WILLIAM A. DANIEL
Prosecutor of Union County
32 Rahway Avenue
Elizabeth, New Jersey 07202-2115
(908) 527-4500
Attorney for the State of New Jersey

SUPREME COURT OF NEW JERSEY
Docket No. 090118
App. Div. Dkt. No.: AM-0105-24T1
Ind. No.: 24-09-00885-I

STATE OF NEW JERSEY,	:	
Plaintiff-Respondent,	:	Criminal Action
v.	:	On Motion for Leave to Appeal from an Interlocutory Order of the
FERNANDO J. GARCIA-MORONTA	:	Superior Court of New Jersey, Appellate Division, Denying
Defendant-Movant.	:	Defendant's Motion for Leave to Appeal.
	:	Sat Below: Hon. Adam E. Jacobs, J.A.D. Hon. Katie A. Gummer, J.A.D.

SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

MILTON S. LEIBOWITZ
Assistant Prosecutor
Of Counsel and on the Brief
Attorney ID No. 082202013

Michele.buckley@ucpo.org

DATED: August 11, 2025

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PRELIMINARY STATEMENT

Defendant's appeal should be denied because it was rendered moot by his deportation and current ability to appear for his arraignment via Zoom. The trial court issued a bench warrant in this case because defendant did not physically appear at his arraignment, seemingly was unable to appear virtually, and because the State objected to a telephonic appearance without further assurances defendant would be the person on the phone. Since that time, defendant has been deported and now seems to have the capability to appear for his arraignment virtually. Thus, defendant can now appear for his arraignment and the bench warrant can be vacated. Accordingly, the issue that is the basis of this appeal no longer exists and, thus, this appeal should be dismissed as moot.

However, if this Court nevertheless considers defendant's appeal, defendant's challenge to the trial court's use of a bench warrant as a detainer in this matter should be rejected. A bench warrant is merely a procedural mechanism that ensures a defendant is brought to a specific judge if that defendant is released from custody. It does not cause any of the harms that defendant alleges. The bench warrant does not prevent defendant from receiving discovery, filing motions, or facing the charges. It also does not stop the case from moving forward or cause daily distress. Rather, all of the harms

that defendant asserts are attributed to the bench warrant actually are attributable to defendant's detention by ICE, deportation, or failure to appear in court. Accordingly, defendant's claim that the trial court abused its discretion when it issued a bench warrant in this case after defendant failed to appear for his arraignment is meritless and his appeal should be denied.

Additionally, all of defendant's due process claims are without merit. Defendant was provided notice and an opportunity to be heard. He failed to appear. Notably, the trial court did not proceed in absentia, but rather issued a bench warrant as a detainer to ensure that defendant would one day appear to confront the allegations against him. Thus, his assertion that the bench warrant violated his right to due process is baseless.

Moreover, defendant's speedy trial arguments, which were not raised below, should not be considered because they are premature and not properly before this Court. The four factor Barker tests does not address potential future harms, but present harms caused be existing delays. None of the delay in this case is attributable to the State. The bench warrant was caused by defendant's failure to appear and all subsequent delays were caused by defendant's appeal. Indeed, after defendant was deported, the State contacted defense counsel to see if defendant was interested in appearing via Zoom and was informed that he wanted to proceed with the appeal instead. Therefore, it

is clear that this issue, which was never argued below, either should not be considered by this Court or it should be rejected.

The State does not object to the general principle of permitting a defendant who is in ICE custody to appear for arraignment virtually or telephonically. However, the use of those methods should only be permitted where necessary and where a defendant has established the presence of appropriate safeguards that will ensure the integrity of the proceeding. Based on the extremely limited record in this case and facts presented therein, it is clear that defendant failed to meet this burden and, therefore, he has failed to show the trial court's order was an abuse of discretion. Defendant did not appear for his arraignment in-person. Counsel did not ask for a virtual appearance. And, although counsel asked for a telephonic appearance, when offered an opportunity to provide legal support for his request, counsel failed to explain why an alternative format of appearance was appropriate or how the integrity of the proceeding could be protected despite that appearance. Thus, the trial court rightfully issued a bench warrant and its ruling should be affirmed on appeal.

COUNTER-STATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

E.S. and defendant-appellant Fernando J. Garcia-Moronta were in a dating relationship from January of 2024 through April 2024. (Da27). After the relationship ended, defendant continued to call her and go to her house, despite E.S. blocking defendant's phone number and her request that defendant stop contacting her. Ibid.

On May 2, 2024, defendant was waiting for E.S. when she was released from school and followed her to her dentist appointment. Ibid. Defendant eventually left the area, but then responded to her residence. Ibid. E.S. stated that defendant called her and asked her to step outside to give her a gift, which was a stuffed teddy bear. Ibid. E.S. accepted the gift and then defendant entered her residence without her permission. Ibid. E.S. did not refuse his entry, but she asked defendant to leave the residence and informed him that she was seeing someone new. Ibid.

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

Da refers to the appendix to defendant's motion for leave to appeal brief filed on December 16, 2024.

Db refers to the defendant's brief dated July 11, 2025.

Pa refers to the State's appendix to the State's motion for leave to appeal brief filed on January 9, 2025.

Psa refers to the appendix to this brief, filed on August 11, 2025.

OPDA refers to the Office of the Public Defender's amicus brief appendix.

1T refers to the transcript of arraignment dated October 7, 2024.

Defendant became irate at hearing this news and an argument ensued. Ibid. Defendant then placed E.S. in a choke hold from behind and held her in this position for almost four seconds. Ibid. E.S. could not breathe. Ibid. Defendant loosened his arm from E.S.'s neck area, but then placed her in the choke hold again. Ibid. He eventually released her, but before doing so, caused E.S. to have difficulty breathing. Ibid. E.S. also complained of neck pain. Ibid.

E.S. also informed law enforcement that defendant took her Samsung Note cell phone and exited the residence. Ibid. E.S. eventually contacted defendant. Ibid. When she attempted to retrieve her phone, defendant shoved E.S.'s face aggressively, injuring E.S.'s lip and scratching E.S.'s jaw. Ibid. Defendant then broke E.S.'s Samsung phone and then her Apple iPhone 14 Pro max. Ibid.

During the incident, defendant roughly grabbed E.S.'s arms leaving a bruise. Ibid. He also threatened to upload a video to social media that contained the two having sexual intercourse. Ibid. E.S. advised police that she is fearful of defendant, who has advised her that he will follow E.S. to college in Florida next year. Ibid.

