

Honorable Chief Justice and
Associate Justices of the
Supreme Court of New Jersey
P.O. Box 970
Trenton, New Jersey 08625

Re: State of New Jersey v. Fernando Garcia Moronta
Docket No.
App. Div. Docket No. AM-000105-24
Union County Indictment No.: 24-09-00885-I

**LETTER BRIEF IN LIEU OF FORMAL BRIEF IN SUPPORT OF MOTION FOR
LEAVE TO APPEAL**

Yours Honor:

This letter is submitted in lieu of a formal petition for certification on behalf of Fernando Garcia Moronta. The Appellate Division denied without opinion. This case involves issues of widespread public importance that repeat daily in the New Jersey Courts and presents substantial questions of law, including substantial impingement of Due Process.

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QUESTIONS PRESENTED FOR CERTIFICATION

1. Does a Defendant have a right to Due Process to defend him/herself against pending criminal charges when held out-of-state by Immigration and Customs Enforcement?
2. May courts maintain and apply a blanket policy to issue bench warrants for non-citizen defendants held out-of-state by Immigration and Customs Enforcement (“ICE”) when there are options available to secure the defendant’s appearance or to proceed with a waiver of appearance?
3. Is it appropriate for trial courts to issue bench warrants for involuntary failure to appear when the defendant has counsel appearing on his/her behalf and the defendant’s inability to appear is due to circumstances beyond the defendant’s control?

PROCEDURAL HISTORY

On May 2, 2024, Mr. Garcia was charged on complaint warrant W-2024-000853-2004 with five counts of criminal offenses. On May 7, 2024, he was released on his own recognizance with conditions.

On Sept. 18, 2024, the Union County Grand Jury returned indictment number 24-09-00885 with two counts of criminal offenses. Arraignment was scheduled for Oct. 7, 2024 before the Hon. Stacey K. Boretz, J.S.C.

On Oct. 7, 2024, counsel appeared on Mr. Garcia's behalf, though Mr. Garcia was unable to appear because he was in the custody of Immigration and Customs Enforcement ("ICE"). Despite counsel's requests to appear telephonically, waive his appearance or issue a writ to the Union County Sheriff to produce Mr. Garcia, the court issued a bench warrant.

Mr. Garcia submitted a timely appeal followed on Oct. 25, 2024. The Appellate Division denied without opinion on November 14, 2024.

This late-filed Petition follows for the reasons set forth in the accompanying Motion to Accept a Late Filing.

FACTS

The facts underlying the charge are irrelevant. The relevant facts are the procedural history, specifically that Mr. Garcia is in ICE custody in Pennsylvania.

ARGUMENT

I. THE ISSUANCE OF A BENCH WARRANT DENIES MR. GARCIA THE FUNDAMENTAL RIGHT TO DEFEND HIMSELF BEFORE THE SUPERIOR COURT OF NEW JERSEY AND DENIES DUE PROCESS(DA1)

According to Rule 3:16(a), “[t]he defendant must be present for every scheduled event unless excused by the court for good cause shown.” R. 3:16(a). NJ Court Rule 7:2-3 sets forth the circumstances under which a bench warrant may be issued. The court may issue a bench warrant for any number of reasons, including failure to appear for an arraignment or other hearing, sentencing, etc. 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. While the Court has not excused Mr. Garcia from appearing in Court for good cause, he did not willfully choose to ignore the Court’s authority. Rather, he only failed to appear because he was detained by ICE. Mr. Garcia is currently unable to appear in Court not of his own volition; ICE detained him because of his criminal case, and thus he is unable to attend court due to being in detention. The bench warrant is therefore the only obstacle preventing Mr. Garcia from negotiating a resolution, filing a motion to dismiss the indictment, and other procedures that do not require his physical presence in court. The bench warrant is also the only barrier to Mr. Garcia

appearing in Court telephonically or by writ and must be vacated in order to allow Mr. Garcia a chance to answer these charges. Should motions and negotiations prove unable to resolve the matter, the Court could always issue another detainer in the future. The insistence upon a bench warrant at the outset before the defense has even received a transcript of the grand jury proceeding or discovery is a barrier to justice rather than a tool of justice.

