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STATE OF NEW JERSEY,
Plaintiff,
v.
FERNDANDO GARCIA MORONTA,
Defendant.

SUPREME COURT OF THE
STATE OF NEW JERSEY

Docket No.: 090118
Appellate Docket No.: AM-105-24
Indictment No.: UNN-24-09-00885

Supplemental Brief in Support of
Appeal

TABLE OF CONTENTS

PROCEDURAL HISTORY	1
FACTS	2
ARGUMENT	2
I. Mr. Garcia’s deportation does not make this issue moot	6
II. This Court must vacate the bench warrant and permit his remote appearance because the bench warrant and resulting indefinite delay in the proceedings violate Mr. Garcia’s Due Process Rights under Article I of the New Jersey Constitution and the Fifth and Fourteenth Amendments of the U.S. Constitution	9
III. This Court must vacate the bench warrant and permit his remote appearance because the bench warrant and resulting indefinite delay in the proceedings violate Mr. Garcia’s right to speedy trial under Article I of the New Jersey Constitution and the Sixth Amendment of the U.S. Constitution	17
IV. Permitting ICE detainees and deportees to participate without in-person appearance satisfies Due Process, Speedy Trial, statutory and other court-mandated requirements	24
CONCLUSION	29

TABLE OF AUTHORITIES

CASES

A.A.R.P. v. Trump, 145 S. Ct. 1364 (2025).....	11
Advance Inc. v. Montgomery Twp., 351 N.J. Super. 160 (App.Div.2002).....	6
Barker v. Wingo, 407 U.S. 514 (1972).....	18, 18, 19, 20, 21, 22
Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, (1961).....	12
Carey v. Piphus, 435 U. S. 247 (1978).....	11, 16
Central Hanover Bank & Trust Co., 339 U. S. 306 (1950).....	11
Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).....	15
Doe v. Poritz, 142 N.J. 1 (1995).....	10, 12, 13, 14, 15
Doggett v. United States, 505 U.S. 647 (1992).....	13, 18, 19, 21
Gormley v. Wood-El, 218 N.J. 72, (2014).....	11
Goss v. Lopez, 419 U.S. 565 (1975).....	12
Greenberg v. Kimmelman, 99 N.J. 552 (1985).....	11
Harvard v. State, Judiciary, Atl.-Cape May Vicinage, 460 N.J. Super. 433 (App. Div. 2018).....	10
In re P.H., 436 N.J. Super. 427 (App. Div. 2014).....	7
Lisenba v. California, 314 U.S. 219 (1941).....	13
Maine v. Moulton, 474 U.S. 159 (1985).....	4
Mathews v. Eldridge, 424 U.S. 319 (1976).....	11
Matthew G. Carter Apartments v. Richardson, 417 N.J. Super. (App. Div. 2010).....	6
Morrissey v. Brewer, 408 U.S. 471 (1972).....	12
Pathri v. Kakarlamat, 462 N.J. Super. 208 (App. Div. 2020).....	26
Plyler v. Doe, 457 U.S. 202 (1982).....	13

Redd v. Bowman, 223 N.J. 87 (2015).....	6, 7
Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352 (1996).....	10
Rodriguez v. Rosenblatt, 58 N.J. 281 (1971).....	14
Spadoro v. Whitman, 150 N.J. 2 (1997).....	7
State v. Abbati, 99 N.J. 418 (1985).....	13
State v. Cahill, 213 N.J. 253 (2013).....	19, 20, 21, 22
State v. Cassidy, 235 N.J. 482 (2018).....	7
State v. Chavies, 247 N.J. 245 (2021).....	5
State v. Cruz, 171 N.J. 419 (2002).....	14
State v. Farrell, 320 N.J. Super. 425 (App. Div. 1999).....	21, 22
State v. Gartland, 149 N.J. 456 (1997).....	7
State v. Jones, 232 N.J. 308, 311 (2018).....	5
State v. Lansing, 479 N.J. Super. 565 (App. Div. 2024).....	5, 26
State v. Matrongolo, 479 N.J. Super. 8 (App. Div. 2024).....	7
State v. Melvin, 248 N.J. 321 (2021).....	15
State v. Merlino, 153 N.J. Super. 12 (App. Div. 1977).....	20, 22
State v. Molchor, 464 N.J. Super. 274 (App. Div. 2020).....	24
State v. Nieves, 476 N.J. Super. 609 (App. Div. 2023).....	7
State v. Njango, 247 N.J. 533 (2021).....	14
State v. Pinkston, 233 N.J. 495 (2018).....	5
State v. Reyes-Rodriguez, 480 N.J. Super. 526 (App. Div. 2025)....	19, 20, 27, 28
State v. Saavedra, 222 N.J. 39 (2015).....	13
State v. Szima, 70 N.J. 196 (1976).....	19
State v. Tropea, 78 N.J. 309 (1978).....	14
State v. Tsetsekas, 411 N.J. Super. 1 (App. Div. 2009).....	17, 19, 20, 21, 22