The following day, on May 3, 2024, defendant was charged in Complaint Warrant No. W-2024-000853-2004 with second-degree aggravated

assault, in violation of N.J.S.A. 2C:12-1b(13) (count one), fourth-degree criminal mischief, in violation of N.J.S.A. 2C:17-3a(1) (count two), petty disorderly person harassment, in violation of N.J.S.A. 2C:33-4(a) (count three), petty disorderly person harassment, in violation of N.J.S.A. 2C:33-4(c) (count four), and disorderly person simple assault in violation of N.J.S.A. 2C:12-1a(1). (Da20 to 29).

On May 7, 2024, the Honorable Antonio Inacio, J.S.C., released defendant on his own recognizance, subject to certain enumerated pretrial release conditions. (Pa1 to 5).

On September 18, 2024, a Union County Grand Jury returned Indictment No. 24-09-00885, charging defendant with second-degree strangulation in violation of N.J.S.A. 2C:12-1b(13) (count one), and fourth-degree criminal mischief, in violation of N.J.S.A. 2C:17-3a(1) (count two). (Da30 to 31). On September 20, 2024, the trial court issued a Notice ordering defendant to appear in court for a post indictment arraignment on October 7, 2024. (Pa6). The notice advised defendant "failure to appear will result in the issuance of a bench warrant for your arrest, forfeiture of any monetary bail posted and review of any conditions of pretrial release." Ibid.

On October 7, 2024, the State and counsel for defendant appeared for defendant's arraignment before the Honorable Stacey K. Boretz, J.S.C.;

however, defendant did not appear because he was in Pennsylvania, in the custody of Immigration and Customs Enforcement (ICE). Defense counsel tried to contact defendant by telephone to conduct the arraignment, but counsel was unable to reach defendant by phone. (1T3-8 to 5-2; 1T4-23 to 5-2). Defense counsel then requested the court either adjourn the case for a telephonic appearance, or issue a writ for defendant to be produced in person. (1T3-8 to 23). The trial court asked defendant for legal authority in support of his requests, but counsel was unable to provide any. (1T4-2 to 5-21). The State requested a bench warrant as a detainer because the State was concerned about whether defendant would be the person on the phone and defense counsel had not provided any assurances the caller would be defendant. (1T5-22 to 6-8). As a result of defendant's failure to appearance, Judge Boretz issued a bench warrant as a detainer. (Da32).

On October 25, 2024, defendant filed a Notice of Motion for Leave to Appeal with the Appellate Division. On November 14, 2024, defendant's motion was denied. (Da1).

On December 9, 2024, defendant filed a Notice of Motion for Leave to Appeal with this Court. On December 19, 2024, an Order of Removal was entered by Immigration Judge Dennis Ryan. (Psa1). On March 23, 2023, defendant was deported to Venezuela. (Psa5). On May 6, 2025, this Court

granted defendant's Motion for Leave to Appeal. This brief in opposition follows.

LEGAL ARGUMENT

POINT I

DEFENDANT'S APPEAL SHOULD BE DISMISSED AS MOOT.

On December 19, 2024, defendant was deported to Venezuela. He has since traveled to Ecuador. Therefore, it would seem defendant can now appear for his arraignment virtually, which would in turn, result in the removal of the bench warrant that was issued as a detainer. Thus, the issue raised on appeal is moot and defendant's appeal should be dismissed.

Mootness is a threshold justiciability determination rooted in the notion that judicial power is to be exercised only when a party is immediately threatened with harm. Jackson v. Dep't of Corr., 335 N.J. Super. 227, 231 (App. Div. 2000), certif. denied, 167 N.J. 630 (2001). "A case is technically moot when the original issue presented has been resolved, at least concerning the parties who initiated the litigation." DeVesa v. Dorsey, 134 N.J. 420, 428 (1993) (Pollock, J., concurring) (citing Oxfeld v. N.J. State Bd. of Educ., 68 N.J. 301, 303 (1975)). Stated differently, "'an issue is "moot" when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy.'" Greenfield v. N.J. Dep't of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006) (quoting N.Y. S. & W. R. Corp. v. State Dep't of

Treasury, Div. of Taxation, 6 N.J. Tax 575, 582 (Tax Ct.1984), aff'd, 204 N.J. Super. 630 (App. Div. 1985)).

Moreover, when a party's rights lack concreteness from the outset or lose it by reason of developments subsequent to the filing of suit, the perceived need to test the validity of the underlying claim of right in anticipation of future situations is, by itself, no reason to continue the process." JUA Funding Corp. v. CNA Ins./Cont'l Cas. Co., 322 N.J. Super. 282, 288 (App. Div. 1999) (citing Milk Drivers & Dairy Emps. v. Cream-O-Land Dairy, 39 N.J. Super. 163, 177 (App. Div. 1956)). "[C]ourts of this state do not resolve issues that have become moot due to the passage of time or intervening events." City of Camden v. Whitman, 325 N.J. Super. 236, 243 (App. Div. 1999). Courts generally do not render advisory decisions, for "[o]rdinarily, our interest in preserving judicial resources dictates that we not attempt to resolve legal issues in the abstract." Zirger v. Gen. Accident Ins. Co., 144 N.J. 327, 330 (1996) (citing Oxfeld v. N.J. State Bd. of Educ., 68 N.J. 301, 303-04 (1975) and Sente v. Mayor & Mun. Council of Clifton, 66 N.J. 204, 205 (1974)).

On occasion, however, courts have decided an otherwise moot appeal "where the underlying issue is one of substantial importance, likely to reoccur but capable of evading review." Zirger v. Gen. Accident Ins. Co., 144 N.J. 327, 330 (1996). Accord Mistrick v. Div. of Med. Assistance & Health Servs.,

154 N.J. 158, 165 (1998) (involving an application for Medicaid benefits); In re Conroy, 98 N.J. 321, 342 (1985) (addressing the withholding or withdrawing life-sustaining treatment); State v. Perricone, 37 N.J. 463, 469 (considering blood transfusion for infant son of Jehovah's Witnesses), cert. denied, 371 U.S. 890 (1962); Advance Elec. Co., Inc. v. Montgomery Twp. Bd. of Educ., 351 N.J. Super. 160, 166 (App. Div.) (considering a school board contract and subcontract), certif. denied, 174 N.J. 364 (2002).

