion clarified, 2025 WL

G. Waiver of appearance.

As previously discussed, a defendant has a constitutional right to be present at every critical stage of a criminal proceeding. However, the "right to be present at a criminal trial belongs to no one other than the defendant[,]" State v. Ingram, 196 N.J. 23, 45 (2008), and it may be waived, State v. Morton, 155 N.J. 383, 434-36 (1998) (explaining that the "constitutional nature of this right, however, does not preclude its waiver" (citations omitted)). Thus, Rule 3:16(b) permits a defendant to waive his or her presence at trial, or at any critical stage of the criminal proceeding. State v. Robertson, 333 N.J. Super. 499, 509-10 (App. Div. 2000) (waiver provisions of Rule 3:16(b) apply to a defendant's request to waive appearance at a suppression evidentiary hearing, a critical stage in a criminal proceeding). The rule permits a defendant to waive his or her presence if "(a) the defendant's express written or oral waiver [is] placed on the record, or (b) the defendant's conduct [evidences] a knowing, voluntary, and unjustified absence[.]" R. 3:16(b). And, as noted, Rule 3:16(a) also permits excusing a defendant from any pre-trial court proceeding where good cause has been shown.

949846 (W.D. Pa. Mar. 28, 2025). The case is currently pending appeal in the Third Circuit, Dkt. No. 25-1628.

This Court has previously offered guidance in determining whether a defendant has appropriately waived his or her right to be present. See State v. Tedesco, 214 N.J. 177, 191-97 (2013) (addressing the defendant's request to waive his appearance during sentencing); State v. Dunne, 124 N.J. 303, 317 (1991) (addressing the defendant's request to waive his appearance at trial). This Court has explained that in evaluating a defendant's request to waive his or her appearance, the trial court should consider (1) if the waiver is voluntary, knowing, and competently made with the advice of counsel; (2) if the waiver is tendered in good faith or offered to procure an impermissible advantage; and (3) whether, considering all relevant factors, the court should grant or deny the request in the circumstances of the case. Tedesco, 214 N.J. at 192-93; Dunne, 124 N.J. at 317.

Waivers of appearance are a tool that can move prosecutions forward in cases where a defendant has been detained by ICE or deported and there otherwise is no mechanism to ensure their in-person or remote appearance in court. Although waiver requests must be considered on a case-by-case basis, defendants who are wholly unable to appear in court due to actions taken by ICE are not failing to appear in court voluntarily; thus, waivers of appearance made under such circumstances cannot be classified as being made in bad faith or with some impermissible advantage.

POINT III

PROSECUTORS MUST UTILIZE THE TOOLS AVAILABLE TO ASSURE A DEFENDANT'S PHYSICAL APPEARANCE IN COURT OR ELSE CONSENT TO EITHER REMOTE APPEARANCES BY DEFENDANTS OR WAIVERS OF THEIR APPEARANCES. OTHERWISE, THE CASE MUST BE DISMISSED.

Given the various tools that exist to obtain an ICE-detained or deported defendant's appearance, prosecutors should generally not resort to requesting bench warrants where a defendant has been detained or deported. Nor should prosecutors sit idly by as trial courts enter bench warrants for defendants solely because they are in an ICE detention facility or have been deported. Bench warrants serve only to indefinitely delay these prosecutions; in the instant cases, it is unlikely a bench warrant would do anything to move the prosecution forward.

Instead, prosecutors must utilize the tools available to them to assure an ICE-detained or deported defendant's appearance in court, whether in-person or remotely. After all, "[a] defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. Moreover . . . society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest." Barker v. Wingo, 407 U.S. 514, 527 (1972) (footnotes

omitted). The prosecution also bears the burden of proving a defendant's guilt beyond a reasonable doubt. Historically, that burden has been placed on the State to ensure the protection of a defendant's constitutional rights. See State v. Thomas, 132 N.J. 247, 253 (1993) ("The burden of establishing each element of the offense remains with the State. Requiring that the State bear and discharge that burden is essential to the protection of a defendant's basic constitutional rights." (citations omitted)). It follows then that prosecutors should bear the burden of facilitating a defendant's appearance in court for the prosecution that they initiated and that they intend to seek.

This Court has recognized the vital role prosecutors play in securing a detained or deported defendant's appearance. In Lopez-Carrera, this Court noted that "[f]ederal law provides for coordination between federal prosecutors and immigration officials after a non-citizen is arrested." 245 N.J. at 603 (citing 18 U.S.C. § 3142(d)). Although a similar provision does not exist under New Jersey's Criminal Justice Reform Act, see id. at 602-603, 613, this Court recognized that "[o]ur criminal justice system functions best when the State has an opportunity to present its proofs to try to enforce the law, when defendants who stand accused can defend themselves in court, and when victims and witnesses can be heard and treated with dignity and respect," id. at 603. Thus, this Court "encourage[d] ICE to coordinate with State prosecutors

and allow the criminal justice system to complete its work while charges are pending against non-citizens in state court." Ibid.; see id. at 627 (same).