State v. Yoskowitz, 116 N.J. 679 (1989).....	13, 14
United States v. Alvarez-Perez, 629 F.3d 1053 (9th Cir. 2010).....	4
United States v. Marion, 404 U.S. 307 (1971).....	12, 13
United States v. Macdonald, 456 U.S. 1 (1982).....	13, 18
United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).....	12
Weimer v. Amen, 870 F.2d 1400 (8th Cir. 1989).....	10
Wong Wing v. United States, 163 U.S. 228 (1896).....	13

STATUTE

N.J.S.A. 52:4B-	
36(a).....	27

COURT RULES

Rule 1:2-1(b)	25, 26
Rule 3:9-1(d).....	24, 25
Rule 3:16(a).....	24, 25

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

On October 7, 2024, counsel appeared on Mr. Garcia's behalf, though Mr. Garcia was unable to appear because upon his release from Union County Jail, he was taken into the custody of Immigration and Customs Enforcement ("ICE"). Despite counsel's request for Mr. Garcia to appear telephonically, waive his appearance, or issue a writ for the Union County Sheriff to produce Mr. Garcia, with the State's acquiescence, the court issued a bench warrant. That warrant remains outstanding.

Mr. Garcia submitted a timely appeal on October 25, 2024. The Appellate Division denied the appeal without opinion on November 14, 2024. The Motion for Leave to Appeal to this Court followed.

Mr. Garcia was deported from the United States ("U.S.") in late March

or early April 2025. He is currently located in Ecuador, though he remains in contact with counsel and is ready to answer for these charges as soon as the court allows him to do so. The criminal trial court has made no attempt to secure Mr. Garcia's presence aside from issuing the bench warrant, nor has the State of New Jersey indicated a willingness to extradite him. His criminal case thus remains pending with no end or developments in sight.

FACTS

The facts underlying the criminal charges are not at issue. The dispositive facts are the procedural history.

ARGUMENT

Both parties want to proceed; the State wishes to prosecute and Mr. Garcia wishes to defend himself, but by issuing the bench warrant the trial court has prevented all possibility of progress. There is no way that the warrant can secure his presence at these proceedings; to the contrary, the warrant obstructs participation by a willing defendant.

While a criminal defendant remains in the US and in ICE custody, prosecutors and courts have an obligation to pursue alternatives to a bench warrant before requesting or issuing one. So long as the defendant is willing to subject him/herself to New Jersey's jurisdiction, if the State is unable to secure the defendant's physical presence in court, the case must proceed telephonically, by Zoom, with the defendant's appearance waived, or it must be dismissed. The State plays a critical role in deportation by releasing defendants from state custody directly into ICE custody and by sharing arrest information with ICE. These actions make the State complicit in Mr. Garcia's and other similarly situated defendants' deportations.

Mr. Garcia was transferred to ICE custody directly from the custody of the State of New Jersey, specifically the Union County Sheriff. Many states, counties and municipalities choose not to honor ICE detainers nor collaborate with ICE in deporting their residents. New Jersey is not one of these states, though it contains some cities and counties that are sanctuary jurisdictions. Thus, while the state of New Jersey and the Union County Sheriff did not technically deport Mr. Garcia, by transferring Mr. Garcia to ICE custody when such transfer was not required, knowing he would be deported, the State of New Jersey is complicit in his deportation.

While ICE may still have detained and deported Mr. Garcia if New Jersey did not turn him over to ICE, such a chain of events would not have involved New Jersey's active participation in his deportation. By affirmatively assisting in Mr. Garcia's deportation, followed by issuing a bench warrant without making any effort to secure or waive Mr. Garcia's participation, his Constitutional rights to Due Process, effective assistance of counsel and speedy trial have all been violated.

In cases in which the Government is both the criminally prosecuting and deporting authority, federal courts consistently rule that the government forfeits prosecution when it deports a criminal defendant, and that proceeding with a prosecution under such circumstances would violate the Constitution. See, e.g., *Maine v. Moulton*, 474 U.S. 159, 170 (1985); *United States v. Alvarez-Perez*, 629 F.3d 1053, 1062 (9th Cir. 2010) (citing 18 U.S.C. § 3162(a)(2)). While New Jersey did not deport Mr. Garcia, New Jersey's role in his deportation requires it to facilitate his participation in the criminal proceedings or to dismiss the charges; issuing a bench warrant for a non-willful failure to appear facilitated by the State of New Jersey cannot be considered just, fair, or constitutional.