On October 7, 2024, the State and counsel for defendant appeared for defendant's arraignment before the Honorable Stacey K. Boretz, J.S.C. Defendant did not physically appear because he was detained by ICE at the Moshannon Valley Processing Center. The State asked the trial court for a bench warrant because defendant was not produced. (1T3-15 to 16). Defense counsel responded by requesting that his client be permitted to appear by telephone, but noted that he had technical difficulties establishing a phone call with defendant. (1T3-19 to 4-1). Alternatively, defendant asked the court to writ defendant from ICE. Ibid. Counsel did not ask for a Zoom appearance.[2]

[2] Based on litigation in federal court, it is unclear if defendant was prevented from accessing Zoom for his State appearance. See Doe et al. v. U.S. Department of Homeland Security, et al., No. 24-CV-00259, 2025 WL 360534 (W.D. Pa. Jan. 31, 2025); Doe et al. v. U.S. Department of Homeland Security, et al., No. 24-CV-00259, 2025 WL 949846 (W.D. Pa. Mar. 28, 2025). (Psa14 to 33; Psa34 to 41). Defendant is not one of the named defendants in the

When asked for legal authority to support his position, defense counsel argued his request should be accommodated pursuant to the Rule of Lenity, Court Rule 1:1, an absence of Court Rules prohibiting his request, and general principles of justice as a basis for the relief sought. (1T4-2 to 5-17). The State objected to proceeding with a telephonic appearance because defense failed to provide any, let alone sufficient, assurances that defendant would be the person on the other end of the call. (1T5-24 to 6-8). Accordingly, the State requested the trial court issue a bench warrant as a detainer to ensure defendant would appear for his arraignment if defendant ever was released from ICE and into the public. Ibid. The trial court granted the State's request. (1T6-20 to 22; Da13).

On December 19, 2024, an Order for Removal was entered by the Honorable Dennis Ryan. On March 23, 2025, defendant was deported to Venezuela. (Psa1 to 4; Psa5 to 6). Thereafter, the State reached out to defense counsel to see if counsel was in contact with defendant, if defendant had access to Zoom, and to see if defendant was interested in conducting defendant's arraignment via Zoom. Counsel stated that he was in contact with his client, but informed the State that he would rather pursue the appeal.

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federal lawsuit.

It is clear that defendant, who is now in Ecuador according to counsel's brief, (Db2), and "ready to answer for these charges as soon as the court allows him to do so" can appear for his arraignment virtually. If that is accomplished, the bench warrant that defendant objects to can be vacated. Thus, the underlying issue in this case has been rendered moot and defendant's appeal should be dismissed as moot.

This appeal also should not be considered despite its mootness because the issue is not one of substantial importance that is unlikely to evade review. As argued herein, the trial court properly issued a bench warrant as a detainer based on the defendant's failure to appear and the arguments advanced by counsel. More importantly, there is no harm or controversy that requires this Court's attention. Despite not appearing to seek a virtual appearance below, defendant now claims the bench warrant in the case must be vacated to permit him to appear remotely via Zoom. The availability, or lack thereof, of virtual appearance has been resolved by way of defendant's deportation in this case. It also appears to have been resolved for other defendants. See Doe et al. v. U.S. Department of Homeland Security, et al., No. 24-CV-00259, 2025 WL 360534 (W.D. Pa. Jan. 31, 2025) (Psa14 to 33); Doe et al. v. U.S. Department of Homeland Security, et al., No. 24-CV-00259, 2025 WL 949846 (W.D. Pa.

Mar. 28, 2025) (Psa34 to41). Thus, defendant has an avenue for relief and this issue is not likely to reoccur.

Moreover, this issue is unlikely to reoccur because the State did not object to the use of virtual or telephonic appearances for all cases, but rather objected to the use of a telephonic appearance in this case because defense failed to provide assurances that he could ensure the integrity of the proceeding. If a defendant, including this one, can meet his burden to show both need for an alternative form of appearance and that conditions exist to ensure the integrity of the arraignment, such a request should be granted and a bench warrant will not be filed. Therefore, the issues in this case are unlikely to reappear, and thus, this case does not present an issue of substantial importance that warrants consideration despite its mootness. Accordingly, defendant's appeal should be dismissed as moot.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ISSUING A BENCH WARRANT WHEN DEFENDANT DID NOT APPEAR AT HIS ARRAIGNMENT.

The State did not, and does not, categorically object to allowing defendants, who are in ICE custody or who have been deported by ICE, to appear for an arraignment virtually or telephonically. However, such an appearance only should be permitted at the discretion of the trial court, when a defendant cannot appear for arraignment in-person, and only if certain assurances can be provided by defense to ensure the integrity of the proceeding. If all of those conditions are not met, such as in this case, a trial court may issue a bench warrant for the defendant's failure to appear.

It is well established that "[i]n our judicial system, the trial court controls the flow of proceedings in the courtroom." State v. Jones, 232 N.J. 308, 311 (2018). Appellate courts "apply the abuse of discretion standard when examining the trial court's exercise of that control." Jones, 232 N.J. at 311. "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)). "[A] functional approach to

abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue." State v. R.Y., 242 N.J. 48, 65 (2020) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)) (alteration in original). "When examining a trial court's exercise of discretionary authority, reversal only is appropriate when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011) (quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 (App. Div. 2007)).

Contrary to defendant's claim, the trial court did not abuse its discretion by issuing a bench warrant as a detainer in this case. It cannot be disputed that defendant did not appear for his arraignment. Defendant was not there physically. The record does not reflect a request for virtual appearance. And, although defendant requested the trial court permit him to appear telephonically, defendant failed to establish that he actually was capable of doing so or that adequate assurances existed to protect the integrity of the proceeding. Accordingly, defendant was not present for his arraignment and, therefore, the trial court's issuance of a bench warrant as a detainer was not an abuse of discretion.

Under Rule 1:2-1(a), "[a]ll trials, hearings of motions and other applications, first appearances, pretrial conferences, arraignments, sentencing conferences (except with members of the probation department) and appeals shall be conducted in open court unless otherwise provided by rule or statute." Moreover, under Rule 3:16(a), defendants "must be present for every scheduled [pretrial] event unless excused by the court for good cause shown."

On October 27, 2022, this Court issued a Notice to the Bar and Public Omnibus Order regarding the future of court operations for in-person and virtual court events. In that Notice and Order, this Court provided substantial guidance regarding when in-person appearance is required and when virtual appearance is permitted. Relevant to this case, this Court stated, "[t]he following [criminal] matters also will generally proceed in person but may be conducted virtually at the discretion of the court": post-indictment arraignments, pretrial and other conferences, plea hearings, non-routine motions, and orientation and phases one and two of Recovery Court. (Psa9) (emphasis added). This Court further ordered 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." (Psa12) Additionally, the Court ordered that "[c]ourt events will be scheduled and

conducted consistent with the principles of procedural fairness" and that the provisions of the October 2022 Order "remain subject to ongoing review and potential future refinement." (Psa12 to 13)

This Court's Notice and Order clearly establishes the default method of appearance for a post-indictment arraignment is in-person. It further establishes that where in-person appearance is not available, virtual appearance may be conducted at the discretion of the trial court. Notably, the Notice and Order does not address telephonic appearance.