ICE has also recognized the important role prosecutors play in assuring a detained or deported defendant's appearance in court on criminal charges. As discussed above, the Tool Kit for Prosecutors provides a general overview of the various tools that prosecutors can use to obtain a defendant's appearance and urges prosecutors to contact local ICE authorities for guidance. Prosecutor's offices, as law enforcement agencies, are also better equipped to coordinate with federal law enforcement agencies, such as ICE. For instance, even though a defense attorney can request a writ of habeas corpus ad prosequendum, the prosecutor's office has the ability to obtain and transfer the detained defendant once that writ is issued by the trial court. ICE will not transfer a defendant detained in one of their detention facilities to state criminal court; state and local law enforcement agencies are tasked with that responsibility. Tool Kit for Prosecutors at 9 (requesting law enforcement agency must arrange for defendant's transportation); id. at 10 (requesting law enforcement agency is responsible for monitoring defendant). Prosecutors employ sworn law enforcement officers who can effectuate these transfers and can otherwise work with other law enforcement agencies to arrange for these transfers.

Thus, prosecutors must be tasked with the responsibility of utilizing the tools available to them to assure an ICE-detained or deported defendant's appearance in court. Admittedly, not every tool will be relevant depending on whether the defendant is detained or deported, and ICE retains the discretion to deny requested relief. See Lopez-Carrera, 245 N.J. at 608 (noting State's request to ICE for deferred action or administrative stay of removal was denied); Tool Kit for Prosecutors at 4-8 (noting ICE retains discretion to deny requested relief). Nonetheless, ICE has expressed a desire to work with prosecutors to achieve a defendant's presence. Id. at 2. Therefore, prosecutors must utilize the appropriate tools to attain the defendant's in-person presence. Where in-person appearance is not possible, and a defendant has made a request to appear remotely or a knowing, voluntary, and informed request to waive appearance, those requests must be honored by both the prosecutor and the trial court. That burden must remain on the prosecutor, even where ICE has declined to cooperate. Under such circumstances, prosecutors must continue to utilize whatever tools are available to obtain the defendant's physical or virtual appearance in court, and our courts must accommodate requests for remote or waiver of appearance. Detained or deported defendants should not be faulted for the action or inaction of ICE.

Where prosecutors simply refuse to utilize the available tools for appearance and instead request or acquiesce to the issuance of a bench warrant, dismissal of the charges is warranted for failure to prosecute or for a constitutional speedy trial violation. Courts retain the discretion to dismiss charging documents in various contexts. See e.g., State v. Zadroga, 472 N.J. Super. 1, 20 (App. Div. 2022) ("[D]etermination of whether to dismiss an indictment generally is left to the sound discretion of the trial court[.]); State v. Szima, 70 N.J. 196, 201 (1976) (adopting Barker test for dismissal of indictment on speedy trial grounds); R. 3:25-3 (permitting dismissal for delay in presenting a charge to the grand jury or in filing an accusation); R. 7:8-5 (generally governing dismissal of complaints by municipal courts).

In the context of an indictment, dismissal has been considered "the last resort because the public interest, the rights of victims[,] and the integrity of the criminal justice system are at stake." State v. Williams, 441 N.J. Super. 266, 272 (App. Div. 2015) (quoting State v. Ruffin, 371 N.J. Super. 371, 384 (App. Div. 2004)). Trial courts have been urged not dismiss an indictment "except 'on the clearest and plainest ground.'" Ruffin, 371 N.J. Super. at 384 (quoting State v. Hogan, 336 N.J. Super. 319, 344 (App. Div. 2001)).

However, where the State simply refuses to coordinate with ICE or objects to the defense's request for remote or waiver of appearance, the

"drastic remedy" of dismissal is warranted because no "other judicial action will protect a defendant's fair trial rights." State v. Clark, 347 N.J. Super. 497, 508 (App. Div. 2002). At that point, no other judicial action exists to assure a defendant's constitutional right to appear at critical stages of his or her prosecution. Where the State does not seek or is not amenable to any remedy that may provide for the defendant's appearance, the case against that defendant must be dismissed for failure to prosecute or on speedy trial grounds.[9] State v. Abbati, 99 N.J. 418, 425 (1985) ("It is, of course, true that a trial court must dismiss an indictment if prosecution would violate the defendant's constitutional rights." (citations omitted)); State v. Farrell, 320 N.J. Super. 425, 445-46 (App. Div. 1999) ("Excessive delay in completing a prosecution can potentially violate a defendant's constitutional right to a speedy trial as a matter of fundamental fairness[.]"); Ruffin, 371 N.J. Super. at 385 ("[A] trial court has inherent power to fashion remedies in the interest of justice, which may include dismissal of a[n] indictment for reasons of