The procedural history of this case repeats itself virtually daily. Non-citizens are arrested in New Jersey, released on pre-trial detention,

immediately transferred to ICE custody at ICE's request without a judicial warrant, not permitted to appear in the New Jersey court proceedings, and deported with a bench warrant in place that prevents the defendants from defending themselves in the New Jersey courts and from ever returning to the U.S. This Court has a responsibility to mandate a sustainable, fair and lawful solution that does not approve of a simplistic blanket policy of issuing bench warrants for defendants in ICE custody or who have been deported. Rather, this Court must require trial courts to issue writs to produce defendants or to permit defendants to participate by video, telephonically or by waiver of appearance prior to dismissing charges if the failure to participate is non-willful or issuing a bench warrant if the failure to appear is willful. This is the only option that protects defendants' constitutional rights.

A trial court is vested with wide latitude in controlling all court proceedings. *See State v. Pinkston*, 233 N.J. 495, 511 (2018); *see also State v. Lansing*, 479 N.J. Super. 565, 572 (App. Div. 2024). Appellate courts "apply the abuse of discretion standard when examining the trial court's exercise of that control." *State v. Jones*, 232 N.J. 308, 311 (2018). "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" *State v. Chavies*, 247 N.J. 245, 257 (2021) (quoting *State v. R.Y.*, 242

N.J. 48, 65 (2020)). This Court must find that the trial court abused its discretion in issuing the bench warrant and in refusing to pursue alternative means of securing Mr. Garcia's presence in court, whether remote or physical, because the decision has no rational explanation and was made based on a blanket policy without consideration of the individual facts and circumstances.

I. Mr. Garcia's deportation does not make this issue moot

A case is moot if the disputed issue has been resolved, at least with respect to the parties who instituted the litigation. *Advance Inc. v. Montgomery Twp.*, 351 N.J. Super. 160, 166 (App.Div.2002). The doctrine of mootness will bar review "if the issues are hypothetical, a judgment cannot grant effective relief, or there is no concrete adversity of interest between the parties." *Matthew G. Carter Apartments v. Richardson*, 417 N.J. Super. 60, 67 (App. Div. 2010). An issue is moot when a court's decision sought in a matter, when rendered, can have no practical effect on the existing controversy. *Redd v. Bowman*, 223 N.J. 87, 104 (2015) (quoting *Deutsche Bank Nat'l Trust Co. v. Mitchell*, 422 N.J. Super. 214, 221-22 (App. Div. 2011)). That is, "courts will not decide cases in which . . . a judgment cannot

grant effective relief" *Spadoro v. Whitman*, 150 N.J. 2, 13 (1997) (quoting *Anderson v. Sills*, 143 N.J. Super. 432, 437 (Ch. Div. 1976)). Mootness has been applied in criminal cases, including as a theory upon which to dismiss certain criminal charges and to rule on motions. *In re P.H.*, 436 N.J. Super. 427, 432 n.5 (App. Div. 2014).

When a judicial decision "can have no practical effect on the existing controversy," an issue is rendered moot. *State v. Nieves*, 476 N.J. Super. 609, 657 (App. Div. 2023) (quoting *Redd v. Bowman*, 223 N.J. 87, 104 (2015)). However, as this Court has explained, "the New Jersey Constitution does not confine the exercise of the judicial power to actual cases and controversies," so mootness does not necessarily end a case. *State v. Gartland*, 149 N.J. 456, 464 (1997). Generally, however, courts "will not render advisory opinions or exercise [their] jurisdiction in the abstract." *Id.*; *see also State v. Matrongolo*, 479 N.J. Super. 8, 16 (App. Div. 2024).

New Jersey courts have presided over criminal cases even when the defendant has died. "Our courts will entertain a case that has become moot when the issue is of significant public importance and is likely to recur." *State v. Gartland* at 464; *see also State v. Cassidy*, 235 N.J. 482, 491 (2018) (declining to dismiss as moot an appeal involving a deceased defendant

because the case implicated reliability and admissibility of over 20,000 Alcotest breath samples).

If an issue is not rendered moot by absence due to death, then absence due to deportation likewise does not automatically moot a case. By vacating the bench warrant and allowing Mr. Garcia to appear virtually, telephonically or to waive his appearance, this Court's action will have a meaningful effect on resolving the controversy in question. By permitting Mr. Garcia to participate remotely, or to waive his appearance, this matter may proceed. It may or may not proceed to conclusion, but it can proceed. There could come a time in the future when a bench warrant becomes appropriate, such as if Mr. Garcia willfully ceases to participate, but until that time a bench warrant is improper. Further, even if mootness applied to Mr. Garcia, which it does not, this issue repeats virtually every day in the New Jersey courts. Over and over again, the issuance of bench warrants without allowing alternatives to in-person appearances while defendants are still physically present in the U.S. and willing to participate in their own defenses unconstitutionally prevents these matters from being litigated and requires this Court's intervention because this is a matter of tremendous public importance and that not only is likely to recur, but actually recurs almost daily.