Nevertheless, the State acknowledges there is caselaw, albeit limited, that recognizes the permissible use of telephonic appearance where parties consent or there are "special circumstances," the "identity and credentials" of the person who is appearing are "known quantities," and there is some "circumstantial voucher of the integrity" of what the person will be saying. See State v. Santos, 210 N.J. 129 (2012); Aqua Marine Products, Inc. v. Pathe Computer Control Systems Corp., 229 N.J. Super. 264 (App. Div. 1988). Accordingly, the State does not categorically object to permitting a defendant, who is in ICE custody or who has been deported, to appear for arraignment virtually or telephonically. However, such appearance only should occur if defendant makes the required showing that an alternative form of appearance is necessary and appropriate. And, if a defendant fails to make such a showing

and his request for an alternate form of appearance is denied, the trial court should be permitted to issue a bench warrant.

As mentioned, the Court Rules and case law addressing virtual and telephonic testimony is limited, but those that exist nevertheless provides useful guidance for determining when a trial court should grant a request to proceed by virtual or telephonic appearance. Pursuant to R. 1:2-1(b), "[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." (emphasis added). Thus, before a court should even consider whether a defendant may appear for arraignment virtually or telephonically, defendant must meet the first procedural hurdle: advance notice of its application.

Not only must a defendant notify the court in advance of its request for remote appearance, a defendant also must be able to establish the existence of "good cause" for the request. Although "good cause" is not well defined, it cannot mean "convenience." In determining whether "good cause" exists, courts should evaluate the non-exhaustive list of factors enumerated in Pathri v. Karalamath, 462 N.J. Super. 208 (App. Div. 2020). In Pathri, the Appellate Division considered how a judge should assess a party's request to appear at trial and present testimony by way of contemporaneous video transmission in

the context of a matrimonial trial.[3] Although a matrimonial trial involving testimony is not analogous to an arraignment, Pathri nevertheless presents useful guidance. In Pathri, the Appellate Division found judges should consider the following non-exhaustive list of factors when evaluating an application for virtual appearance:

> • the witness' importance to the proceeding;
>
> • the severity of the factual dispute to which the witness will testify;
>
> • whether the factfinder is a judge or a jury;
>
> • the cost of requiring the witness' physical appearance in court versus the cost of transmitting the witness' testimony in some other form;
>
> • the delay caused by insisting on the witness' physical appearance in court versus the speed and convenience of allowing the transmission in some other manner;
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> • whether the witness' inability to be present in court at the time of trial was foreseeable or preventable; and
>
> • the witness' difficulty in appearing in person.
>
> [Id. at 216].

[3] The State notes that State v. Lansing, 479 N.J. Super. 565 (App. Div. 2024) and State v. Reyes-Rodriguez, 480 N.J. Super. 526 (App. Div. 2025), also address virtual appearance. However, these cases are currently before this Court and their holdings are subject to change. See State v. Lansing, 260 N.J. 54 (2025), and State v. Reyes-Rodriguez, 260 N.J. 450 (2025). Therefore, the State does not rely upon those cases for guidance.

When applying those factors to the issue presented in this case, one conclusion is clear: if a defendant cannot appear in-person for his arraignment because he has been detained by ICE or has been deported, virtual appearance may be an appropriate alternative. The defendant is an essential party to the proceeding and arraignment is a critical stage of a criminal case. Missouri v. Frye, 566 U.S. 134, 140 (2012). At arraignment,

> the judge shall (i) advise the defendant of the substance of the charge; (ii) confirm that if the defendant is represented by the public defender, discovery has been obtained, or if the defendant has retained private counsel, discovery has been requested pursuant to R. 3:13-3(b)(1), or counsel has affirmatively stated that discovery will not be requested; (iii) confirm that the defendant has reviewed with counsel the indictment and, if obtained, the discovery; (iv) if so requested, allow the defendant to apply for pretrial intervention; and (v) inform all parties of their obligation to redact confidential personal identifiers from any documents submitted to the court in accordance with Rule 1:38-7(b).
>
> [R. 3:9-1(b)].

Given the importance of an arraignment and defendant's presence at same, this factor weighs against virtual appearance.

Comparatively, the second and third factors would appear to weigh in favor of permitting a defendant, who is detained in ICE custody, to appear by contemporaneous video transmission. An arraignment is not an adversarial

hearing, but rather a communicative proceeding. The parties do not argue or address factual disputes, but rather the court explains necessary information to the defendant. It is an incredibly important event, but not one that is not ordinarily complex. Moreover, insofar as there is fact-finding, the judge is the fact-finder. Thus, these two factors would suggest virtual appearance may be appropriate for arraignments.

The final four factors are case sensitive and will vary depending on a variety of considerations, including, but not limited to, where defendant is being detained or where a defendant has been deported. If a defendant is being detained in New Jersey, the difficulty and costs associated with producing a defendant, even one who is in ICE custody, is different than producing a defendant who is out of State. Similarly, it might be more appropriate to have a defendant who has been deported to a developed nation with a strong internet connection and high-definition web camera appear via a contemporaneous video appearance than it is for a defendant who has been deported to a nation with poor internet connection and a blurry video. Additionally, where and why a defendant is being detained may change the likelihood that he will be able to appear in the near future. Accordingly, it would be inappropriate to apply a blanket policy regarding how to weigh these factors.

However, even if a defendant can establish "good cause" to proceed by contemporaneous video transmission, his request still should not be granted unless appropriate safeguards are enforced. See R. 1:2-1 (requiring "good cause" and "with appropriate safeguards."). For example, the defendant must be sworn into the proceeding, he must testify that there is no one else in the room, if possible he should move the camera to show that no one else is in the room, and he must provide personal identifying information[4] to ensure he is the individual who is supposed to appear. Ultimately, if a defendant cannot appear for his arraignment in-person, has provided the trial court with notice of that issue, and can establish both "good cause" to appear by contemporaneous video transmission and that appropriate safeguards will ensure the integrity of the proceeding, then a trial court may permit a defendant who is in ICE custody to appear for his arraignment virtually.

If, and only if, a defendant cannot appear for his arraignment in-person or virtually, should a trial court then consider whether a telephonic appearance is warranted. Such an appearance would require yet additional safeguards and assurances because of the inability to see the defendant or his surroundings. Indeed, the Appellate Division's opinion in Aqua Marine Products, Inc. v.

[4] If the court is concerned with utilizing personal identifiers in open court, a predetermined keyword, phrase, or numbers may be a viable alternative.