The primary purpose in setting bail and issuing bench warrants is to ensure a criminal defendant's presence at trial. State v. Fajardo-Santos, 199 N.J. 520, 522 (2009). In deciding whether to detain defendants before trial, courts consider the following factors:

- (1) the seriousness of the crime charged against defendant, the apparent likelihood of conviction, and the extent of the punishment prescribed by the Legislature;
- (2) defendant's criminal record, if any, and previous record on bail, if any;
- (3) defendant's reputation, and mental condition;
- (4) the length of defendant's residence in the community;
- (5) defendant's family ties and relationships;
- (6) defendant's employment status, record of employment, and financial condition;
- (7) the identity of responsible members of the community who would vouch for defendant's reliability;
- (8) any other factors indicating defendant's mode of life, or ties to the community or bearing on the risk of failure to appear, and, particularly, the general policy against unnecessary sureties and detention.

R. 3:26-1(a); State v. Fajardo-Santos, 199 N.J. 520, 530 (2009). In the present case, Mr. Garcia is accused of a serious felony. However, he has no prior criminal record, and he has never previously willfully forfeited his bail. He has family ties in his home in New Jersey,

where he has lived since arriving to the United States. The only factor that bears on his risk of failure to appear is his ICE detention, which is out of his control, and could be resolved if this Court vacates the bench warrant. Thus, the factors weigh in favor of vacating the bench warrant and allowing him to fully address his criminal and immigration cases.

Mr. Garcia was issued a bench warrant because of his immigration status, and the perceived threat that federal immigration action would prevent him from appearing. Basic tenets of justice and constitutional law do not permit a bench warrant due to immigration status. Rather, a bench warrant is only appropriate for a defendant's own volitional acts, not the intervening acts of another governmental entity.

The CJRA mandates the presumptive pre-trial release of all defendants except those charged with murder and offenses for which a life term is possible, unless the court finds by clear and convincing evidence that no release conditions "would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process." N.J.S.A. 2A:162-18(a)(1); see generally State v. Robinson, 229 N.J. 44, 52-62 (2017) (describing CJRA background and summarizing the Act); see also State v. Molchor, 464 N.J. Super. 274, 285 (Super. Ct. App. Div. 2020). Nobody's safety would be at risk if the bench warrant against Mr. Vasquez were vacated, there is no allegation that he would attempt to obstruct the criminal justice process, and there are other conditions of release that would reasonably assure his

appearance in this matter for necessary court dates. Thus, the CJRA's presumption of pretrial release in Mr. Vasquez's case has not been rebutted, and this Court must vacate the bench warrant against him. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." United States v. Salerno, 481 U.S. 739, 755, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) (declaring federal Bail Reform Act constitutional); see also Robinson, 229 N.J. at 68. Defendants like Mr. Vasquez are presumed innocent. Their detention may be justified by the unmanageable risk that they will willfully obstruct justice, harm others, or not appear, which is not the case here. The State did not argue that any of these factors apply and the judge who issued the bench warrant did not even consider these factors. Rather, the judge applied a blanket policy to issue a bench warrant for defendants held out-of-state by ICE.

All criminal statutes "require a voluntary act . . . as [one of] the minimum conditions for liability." State v. Sexton, 160 N.J. 93, 98 (1999). "A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable." N.J.S.A. 2C:2-1(a). Under our system, a person must be responsible for an act in order to be punished for it. Although a bench warrant does not rely on a criminal statute, here it operates more harshly because a court has not convicted Mr. Garcia of any crime; the court may never do so, and he may never be able to challenge the allegations.

The bench warrant is counter-productive in this case. Whereas a bench warrant

normally makes it more likely someone will be produced in court against his will if he willfully fails to appear, in this case, the bench warrant stands as a complete barrier preventing Mr. Garcia from appearing in Court. If the bench warrant is revoked, Mr. Garcia will be able to participate telephonically or in person subject to a writ to produce, or he may waive his appearance so counsel can pursue defenses and negotiations on his behalf. It is in the Court's interest, the prosecutor's interest, and Mr. Garcia's interest for the warrant to be vacated so he can participate in these proceedings. It is entirely unclear who benefits or how from a bench warrant preventing any proceedings from occurring.