II. This Court must vacate the bench warrant and permit his remote appearance because the bench warrant and resulting indefinite delay in the proceedings violate Mr. Garcia's Due Process Rights under Article I of the New Jersey Constitution and the Fifth and Fourteenth Amendments of the US Constitution.

Mr. Garcia's Substantive and Procedural Due Process Rights have been violated. Mr. Garcia, and all defendants, have a liberty interest in defending themselves against criminal prosecution. Convictions, both indictable and disorderly persons, pending charges and bench warrants impact a person's ability to work, travel and live life with the liberty guaranteed by the constitution. By imposing an indefinite, and essentially permanent, pending criminal charge, and by preventing Mr. Garcia from defending himself against those charges, the bench warrant unconstitutionally deprives him of substantive due process. Mr. Garcia's procedural due process rights are violated because the bench warrant prevents him from being meaningfully heard in a meaningful time; Mr. Garcia is being denied any opportunity to be heard at all. If the Court were not inclined to find that due process has been violated, the Court must apply the principles of fundamental fairness because what could be more necessary to fundamental fairness than the opportunity to defend oneself against serious life-altering criminal charges?

The Fifth and Fourteenth Amendments to the United States Constitution as well as Article I, Paragraph 1 of the New Jersey Constitution protect individuals from deprivations of life, liberty, and property, without due process of law. *See Doe v. Poritz*, 142 N.J. 1, 99 (1995). The Fifth Amendment Due Process Clause applies to the Federal Government, while the Fourteenth Amendment extends that right to the states. The Due Process Clause of the Fifth and Fourteenth Amendments protects procedural and substantive rights.

"Substantive due process protects individuals from the arbitrary exercise of the powers of government" and "governmental power [...] being used for [the] purposes of oppression." *Harvard v. State, Judiciary, Atl.-Cape May Vicinage*, 460 N.J. Super. 433, 444 (App. Div. 2018) (citing *Filgueiras v. Newark Pub. Schs.*, 426 N.J. Super. 449, 469 (App. Div. 2012)). Substantive due process does not, however, "protect individuals from all governmental actions that infringe liberty or injure property in violation of some law." *Rivkin v. Dover Twp. Rent Leveling Bd.*, 143 N.J. 352, 366 (1996). Instead, it "is reserved for the most egregious governmental abuses against liberty or property rights, abuses that 'shock the conscience or otherwise offend . . . judicial notions of fairness . . . [and that are] offensive to human dignity.' " *Id.* (quoting *Weimer v. Amen*, 870 F.2d 1400, 1405 (8th Cir. 1989)). Whether a

government official's action "is conscience-shocking is a fact-sensitive analysis and will depend on whether the official['s] conduct is egregious in light of the particular circumstances." *Gormley v. Wood-El*, 218 N.J. 72, 102-03 (2014). Substantive due process analysis requires (1) identifying the constitutional right at stake (e.g. property or liberty interests), and (2) a consideration of whether the state-action was arbitrary in the constitutional sense.

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976). The concept of procedural due process assures that the government will not deprive citizens of certain rights without notice and an opportunity to be heard. *Id.* at 319; *Greenberg v. Kimmelman*, 99 N.J. 552, 568 (1985). "Procedural due process rules are meant to protect" against "the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U. S. 247 (1978). Due process requires notice that is "reasonably calculated, under all the circumstances, to apprise interested parties" and that "afford[s] a reasonable time . . . to make [an] appearance." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950); *A.A.R.P. v. Trump*, 145 S. Ct. 1364 (2025). In examining a

procedural due process claim, courts first assess whether a liberty or property interest has been interfered with by the State, and second, whether the procedures attendant upon that deprivation are constitutionally sufficient.

"Once it is determined that due process applies because of a protected interest at stake, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "Fundamentally, due process requires an opportunity to be heard at a meaningful time and in a meaningful manner. The minimum requirements of due process, therefore, are notice and the opportunity to be heard." *Doe v. Poritz* at 106; *see also Goss v. Lopez*, 419 U.S. 565, 579 (1975). "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. at 481. The Government's violation of any of Due Process rights can lead to sanctions, including dismissal of charges against a defendant. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982).

As the US Supreme Court explained in *Marion*, "the Due Process Clause . . . would require dismissal of [an] indictment if it were shown at trial that [a] delay . . . caused substantial prejudice to [a defendant's] rights to a fair

trial and that the delay was an intentional device to gain tactical advantage over the accused." *United States v. Marion*, 404 U.S. 307, 324 (1971); *see also United States v. Macdonald*, 456 U.S. 1, 8 (1982) ("The Sixth Amendment right to a speedy trial is . . . not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations"); *Doggett v. United States*, 505 U.S. 647, 666 (1992). The United States Supreme Court has long held constitutional protections of due process apply to non-citizens within jurisdiction as well. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Plyler v. Doe*, 457 U.S. 202, 212 (1982).