Pathe Computer Control Systems Corp., 229 N.J. Super. 264 (App. Div. 1988), aptly explains the concerns associated with telephonic appearance and why they should be used sparingly.

In Aqua Marine the Appellate Division addressed the propriety, or lack thereof, in permitting a witness to testify in a civil lawsuit via telephone over the defendant's objection. Id. at 273. Concerned with ensuring the integrity of the proceeding, the Appellate Division held that it was "grossly and patently improper [for the trial court] to admit such testimony over a party's objection." Id. at 274. As the Appellate Division noted, when an individual appears by telephone, it is more difficult to ascertain the person's identity and assure that he was who he is supposed to be, it is harder to make credibility determinations especially because there is no "demeanor" to be evaluated, and it inhibits a party's ability to prepare a meaningful cross-examination. Ibid.

Nevertheless, the Appellate Division recognized some Court Rules permit a witness, or attorney, to interact with the court via telephone, and, thus, the Appellate Division observed a witness' telephonic appearance may be appropriate in "special situations in which there is either exigency or consent and in which the witness' identity and credentials are known quantities." Id. at 274. Such situations arise when a two-part test can be met. First, the court must determine whether the opposing party has consented to the testimony or

whether there is a "special circumstance" or "exigency," "compelling the taking of telephone testimony." Aqua Marine, 229 N.J. Super. at 275. Second, the court must be satisfied that "the witness' identity and credentials are known quantities" and that there is some "circumstantial voucher of the integrity of the testimony." Ibid. Although the Appellate Division did not identify what vouchers should be provided, the State would suggest, that at a minimum, the following conditions be required: defendant must provide the phone number he will be reached at in advance of the hearing; the trial court should initiate the call; the defendant must provide personal identifying information; and most importantly, someone must confirm under oath that the person on the other end of the call is the defendant. If those conditions cannot be established, for example, because counsel has never met with defendant and, therefore, cannot identify defendant's voice, then telephonic appearance should not be permitted.

Finally, if a defendant cannot appear by any of these methods, a trial court should be permitted to issue a bench warrant for defendant's failure to appear. Relying upon this Court's opinion in State v. Lopez-Carrera, 245 N.J. 596 (2021), defense and amici argue that a defendant's failure to appear cannot be attributed to a defendant who has been detained by ICE or deported unless the defendant no longer wishes to be an active participant in his case.

Defendants and amici ask too much. This Court's ruling in Lopez-Carrera, 245 N.J. 596 (2021), addressed whether the CJRA permitted the State to seek pretrial detention because of the concern that ICE may detain and deport defendant. Although this Court addressed what the CJRA meant by the phrase "risk that a defendant will not appear in court as required" and found that it only applies to a defendant's volitional acts, that definition should not be attached to Rule 3:16(a).

In Lopez-Carrera, the State moved to detain the defendants pending trial because the State claimed the defendants were a flight risk. Lopez-Carrera, 245 N.J. at 604. Specifically, the State argued defendants were a flight risk because they were undocumented immigrants and that if ICE detained the defendants, the victim would be deprived of any relief. Ibid. The trial court detained the defendants, but the Appellate Division reversed, "conclud[ing] that the Legislature . . . intended that a defendant may be detained based on the risk of non-appearance only if it arises from the defendant's own misconduct or volitional act" -- and not "to thwart federal immigration action." State v. Molchor, 464 N.J. Super. 274, 296 (App. Div. 2020). Reviewing the plain language of the CJRA, the overall scheme and purpose of the CJRA, the legislative history of the CJRA, and general principles of justice, this Court agreed with the Appellate Division that the fear that ICE will remove a

defendant does not support a risk that a defendant will not appear in court as required. Lopez-Carrera, 245 N.J. at 610-27.

This Court's holding in Lopez-Carrera was strictly about the CJRA and pretrial detention. It should not be expanded to the definition of appearance, or non-appearance, in all manners. Indeed, unlike the CJRA, R. 3:16(a), does not utilize the phrase "will not appear." Rather, R. 3:16(a) states, "[t]he defendant must be present for every scheduled event unless excused by the court for good cause shown." Although the Rule permits a defendant to seek to be excused from an event for good cause, and detention or deportation may be deemed good cause, that determination should be left to the discretion of the trial court. However, where a defendant does not appear for his arraignment in-person, and does not meet his burden to establish the need and appropriateness of virtual or telephonic appearance, the trial court should be left with the discretion to decide if a bench warrant is appropriate. Thus, this Court should not create a new rule prohibiting trial court's from issuing bench warrants merely because a defendant has been detained by ICE or deported.

Finally, this Court should reject the argument made by amici that the State should be obligated to file a writ of habeas corpus ad prosequendum, ask ICE to delay its deportation proceedings under deferred action, seek administrative stay of removal, extradite deported defendants, or seek

significant benefit parole. Foremost, the obligation to produce defendant should lie with defendant and defendant alone. Although the State may have a better relationship with the federal government and may be more successful in causing a federal entity to produce defendant, that should not shift the burden of causing defendant's appearance to the State. As demonstrated by Doe et al. v. U.S. Department of Homeland Security, et al., No. 24-CV-00259, 2025 WL 360534 (W.D. Pa. Jan. 31, 2025), and Doe et al. v. U.S. Department of Homeland Security, et al., No. 24-CV-00259, 2025 WL 949846 (W.D. Pa. Mar. 28, 2025), defendants can sue the federal government for relief where their rights are being violated. (Psa14 to 33; Psa34 to 41). Moreover, as established by Deputy Public Defender Susannah Volpe's certification, the Office of the Public Defender was successful in obtaining a writ for a defendant's appearance. (OPDa2 to 3). While the State's decision not to utilize potential avenues for production may be relevant to other considerations, such as an eventual speedy trial analysis, it does not justify requiring the State to be responsible for defendant's appearance. Thus, this Court should not create a new requirement, shifting the burden of producing defendant to the State.

Applying the law to the present case, it is clear that the trial court did not abuse its discretion by issuing a bench warrant as a detainer. In this case,

defendant was detained by ICE and transported to Moshannon Valley, which is several hours away from the Elizabeth Courthouse. Thus, defendant was unavailable to appear in-person. However, based on the limited record before this Court, it does not appear that defendant requested to appear virtually. Rather, he asked to appear telephonically. Moreover, that request was made on the day of the arraignment and when asked for law to support his request, defendant failed to provide any, let alone an explanation of how he could ensure the integrity of the proceeding. Thus, the trial court did not abuse its discretion in denying defendant's request to permit defendant to appear telephonically for his arraignment or by issuing a bench warrant because of defendant's non-appearance.