In addition to statutes, Constitutional principles and court rules mandate the vacatur of the bench warrant against Mr. Garcia, and relevant case law requires the same. In State v. Molchor, 464 N.J.Super. 274 (App.Div. 2020), the Appellate Division held only a volitional act may be considered during the pre-trial detention considerations pursuant to the CJRA. The court specifically held that the acts of another arm of government cannot be considered in determining risk of flight. The Molchor court reasoned that while the "CJRA's plain language does not resolve the question whether the risk of a defendant's failure to appear justifying detention must arise from the defendant's own volitional acts," the statutory context and legislative history confirm this to be the case. N.J.S.A. 2A:162-18; N.J.S.A. 2A:162-19; State v. Molchor, 464 N.J. Super. 274, 289 (Super. Ct. App. Div. 2020). The Molchor court also noted that other federal courts have likewise concluded that, to justify detention under 18 U.S.C. § 3142(e), the risk of non-

appearance must pertain to voluntary or volitional non-appearance. United States v. Espinoza-Ochoa, 371 F. Supp. 3d 1018, 1022 (M.D. Ala. 2019) (holding non-appearance must be volitional, and rejecting United States' argument "that because it could not ensure that the defendant would be present at trial due to the administrative deportation proceedings initiated by ICE, the defendant should be held pursuant to the 'risk of nonappearance' clause of the Bail Reform Act"); United States v. Resendiz-Guevara, 145 F. Supp. 3d 1128, 1134 (M.D. Fla. 2015) (following Santos-Flores); United States v. Barrera-Omana, 638 F. Supp. 2d 1108, 1111 (D. Minn. 2009) ("[t]he risk of nonappearance referenced in 18 U.S.C. § 3142 has to involve an element of volition"); State v. Molchor, 464 N.J. Super. 274, 294 (Super. Ct. App. Div. 2020).

In State v. Williams, 452 N.J. Super. 16, 21-22 (App. Div. 2017), the same court held that the defendant's pregnancy could be considered as a factor potentially impacting whether pretrial detention was necessary, despite it not being explicitly listed in N.J.S.A. 2A:162-20. Similarly, applying the pre-CJRA bail regime, the New Jersey Supreme Court has declared that, "When bail is set, it is entirely appropriate to consider a defendant's immigration status in evaluating the risk of flight or nonappearance." State v. Fajardo-Santos, 199 N.J. 520, 531, 973 A.2d 933 (2009).

"The person's status along with the action or inaction of federal immigration officials may prompt a defendant to react in different ways. A person's status may include, for example, whether the person is an undocumented entrant to the country, the person has overstayed a visa, or the person is a permanent resident. Federal immigration action may include, for

example, whether a detainer has been lodged, whether federal officials have released the defendant on bond or parole after arrest, whether an order of removal has been issued, and whether such an order has been stayed. Absent any action by immigration officials, a person's status conceivably may, under the totality of circumstances, have little impact on whether he or she will appear in court.”

State v. Molchor, 464 N.J. Super. 274, 286-87 (Super. Ct. App. Div. 2020). Thus, the primary reason a criminal defendant’s immigration status may impact whether he will appear in criminal court is if ICE decides to detain him. The lodging of a detainer “announces ICE's decision to obtain custody of the defendant in order to arrest and remove him, and . . . sets in motion the entire removal process.” Fajardo-Santos, 199 N.J. at 531 (citing 8 C.F.R. § 287.7(a)).

Critically, the two forms of non-appearance that the Fajardo-Santos Court considered involved a defendant's volitional act: purposely absenting oneself from court and intentionally submitting to federal removal proceedings. See State v. Molchor, 464 N.J. Super. 274, 288 (Super. Ct. App. Div. 2020). The triggering event may prompt some defendants to flee to avoid removal; others may want to submit to removal, as a more palatable option than the risk of conviction and incarceration following trial; and yet, others may “vigorously contest removal” to remain here and to fight State charges, as is the case with Mr. Garcia. *Id.* at 531-32. His absence from the most recent court date was entirely out of his control, a non-volitional act resulting from his ICE detention. He did not intentionally submit to federal removal proceedings, nor did he purposely absent himself

from criminal court for the present case, nor did he attempt to flee to avoid removal or prosecution. It is not Mr. Garcia's choice; it is not Mr. Garcia's intent, and it is not Mr. Garcia's willful act to fail to appear. Mr. Garcia is willing and wanting to appear before the Court, but cannot do so. Therefore, this Court must vacate the bench warrant against Mr. Garcia and allow him to appear or participate by alternative means.