The Fifth Amendment's guarantee of due process requires that defendants "be treated with 'that fundamental fairness essential to the very concept of justice.'" *Lisenba v. California*, 314 U.S. 219, 236 (1941). Fundamental fairness is "often extrapolated from or implied in other constitutional guarantees." *State v. Yoskowitz*, 116 N.J. 679, 731, (1989). The doctrine "can be viewed as an integral part of the right to due process," *State v. Abbati*, 99 N.J. 418, 429 (1985), because it "serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental procedures that tend to operate arbitrarily." *State v. Saavedra*, 222 N.J. 39, 67 (2015) (quoting *Doe v. Poritz*, 142 N.J. at 108).

This Court has applied the doctrine of fundamental fairness "sparingly and only where the 'interests involved are especially compelling; if a defendant would be subject to oppression, harassment, or egregious deprivation, it is [to] be applied." *Doe v. Poritz*, 142 N.J. at 108.

The doctrine of fundamental fairness has been invoked in criminal cases "when the scope of a particular constitutional protection has not been extended to protect a defendant." *Yoskowitz*, 116 N.J. at 705. "Thus, even in circumstances not implicating violations of constitutional rights, [New Jersey] courts have imposed limitations on governmental actions on grounds of fundamental fairness." *State v. Cruz*, 171 N.J. 419, 429 (2002); *see also State v. Njango*, 247 N.J. 533, 537, (2021) (holding that fundamental fairness required that the excess time defendant erroneously served in prison be credited to reduce his parole supervision term under NERA); *State v. Tropea*, 78 N.J. 309, 315-16 (1978) (finding that a defendant's retrial on a motor vehicle speeding charge was barred by principles of fundamental fairness where the reversal of the defendant's earlier conviction was based on the State's failure to prove the applicable speed limit); *Rodriguez v. Rosenblatt*, 58 N.J. 281, 294-96 (1971) (holding that indigent municipal court defendants facing charges that could result in a sentence of imprisonment or another "consequence of magnitude" must be granted the right to counsel based on

principles of fundamental fairness). The doctrine serves as "an augmentation of existing constitutional protections or as an independent source of protection against state action." *Poritz*, 142 N.J. at 108; *State v. Melvin*, 248 N.J. 321, 347-49 (2021).

Mr. Garcia's Substantive Due Process rights were violated because the improper bench warrant deprives him of the liberty guaranteed to him, and all persons present in the U.S. Pending criminal charges, especially with an open bench warrant, impact a person's daily life and liberty; it becomes impossible to obtain a passport or a driver's license; finding employment becomes exceedingly difficult; travel, domestically and internationally, is greatly impacted. Bench warrants are specifically designed and intended to restrict and deprive a person's liberty to compel them into court. This cannot be questioned. Where a person is willfully failing to appear in court, this tactic is just and proper. However, where a person is trying to appear in court, trying to participate in his own defense, the bench warrant's purposeful deprivation of liberty violates Due Process.

Mr. Garcia's procedural due process rights were violated because, while he was provided notice of hearing, he was not actually provided a hearing before the act of deprivation took place. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). "Procedural due process rules are

meant to protect persons . . . from the mistaken or unjustified deprivation of life, liberty, or property,” and that is exactly the case here. *Carey v. Piphus*, 435 U.S. at 259. The Court imposed a bench warrant, without making any allowance or efforts for Mr. Garcia to participate and be heard. Mr. Garcia was unable to obtain discovery, conduct his own investigation based on that discovery, file a motion to dismiss the indictment, file a motion to suppress evidence, or pursue other defenses because the court, with the prosecutor’s acquiescence, imposed a blanket policy to issue a bench warrant for defendants held in ICE custody. Mr. Garcia, despite being provided notice, was denied the right to a hearing guaranteed to him by Due Process.

The issuance of a bench warrant without allowing a defendant to participate remotely or by waiving appearance is a denial of fundamental fairness. The State issues life-altering criminal charges against people with the understanding that those people will be entitled to their day in court to challenge the State’s allegations and to present their own evidence. Where the state, by way of a judicially issued bench warrant, deprives the accused of the required “day in court” it is fundamentally unfair and cannot be allowed.

This Court can rectify the due process violation by vacating the bench warrant and allowing Mr. Garcia, and others similarly situated, to participate in the proceedings by telephone, by video, by production through writ when

possible, or by waiving appearance through counsel, if necessary. Such a policy would protect the integrity of the judicial system while protecting defendants' due process rights.