POINT III

DEFENDANT'S RIGHT TO DUE PROCESS WAS NOT VIOLATED BY THE ISSUANCE OF A BENCH WARRANT AS A DETAINER.

Defendant claims this Court must vacate the bench warrant and permit his remote appearance because the bench warrant causes an indefinite delay of the proceedings that will violate his right to due process. Defendant's claim is without merit. Contrary to defendant's claim, the bench warrant does not cause the harms defendant alleges. Rather, they are a result of defendant's failure to appear. Now that defendant has been deported and presumably has access to Zoom, he can move before the trial court to have a virtual arraignment, have the bench warrant vacated, and have his day in court. Furthermore, even if the bench warrant is not vacated, defendant's case can still proceed. Defendant's right to due process has been protected throughout these proceedings, and thus, his claims to the contrary are wholly without merit. Therefore, his appeal should be denied.

Although the State Constitution "does not enumerate the right to due process," Article 1, Paragraph 1 "protects 'values like those encompassed by the principle[] of due process.'" Doe v. Poritz, 142 N.J. 1, 99 (1995) (alteration in original) (quoting Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985)). Due process is not a fixed concept, however, but a flexible one that

depends on the particular circumstances. Zinermon v. Burch, 494 U.S. 113, 127 (1990); Mathews v. Eldridge, 424 U.S. 319, 334 (1976); Nicoletta v. North Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 165 (1978). Fundamentally, due process requires an opportunity to be heard at a meaningful time and in a meaningful manner. Kahn v. U.S., 753 F.2d 1208, 1218 (3d Cir.1985). The minimum requirements of due process, therefore, are notice and the opportunity to be heard. U.S. v. Raffoul, 826 F.2d 218, 222 (3d Cir.1987) (citing Goss v. Lopez, 419 U.S. 565 (1975)).

To determine what procedural protections are required in a given case, courts must weigh the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
>
> [Zinermon, 494 U.S. at 127 (quoting Mathews, 424 U.S. at 335).]

Contrary to defendant's claims, the trial court's issuance of a bench warrant did not violate his right to procedural due process. Defendant was properly charged by way of Complaint Warrant, had a pre-trial detention hearing, during which he was told he had to appear for all scheduled court

proceedings, and afforded notice of his arraignment date. (Pa3; Pa6). Defendant was afforded an opportunity to be heard at his arraignment, which was held on October 7, 2024; the trial court, State, and defense counsel were present, but defendant was not. Defense counsel presented the trial court with an argument on defendant's behalf. Accordingly, defendant was afforded notice and opportunity to be heard and, therefore, a procedural due process violation did not occur.

To be clear, the trial court does not have a policy to issue a bench warrant merely because a defendant is in the custody of ICE or has been deported. Rather the trial court has a policy of issuing a bench warrant when a defendant does not appear for a required court appearance, such as at an arraignment. That policy applies even if the reason the defendant does not appear for the hearing is because he is in ICE custody or because he has been deported. Defendant's claims fail to appreciate that distinction. The State would agree that the trial court would have abused its discretion if it issued the bench warrant in this case solely based upon defendant's immigration status or solely because he was in the custody of ICE, but that is not what was done here. This is not a case where defendant appeared virtually from an ICE facility or foreign country and the trial court nevertheless issued a bench warrant. Rather, this was a case where defendant was afforded an opportunity

to appear and failed to do so. That failure, and not defendant's immigration status, was the reason the trial court issued the bench warrant. Therefore, the trial court's order was not an abuse of discretion.

Defendant's substantive due process claim similarly is without merit. The substantive due process doctrine does not protect an individual from all government action that might infringe that person's liberty in violation of a law. In re Att'y Gen. L. Enf't Directive Nos. 2020-5 & 2020-6, 465 N.J. Super. 111, 155 (App. Div. 2020). "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."'" Ibid. (alterations in original) (quoting Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352, 366, (1996)). When determining the extent of this protection, New Jersey courts must weigh the "nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Visiting Homemaker Serv. of Hudson Cty. v. Bd. of Chosen Freeholders, 380 N.J. Super. 596, 610 (App. Div. 2005) (quoting Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985)).

Here, the government action at issue is the trial court's issuance of a bench warrant for defendant's failure to appear. The liberties that allegedly

were violated are unsubstantiated claims about how a bench warrant impacts a defendant's daily life. Specifically, without support, defendant claims "it becomes impossible to obtain a passport or driver's license finding employment becomes exceedingly difficult; travel, domestically and internationally, is greatly impacted." It is unclear how a bench warrant causes these harms. Most of those harms appear to be a byproduct of defendant's unlawful entry into the United States, his detention in an immigration detention facility, and his deportation. Those harms are not the of a result of the bench warrant. Indeed, it seems that defendant had no difficulty traveling from Venezuela, where he was deported, to Ecuador, where counsel asserts defendant currently is located.

Regardless of the harms that defendant alleges, he was provided notice and a hearing. The trial court heard from defense counsel. The court found defense counsel's arguments lacking and correctly issued a bench warrant. The procedure that was followed and the resulting court order does not amount to "egregious governmental abuse" that "shock the conscience or otherwise offend judicial notions of fairness." Thus, defendant's claim that the proceedings in this case violated his right to substantive due process also is without merit.

Similarly, defendant's claim that the proceedings violated principles of fundamental fairness is meritless. The New Jersey Constitution is a source of fundamental rights independent of the United States Constitution. See State v. Gilmore, 103 N.J. 508, 522-23 (1986) (holding that the New Jersey Constitution, independent of the United States Constitution, protected the right to a trial by jury by forbidding the exclusion of black jurors by use of peremptory challenges). The Federal Constitution provides the floor for constitutional protections, and our own Constitution affords greater protection for individual rights than its federal counterpart. Id. at 522-24; see also State v. Carter, 247 N.J. 488, 529-30 (2021) (collecting cases and noting that this Court has found that our State Constitution offers greater protection than the Fourth Amendment from unreasonable searches and seizures "[o]n a number of occasions"); State v. Zuber, 227 N.J. 422, 438 (2017) ("As in other contexts, the State Constitution can offer greater protection in [the Eighth Amendment] area than the Federal Constitution commands."). The doctrine of fundamental fairness reflects the State Constitution's heightened protection of due process rights.

Article I, paragraph 1 of the New Jersey Constitution provides that

> [a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and

> liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

"Despite the absence of the phrase due process in that paragraph, this Court has 'construed the expansive language of Article I, Paragraph 1 to embrace the fundamental guarantee of due process.'" State v. Njango, 247 N.J. 533, 548 (2021) (quoting Jamgochian v. State Parole Bd., 196 N.J. 222, 239 (2008)). An important part of that due process guarantee is the doctrine of fundamental fairness.