In State v. Quintana, 270 N.J. Super. 676 (App. Div. 1994), the court addressed the standard of willful non-appearance in the contempt context. Ms. Quintana appealed an order summarily adjudicating her in contempt in the presence of the court because of her nonappearance for sentencing on minor criminal charges. Id. at 678. The Appellate Division went on to “address [] [the] element common to all contempt, that is, the willfulness of the conduct whether it be willful noncompliance with a court order or willful misbehavior in the courtroom.” Id. at 683. The Appellate Division determined that the “defendant's nonappearance at sentencing cannot be deemed willful if she was neither actually notified of the sentencing date nor ordered to keep either the court or the Probation Department Advised of her change of address.” Id. at 684. The Appellate Division ultimately vacated the contempt conviction and sentence. Id. at 686.

While Quintana involves contempt in presence of the court, Mr. Garcia's case is nevertheless analogous. Mr. Garcia did not have the requisite willfulness to ignore the Court to justify issuance of a bench warrant. Mr. Garcia should not be punished, this Court should not leave a case indefinitely open, and the prosecutor should not be denied its

prosecution when the matter can be addressed. Just as the Appellate Court vacated the contempt order in Quintana, so should this Court vacate the bench warrant against Mr. Garcia.

These cases demonstrate that the Court must consider the circumstances of the failure to appear. The Court's blanket policy to issue a bench warrant because a non-citizen is in ICE custody is improper, violates Due Process and is unconstitutional.

The State has argued there is no fundamental injustice and it is not in the interests of justice to vacate the warrant. Quite the contrary. It is the most basic of injustices and violations of justice to deny a willful participant in his own defense the fundamental right and basic principle of justice to do so based on the actions of a third party, in this case the U.S. government.

The trial court's comments and the State's argument that there is no court rule allowing the court to order an out-of-state agency to produce Mr. Garcia has nothing to do with the case at hand; no one is asking for such an order. At no point did Mr. Garcia ask for such an order. Mr. Garcia's request is for the court to order the Union County (New Jersey) Sheriff's Office to pick up Mr. Garcia and bring him back to New Jersey. This is indisputably within the Court's ability. It may be expensive and time-consuming, but failing to do so in combination with the State's law abolishing immigration detention in New Jersey (which has resulted in almost all non-citizens arrested in New Jersey being detained out-of-state) combine to deny Mr. Garcia, and all other similarly situated

defendants, the basic right to defend themselves in the Superior Court of New Jersey.

If the bench warrant were vacated, Mr. Garcia could appear telephonically, in person by writ, or with a waiver of appearance. The matter could then be resolved by negotiation or motions that do not require an in-person appearance by Mr. Garcia. Because it is in Mr. Garcia's best interest, the State's best interest, and the Court's best interest, because telephonic appearance is routine and possible in this Court, and because there is no benefit to any party from the existence of the bench warrant, Mr. Garcia respectfully requests that the bench warrant issued against him be vacated and arraignment be scheduled.

CONCLUSION

Because the trial court applied an unlawful blanket policy that denies Due Process to issue a bench warrant for a defendant represented by counsel who could involuntarily not appear only due to his detention by ICE, this Court must intervene to vacate the bench warrant and allow Mr. Garcia to defend himself.

Dated: Dec. 9, 2024

Respectfully submitted,

/s/ Eric M. Mark
Eric M. Mark, Esq.

CERTIFICATION

I certify that this petition is being filed in good faith, presents substantial questions of law, and is not filed for the purpose of delay.

Dated: Dec. 9, 2024

/s/ Eric M. Mark

Eric M. Mark, Esquire

Attorney I.D. 043912005

CC: Union County Prosecutor's Office