III. **This Court must vacate the bench warrant and permit his remote appearance because the bench warrant and resulting indefinite delay in the proceedings violate Mr. Garcia's right to speedy trial under Article I of the New Jersey Constitution and the Sixth Amendment of the US Constitution.**

"The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and imposed on the states by the Due Process Clause of the Fourteenth Amendment." *State v. Tsetsekas*, 411 N.J. Super. 1, 8 (App. Div. 2009) (citing *Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967). The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial." Such a right is fundamental and exists not just to ensure "that all accused persons be treated according to decent and fair procedures," *Barker v. Wingo*, 407 U.S. 514, 519 (1972), but also because "there is a societal interest in providing a speedy trial

which exists separate from, and at times in opposition to, the interests of the accused." *Id.* at 519.

The touchstone of the speedy trial right is the substantial deprivation of liberty that typically accompanies an "accusation," rather than the accusation itself. *Doggett v. U.S.*, 505 U.S. at 647.

"The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *U.S. v. MacDonald*, 456 U.S. at 1.

A lengthy pretrial delay, of course, may prejudice an accused's ability to defend himself. Even though a defendant may be prejudiced by a pretrial delay, and even though the government may be unable to provide a valid justification for that delay, the Speedy Trial Clause does not come into play unless the delay impairs the defendant's liberty. *Doggett v. U.S.*, 505 U.S. at 660-62. The US and New Jersey Supreme Courts have on occasion identified the prevention of prejudice to the defense as an independent and fundamental objective of the Speedy Trial Clause. In particular, in *Barker v. Wingo*, 407 U.S. at 532, the Court asserted that the Clause was "designed to protect" three

basic interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." The *Barker* Court went so far as to declare that of these three interests, "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." 407 U.S. at 532; *Doggett v. U.S.*, 505 U.S. at 660-62.

The *Barker* analysis, subsequently adopted by the New Jersey Supreme Court in *State v. Szima*, 70 N.J. 196, 200-01, (1976), requires courts to consider and balance the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker*, 407 U.S. at 530. Courts are required to analyze each interrelated factor "in light of the relevant circumstances of each particular case." *Tsetsekas*, 411 N.J. Super. at 10. The factors are "nonexclusive," *State v. Cahill*, 213 N.J. 253, 264 (2013), and no factor standing alone is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial," *Barker*, 407 U.S. at 533. A court must "engage in a difficult and sensitive balancing process." *Id.* The burden of demonstrating the *Barker* factors weigh in favor of dismissal lies with the defendant. *See State v. Berezansky*, 386 N.J. Super. 84, 99 (App. Div. 2006); *State v. Reyes-Rodriguez*, 480 N.J. Super. 526, 543-44 (App. Div. 2025).

Regarding the first *Barker* factor, "once the delay exceeds one year, it is appropriate to engage in the analysis of the remaining *Barker* factors." *Cahill*, 213 N.J. at 266. However, even in cases where the delay has not reached one year, it follows that lesser delays trigger the speedy trial right where there is currently no action being taken to obtain the defendant's presence in court. *Barker's* second prong examines the length of a delay in light of the culpability of the parties, in other words who caused the delay and how. *Tsetsekas*, 411 N.J. Super. at 12 (citing *Barker*, 407 U.S. at 529); *State v. Reyes-Rodriguez*, 480 N.J. Super. 526, 545 (App. Div. 2025). The third *Barker* factor, a defendant's prompt assertion of his right to a speedy trial is measured heavily in the speedy trial analysis. *Cahill*, 213 N.J. at 274. Nonetheless, "[a] defendant has no duty to bring himself to trial; the State has that duty." *State v. Merlino*, 153 N.J. Super. 12, 17 (App.Div. 1977) (quoting *Barker*, 407 U.S. at 527). Courts should consider "the frequency and force of the defendant's objections" in assessing whether the defendant properly invoked the right. *Barker*, 407 U.S. at 529.

The fourth prong of the *Barker* analysis considers the prejudice "in the context of the interests the right is designed to protect." Those interests include prevention of oppressive incarceration, minimization of anxiety attributable to unresolved charges, and limitation of the possibility of

impairment of the defense." *Cahill*, 213 N.J. at 266. Affirmative proof of particularized prejudice is not required to establish a speedy trial violation. *Doggett*, 505 U.S. at 655; *Cahill*, 213 N.J. at 274-75. "[I]f the other factors weigh heavily enough, a speedy trial violation can be established without an affirmative showing of prejudice to the defendant." *State v. Farrell*, 320 N.J. Super. 425, 446, (App. Div. 1999). Excessive delay "presumptively compromises the reliability of a trial in ways that neither party can prove or . . . identify." *Doggett*, 505 U.S. at 655. Although "such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay." *Id.* at 655-56. The possibility of impairment to the defense is the "most serious" form of prejudice "because the inability of a defendant to adequately to prepare his [or her] case skews the fairness of the entire system." *Doggett*, 505 U.S. at 654 (quoting *Barker*, 407 U.S. at 532.