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. 1, 108 (1995)).

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." Ibid. (quoting Doe, 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 our courts have imposed limitations on governmental actions on grounds of fundamental fairness." State v. Cruz, 171 N.J. 419, 429 (2002); see also Njango, 247 N.J. at 537, 255 (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).

Contrary to defendant's claim, the doctrine of fundamental fairness also does not require this Court to vacate the bench warrant that was issued by the trial court. As previously argued, defendant was properly charged and provided notice of the charges. The State then moved to detain defendant, but

he was released. The State then indicted defendant and he was notified to come to court for his arraignment. Defendant did not come to court. Although his ability to do so may have been effected by his detention in an ICE facility, that does not change the fact that defendant did not appear. His counsel did not request defendant be permitted to appear virtually and his attorney did not provide any assurances to enable a telephonic appearance. Therefore, defendant did not appear for his arraignment in any format and, thus, it was entirely appropriate for the trial court to issue a bench warrant.

If defendant can now make the appropriate showing and the trial court still denies his request, perhaps that would be an abuse of discretion. However, that is not this case. Defendant was not present for his arraignment and the trial court properly issued a bench warrant as a detainer in response.

POINT IV

THE BENCH WARRANT DOES NOT VIOLATE DEFENDANT'S RIGHT TO A SPEEDY TRIAL. (NOT RAISED BELOW).

For the first time, defendant claims the bench warrant must be vacated because it violates defendant's right to a speedy trial. Defendant did not raise this claim before the trial court or the Appellate Division. Therefore, it is not appropriately before this Court and this Court should not consider it. Moreover, defendant's claim is wholly without merit. Thus, if this Court nevertheless considers defendant's claim, it should be rejected.

Foremost, defense counsel did not raise a speedy trial claim before the trial court or Appellate Division. Therefore, this claim is not properly before this Court and this Court should decline to address them. See DYFS v. M.C. III, 201 N.J. 328, 339 (2010) (noting that "issues not raised below will ordinarily not be considered on appeal").

However, even if this Court were to consider defendant's claim, his appeal should be denied because his claim is meritless. The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and imposed on the states through the Due Process Clause of the Fourteenth Amendment. Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1967). "The constitutional right . . . attaches upon defendant's arrest." State v. Fulford,

349 N.J. Super. 183, 190 (App. Div. 2002) (citing State v. Szima, 70 N.J. 196, 199-200 (1976)). As a matter of fundamental fairness, excessive delay in completing a prosecution may qualify as a violation of a defendant's constitutional right to a speedy trial. State v. Farrell, 320 N.J. Super. 425, 445-46 (App. Div. 1999) (citing State v. Gallegan, 117 N.J. 345, 354-55 (1989)).

New Jersey Courts apply the four-part test enumerated in Barker v. Wingo, 407 U.S. 514 (1972), to determine when a delay infringes upon a defendant's due process rights. State v. Szima, 70 N.J. 196 (1976). Courts must 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." Ibid. No single factor is a "necessary or sufficient condition to the finding of a deprivation of the right [to] a speedy trial." Barker, 407 U.S. at 533. Rather, the factors are interrelated, and each must be considered in light of the relevant circumstances of each particular case. Ibid. In an analysis of a speedy trial challenge, a trial court must weigh the "societal right to have the accused tried and punished" and a defendant's right "to be prosecuted fairly and not oppressively." State v. Dunns, 266 N.J. Super. 349, 380 (App. Div. 1993) (quoting State v. Farmer, 48 N.J. 145, 175 (1966)).

The first factor, the length of time, is a "triggering mechanism" and "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity" for the court to balance the other factors. Barker, 407 U.S. at 530. "[T]he length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." Id. at 530-31 (footnote omitted) (adding "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge").

"Barker's second prong examines the length of a delay in light of the culpability of the parties." Tsetsekas, 411 N.J. Super. at 12 (citing Barker, 407 U.S. at 529). Trial courts, in reviewing "the chronology of the delay," should "divide the time into discrete periods of delay" and attribute each delay to the State, defendant or the judiciary. State v. May, 362 N.J. Super. 572, 596, 600 (App. Div. 2003) (affirming a trial court which examined the chronology of the case as discrete periods of delay). Thereafter, "different weights should be assigned to different reasons" proffered to justify a delay. Barker, 407 U.S. at 531. Purposeful delay tactics weigh heavily against the State. Tsetsekas, 411 N.J. Super. at 12 (citing Barker, 407 U.S. at 531). "A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such

circumstances must rest with the government rather than with the defendant." Barker, 407 U.S. at 531. "[A] valid reason, such as a missing witness, should serve to justify appropriate delay." Ibid. And, "[d]elay caused or requested by the defendant is not considered to weigh in favor of finding a speedy trial violation." State v. Farrell, 320 N.J. Super. 425, 446 (App. Div. 1999) (first citing State v. Gallegan, 117 N.J. 345, 355204 (1989) and then citing State v. Marcus, 294 N.J. Super. 267, 293 (App. Div. 1996)).

In analyzing the third factor, a defendant's assertion of speedy-trial rights, a court may consider "the frequency and force of the [defendant's] objections" when assessing whether the defendant properly invoked the right. Barker, 407 U.S. at 529. This third factor "is closely related to the other factors" and "is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." Barker, 407 U.S. at 531-32.

The fourth prong of the Barker test considers the prejudice to a defendant caused by delay. "[P]roof of actual trial prejudice is not 'a necessary condition precedent to the vindication of the speedy trial guarantee.'" Tsetsekas, 411 N.J. Super. at 13-14 (quoting State v. Merlino, 153 N.J. Super. 12, 15 (App. Div. 1977)). Although the delay may not prejudice a

> defendant's liberty interest or his [or her] ability to defend on the merits[,] . . . significant prejudice may also arise when the delay causes the loss of

> employment or other opportunities, humiliation, the anxiety in awaiting disposition of the pending charges, the drain in finances incurred for payment of counsel or expert witness fees and the "other costs and inconveniences far in excess of what would have been reasonable under more acceptable circumstances.
>
> [Id. at 13 (quoting Farrell, 320 N.J. Super. at 452).]