[9] The OPD endorses the constitutional speedy trial arguments made by defendant in this case. Where the State fails to utilize any tools available to obtain the defendant's appearance, and instead, requests or acquiesces to the issuance of a bench warrant based on the defendant's detention in an ICE facility or deportation, the four-factor test set forth in Barker -- length of the delay, reason for the delay, assertion of the right by a defendant, and prejudice to the defendant -- weighs in favor of dismissal of the matter on speedy trial grounds. As well, OPD joins in the due process and fundamental fairness arguments raised by defendant.

fundamental fairness even in circumstances where a defendant's constitutional rights are not implicated." (citation omitted)).

POINT IV

THIS COURT SHOULD INSTRUCT OUR TRIAL COURTS THAT BENCH WARRANTS ARE GENERALLY IMPROPER FOR DEFENDANTS WHO ARE IN ICE CUSTODY OR HAVE BEEN DEPORTED. AS WELL, THE STATE MUST MAKE A GOOD FAITH EFFORT TO UTILIZE ALL AVAILABLE TOOLS TO FACILITATE THE DEFENDANT'S APPEARANCE.

To summarize, where a defendant has been detained by ICE or deported, bench warrants do nothing to assure the defendant's appearance in state court, are generally inappropriate under Rule 3:7-8 to address the defendant's non-volitional absence, frustrate the CJRA's dual mandate that detention should not be based on the acts of third parties or a defendant's immigration status, and unnecessarily stall the prosecution. Bench warrants are simply an ineffective and inappropriate tool to address situations where a defendant has been detained or deported.

Thus, this Court should hold that trial courts should generally not issue bench warrants in cases where the defendant is in ICE custody or has been deported.[10] Instead, under such circumstances, prosecutors must utilize the

[10] Additionally, this Court should similarly announce that bench warrants should not be routinely issued in cases where defendants have failed to comply

tools available to them to ascertain the defendant's in-person appearance in court, including requesting writs, deferred action, and administrative stays of removal, or pursuing extradition, when appropriate. Both prosecutors and our courts must also be amenable to remote appearances or waivers of appearances by detained or deported defendants where their physical appearance in court is otherwise not possible and where they have consented to virtual appearances or waivers.

Where prosecutors refuse to utilize the tools available to them to assure a defendant's in-person appearance or oppose a defendant's remote or waiver of appearance, trial courts should dismiss the case -- either on the motion of the defendant or sua sponte -- for failure to prosecute or for a violation of a defendant's constitutional right to a speedy trial. The State's failure to act should be weighed heavily by the trial court in determining whether dismissal is appropriate. After all, the State bears the duty to bring a defendant to trial and bears the ultimate burden of proof. It follows then that prosecutors must

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with pretrial intervention (PTI) conditions or probation requirements simply because they have been detained by ICE or deported. The OPD has recently observed a rise in bench warrants being issued under these circumstances. Bench warrants in such cases pose a barrier to a defendant's successful completion of PTI or probation, as well as a barrier to lawful reentry into the United States.

bear the responsibility of utilizing the tools available to them to assure an ICE-detained or deported defendant's appearance in court.

Importantly, neither OPD's proposal nor the tools outlined in this brief are contrary to the laudable purposes of the Immigrant Trust Directive. See Attorney General, Law Enforcement Directive No. 2018-6 v2.0 (rev. Sept. 27, 2019) (emphasizing that the primary duty of state and local law enforcement agencies is to enforce state law and protect the communities they serve and limiting the extent to which state and local law enforcement officers can assist federal immigration authorities). The narrow question presented here is how prosecutors, our courts, and defense counsel can use all available tools to move pending cases forward and ensure that detained or deported defendants are afforded their constitutional right to defend against criminal charges. The use of bench warrants under such circumstances does not further that goal but rather thwarts it. The OPD's proposal offers a workable solution, and it is respectfully requested that the Court adopt it.

CONCLUSION

For the foregoing reasons, this Court should instruct trial courts that bench warrants are generally improper where a defendant is in ICE custody or has been deported. This Court should also make clear that prosecutors must utilize the tools available to them to obtain a detained or deported defendant's physical appearance in court, or alternatively, order that prosecutors must consent and trial courts should permit remote or waivers of appearances by such defendants. And, in the instant case specifically, this Court should vacate the bench warrant imposed by the trial court and remand the matter with instructions to permit the defendant to appear remotely or waive their appearances at future proceedings in his case.

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