New Jersey courts have also recognized "significant prejudice may also arise when the delay causes the loss of employment or other opportunities, humiliation" and "the drain in finances incurred for payment of counsel or expert witness fees." *Tsetsekas*, 411 N.J. Super. at 13. "[P]roof of actual trial prejudice is not 'a necessary condition precedent to the vindication of the

speedy trial guarantee.'" *Id.* at 13-14 (quoting *Merlino*, 153 N.J. Super. at 15-16).

"Excessive delay in completing a prosecution can potentially violate a defendant's constitutional right to a speedy trial as a matter of fundamental fairness." *State v. Farrell*, 320 N.J. Super. at 445-46; *see also Tsetsekas*, 411 N.J. Super. at 8. The right to a speedy trial must be addressed with a careful analysis of the circumstances. *Barker*, 407 U.S. at 522. "The only remedy" for a violation of a defendant's right to a speedy trial "is dismissal of the charge." *State v. Cahill*, 213 N.J. at 276.

Applying the first *Barker* factor to Mr. Garcia's case, the length of delay between the indictment and trial should be considered presumptively unreasonable and prejudicial because so long as there is a bench warrant in place and Mr. Garcia is (predictably) deported , the delay is indefinite.

Applying the second *Barker* factor, the delay is attributable to the State's cooperation with having Mr. Garcia detained and deported by ICE, the trial court's blanket policy to issue a bench warrant with no consideration of the particular circumstances, and the prosecutor's acquiescence to the court's blanket policy without making any efforts to secure Mr. Garcia's appearance.

Applying the third speedy trial factor, Mr. Garcia has promptly asserted his Sixth Amendment right as soon as he was able to do so under the circumstances of unexpectedly residing in a foreign country. He is currently suffering from two of the three basic interests the Clause was designed to protect: minimizing anxiety and concern of the accused and limiting impairment to the defense. Such anxiety will continue indefinitely and his defense will be permanently impaired unless this Court vacates the warrant and facilitates his participation or dismisses the charges.

Finally, applying the fourth speedy trial factor, the prejudice to Mr. Garcia is extreme. So long as he has a pending criminal charge and a bench warrant, his liberty is restricted both domestically and internationally as previously described.

All four of the foregoing factors weigh in favor of this Court finding that Mr. Garcia's Sixth Amendment right to a speedy trial has been violated by issuance of a bench warrant and will continue to be violated until the bench warrant is vacated and the prosecution may proceed. Courts consistently find that when this right is violated, the only acceptable court ruling is to dismiss all charges with prejudice. However, in the circumstances here, this Court may apply the lesser remedy to vacate the bench warrant and facilitate Mr. Garcia's participation.

IV. Permitting ICE detainees and deportees to participate without in-person appearance satisfies Due Process, Speedy Trial, statutory and other court-mandated requirements

Although the court in *State v. Molchor*, 464 N.J. Super. 274 (App. Div. 2020) ruled that immigration status cannot be considered as a factor in determining a criminal defendant's pretrial custody or release, this Court must find a middle ground that recognizes the reality that New Jersey's criminal defendants in ICE custody will almost always be unable to appear in New Jersey courts. The *Molchor* court emphasized a distinction between a defendant's volitional acts absenting oneself from court compared to non-volitional acts such as being detained by ICE and deported. A criminal defendant's absence in court due to ICE custody and deportation is entirely non-volitional, and it must be considered when determining how to address a defendant's inability to appear in court.

Pursuant to *Rule 3:9-1(d)*, all disposition conferences, including a "Discretionary Case Disposition Conference . . . shall be held in open court with the defendant present." Similarly, *Rule 3:16(a)*, which pertains to pretrial hearings, provides, "[t]he defendant must be present for every scheduled event

unless excused by the court for good cause shown." Further, paragraph (b) of *Rule 3:16* governs trial and post-conviction proceedings and, with limited exceptions, requires the defendant's "presen[ce] at every stage of the trial" unless the defendant "waiv[es] the right to be present at trial." Indeed, "[t]he right to be present at a criminal trial belongs to no one other than the defendant," who may waive the right "directly or impliedly." *State v. Ingram*, 196 N.J. 23, 45 (2008); *see also R. 3:16(b)*. Notably, *Rule 3:9-1* neither defines "present" nor expressly prohibits a defendant's virtual appearance.

Paragraph 7 of the *Virtual Court Order* states, "[c]ourt events will be scheduled and conducted consistent with the principles of procedural fairness." Paragraph 7(b) further provides, "[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 in person in a virtual proceeding *or to participate virtually in a matter being conducted in person.*" (Emphasis added). Moreover, *Rule 1:2-1(b)* was promulgated the year preceding issuance of the *Virtual Court Order*. The rule provides, "[u]pon 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." *R.* 1:2-1(b). As the comments to *Rule 1:2-1* make clear, "[e]xperience with the various video conferencing and live streaming applications employed during th[e 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).