The burden ultimately lies on defendant to show that the Barker factors, on balance, weigh in favor of dismissal. See State v. Berezansky, 386 N.J. Super. 84, 99 (App. Div. 2006). However, because the analysis requires balancing, "when the delay in concluding a trial is excessively long by any measure . . . , the burden upon defendant to satisfy the other factors is correspondingly diminished." Farrell, 320 N.J. Super. at 453. "[I]n the administration of justice, dismissal must be a recourse of last resort," Id. at 447 (quoting State v. Prickett, 240 N.J. Super. 139, 147 (App. Div. 1990)), however, a defendant's right to be prosecuted "fairly and not oppressively" must also be considered. Dunns, 266 N.J. Super. at 380 (quoting Farmer, 48 N.J. at 175).

Applying the Barker test to the facts of this case, it is clear that defendant's right to a speedy trial has not been violated. On May 3, 2024, defendant was charged and arrested. Four days later, on May 7, 2024, defendant was released pending trial. One hundred and thirty-four days later,

on September 18, 2024, he was indicted. (Da30 to 31). Shortly, thereafter, on October 7, 2024, defendant was supposed to appear for his arraignment. He failed to appear and the bench warrant at issue was ordered. Thus, the time from arrest to the time of the order at issue is one hundred and fifty-seven days, well short of the one-year "presumptively prejudicial" threshold discussed in Doggett v. United States, 505 U.S. 647 (1992). Therefore, this factor weighs against defendant's claim.[5]

Defendant asserts this factor should weigh in his favor because the delay is infinite. There is no law to support this claim and it is factually inaccurate. Contrary to defendant's assertion, the case is not delayed because of the bench warrant. Discovery should have been tendered and defendant can prepare his defense. Moreover, plea negotiations are not precluded. See Rule 3:9-1(a). Additionally, the parties can engage in motion practice. In short, although defendant's failure to appear may limit what can occur, the bench warrant does not prevent a case from proceeding.

Barker's second prong similarly weighs against defendant and against dismissal of the indictment. The reason for delay is not due to "the State's

[5] If this Court were to use the date of argument for purposes of calculation, this matter will be greater than one year old. However, as argued herein, all of the delay after the trial court issued a bench warrant was caused by defendant's appeal and, thus, is attributed to him.

cooperation with having Mr. Garcia detained and deported by ICE[.]" (Db22). The State did not collude with ICE and no such collusion is supported by the record. If this Court were to utilize the date of the bench warrant for purposes of this analysis, then there is no meaningful delay. If this Court were to utilize the date of argument in this case for purposes of analysis, then the majority of the delay is attributable to defendant and his decision to appeal. See N.J.S.A. 2A:162-22(b)(1)(c); State v. Mackroy-Davis, 251 N.J. 217, 241 (2022) (recognizing the Criminal Justice Reform Act states that "[t]he time from the filing to the final disposition of a motion made before trial by the prosecutor or the eligible defendant" "shall be excluded in computing time in which a case shall be indicted or tried."). Indeed, after Leave to Appeal was granted by this Court and the State learned that defendant was deported, the State reached out to defense counsel to see if defendant was interested in attempting to appear via Zoom and was informed that defendant wished to proceed with the appeal. Therefore, it is clear that the overwhelming majority of the delay in this case is attributable to defendant and, thus, the second Barker factor weighs against defendant.

The third Barker factor should not weigh in defendant's favor. Although defendant does not need to bring himself to trial, he did not assert this right before the trial court. Defendant also did not assert this right before the

Appellate Division. Although defendant now asserts his right, this factor should not weigh in his favor.

As to the fourth Barker factor, defendant cannot show how he is prejudiced by the delay. Defendant has not explained how the delay in his trial has impacted his defense. It is unclear how defendant's pending criminal charges, or the New Jersey detainer, restricts his travel internationally beyond limitation to the United States, where he cannot legally reenter at this time. Nor is it clear how those circumstances prevent him from getting a passport or driver's license from his country of birth. Notably, defendant's claim that his ability to travel is undermined by the fact that he was removed to Venezuela, but according to his counsel, defendant now is in Ecuador. Thus, defendant cannot show how he is prejudiced by the pending criminal proceedings. As such, the Barker factors clearly weigh against defendant's claim.

Although the State reiterates that this Court should not consider defendant's speedy trial claim because it was not raised before, an evaluation of the Barker factors clearly weigh against dismissal of the indictment. Therefore, if this Court nevertheless does address defendant's claim, his appeal should be denied because it is without merit.

CONCLUSION

Defendant's appeal should be dismissed because his claim of error is moot. He has been deported and presumably can appear for his arraignment virtually. Therefore, defendant can renew his request to appear remotely, and if he can establish the propriety of such a request, he can appear for his arraignment via contemporaneous video transmission and have the bench warrant vacated. As such, there is no controversy for this Court to review and, thus, his appeal should be dismissed.

Moreover, because the State does not categorically object to the use of contemporaneous video transmission or telephonic appearance for arraignment, but merely does so where a defendant has failed to meet his burden of establishing both the need for such an appearance and propriety of same, this issue is unlikely to reappear. Therefore, this is not an issue of substantial importance that warrants consideration despite its mootness.

However, if this Court nevertheless considers defendant's appeal, it should be denied. An arraignment is a pivotal proceeding that protects a defendant's rights and, therefore, in-person appearance should be the default requirement. Only when in-person appearance is not possible, and not merely for convenience or expedience, should the court consider alternative forms of appearance. When in-person appearance is not possible, contemporaneous

video transmission may be an appropriate alternative if a defendant provides the court with advanced notice of his request for a remote appearance, can establish good cause for his request, and can provide appropriate safeguards to ensure the integrity of the process. Only when in-person appearance and video appearance are not possible, should a court consider telephonic appearance. In those circumstances, such an appearance is appropriate if the defendant provides the court with advance notice of his request, can establish this is a "special case" that warrants further relaxation of the Court Rules, and can show that there are appropriate safeguards in place to ensure the integrity of the process. If none of these methods can be utilized, a trial court still should be permitted to issue a bench warrant because the defendant will have failed to appear.

Applying that standard to the facts of this case, it is clear that the trial court did not abuse its discretion by issuing a bench warrant as a detainer because defendant did not appear for his arraignment. The record does not establish whether defendant provided the court with advanced notice of his desire to appear remotely, but there is nothing in the record to show that he did. Regardless, the record clearly shows defendant was not at his arraignment in-person, a request for virtual appearance was not made, and defendant did not establish that telephonic appearance was appropriate or could be done in a

manner that would protect the hearing. Therefore, based on that record, the trial court was will within its authority to issue a bench warrant.

Thus, for the foregoing reasons, the State respectfully requests that defendant's appeal be denied.

Respectfully submitted,

WILLIAM A. DANIEL
Prosecutor of Union County

s/Milton S. Leibowitz

By: MILTON S. LEIBOWITZ
Assistant Prosecutor
Attorney ID No. 082202013

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