The comments to paragraph (b) of *Rule 1:2-1* further state, "[w]hat constitutes good cause" under *Rule 1:2-1(b)*, "almost certainly will evolve with further experience with contemporaneous proceedings." *Id.* comment 2.6. The *Virtual Court Order* does not preclude a trial court from permitting a witness to testify remotely at an evidentiary hearing without the State's consent. *Lansing*, 479 N.J. Super. at 574. In *Lansing*, the court explained *Rule 1:2-1(b)* and the *Virtual Court Order* address the use of remote testimony in criminal proceedings. *Id.* at 574-75. The *Virtual Court Order* "recognizes that 'judges also routinely exercise discretion to permit individuals to participate virtually as necessary for health and other reasons.'" *Id.* at 575 (quoting *Virtual Court Order* pml.). "A trial court retains its authority to permit remote testimony by witnesses at those proceedings where 'good cause' is shown and 'appropriate safeguards' are imposed." *Pathri v. Kakarlamath*, 462 N.J. Super. 208, 215-16 (App. Div. 2020) (establishing guidelines for deciding "good

cause" and "appropriate safeguards" for allowing virtual testimony in a Family Part hearing).

With these principles in mind, the *Reyes-Rodriguez* court concluded the trial court abused its discretion by issuing a bench warrant for defendant's failure to appear in person at a pre-trial conference when the defendant appeared virtually. *State v. Reyes-Rodriguez*, 480 N.J. Super. at 526. The court reasoned that the defendant's inability to attend court hearings in person in this matter was the direct result of his removal from the United States by immigration officials, not by his voluntary conduct. *See Lopez-Carrera*, 245 N.J. at 617. Ultimately, the *Reyes-Rodriguez* court vacated the bench warrant issued by the trial court so the defendant could appear remotely.

The court reasoned the defendant's virtual appearance protects his right to be present and participate at his trial — and it ensures the victim's rights "[t]o be treated with dignity and compassion by the criminal justice system," *N.J.S.A. 52:4B-36(a)*, and "[t]o be present at any judicial proceeding involving a crime," *N.J.S.A. 52:4B-36(p)*; *State v. Reyes-Rodriguez*, 480 N.J. Super. at 526. Finally, although the court recognized the defendant's removal from the United States prohibited the court from enforcing a custodial or non-custodial sentence, those obstacles did not outweigh the defendant's right to a speedy trial on the charges he had consistently contested.

The *Reyes-Rodriguez* court got it right and this Court should follow in allowing Mr. Garcia, and all similarly situated defendants, to appear remotely or waive appearance in order to protect their constitutional rights. For those defendants in ICE custody who make no effort to participate in the criminal proceedings, a bench warrant may still be appropriate. This distinction of voluntary versus involuntary failure to appear is a meaningful and proper distinction to protect defendants' rights and to give courts the necessary tools to manage their dockets. This is the distinction this Court made in *Lopez-Carrera* and that should be made here.

Defendants who hire a lawyer or communicate with their public defenders may express their wishes through counsel, while others may communicate directly with the courts from detention or after deportation. For these defendants, remote or waived appearance is the only fair and just policy. For those who are completely absent, a bench warrant remains an appropriate action. Appearances through counsel, particularly for conferences and non-testimonial appearances, provide adequate protection of a defendant's rights through counsel. Telephonic appearances from ICE custody ensure adequate identification of the defendant because of ICE's identification procedures for detaining people and scheduling such phone calls. Further, counsel and/or others who have spoken with the defendant previously could provide voice

identification or the court could verify identity through proper questioning of unique identifiers. Video appearances obviously allow for visual identification easily. Even where such a defendant cannot appear at all due to ICE constraints, technological inability from abroad or some other reason, such defendants can provide notarized letters waiving appearance or counsel can certify to their desire to waive appearance including a description of how such waiver was discussed and the decision reached.

The right to appear at trial belongs to the defendant. If it is the defendant's desire, and in his/her opinion that it's in his/her best interest, the defendant can waive that right to be in-person or to be present at all. Given the choice between the deprivation of liberty caused by an indefinitely pending criminal charge and bench warrant and the right to be present in person, many defendants will choose to proceed with criminal proceedings other than in-person. This should be their decision to make, not the prosecutors, and not the courts.

CONCLUSION

Because the trial court's refusal to allow an appearance other than in-person despite Mr. Garcia's attempts to participate, the bench warrant issued pursuant to the court's blanket policy violates Mr. Garcia's substantive and

procedural Due Process rights, violates Fundamental Fairness, and violates the Right to Speedy Trial. This Court must vacate the bench warrant and authorize Mr. Garcia, and other similarly situated defendants, to participate without in-person appearance.

Dated: July 11, 2025

Respectfully submitted,

/s/ Eric M. Mark

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