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VIA ELECTRONIC FILING

March 13, 2020

Superior Court of New Jersey
Appellate Division
25 Market Street
P.O. Box 006
Trenton, NJ 08625

Re: State v. Rios, Docket No. A-002010-19

Honorable Judges of the Appellate Division:

Please accept this letter brief in lieu of a more formal submission from *amicus curiae* the American Civil Liberties Union of New Jersey (ACLU-NJ) in the above-captioned matter.

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Preliminary Statement

This case raises the important question of whether the Criminal Justice Reform Act (CJRA) permits the government to detain individuals pretrial solely on the basis of their immigration status. Relevant case law, legislative intent, and constitutional limitations all make clear that the answer is an emphatic no.

There is no reasonable interpretation of the CJRA that would permit judges to make pretrial detention decisions on the basis of pure speculation regarding circumstances that are entirely outside of a defendant's control. Nonetheless, that is exactly what happened when the court decided to detain Mr. Rios based on the potential that immigration authorities might choose to remove him.

Our nation's immigration legal system is complex, ever changing, and subject to multiple levels of discretionary authority. The supposed logic of detaining an undocumented person pretrial – that he will swiftly and inevitably be removed and therefore be unable to appear in court – is based neither in law nor in reality. Immigration authorities do not get involved in the case of every person without legal immigration status. Even when ICE does seek to remove someone, most immigrants go through a lengthy legal process before removal is even a possibility, and many are never removed at all.

Determining the likelihood of a defendant's removal and resulting non-appearance would thus involve a great deal of speculation. The CJRA cannot and does not ask trial judges to engage in this conjecture. Rather, it asks judges to assess whether defendants will make a volitional choice not to appear. Even if involuntary removal could be considered under the CJRA, only *certain and imminent* removal would be relevant. Any other rule would result in the above-mentioned improper speculation and raise serious constitutional questions.

Because Mr. Rios's detention was based solely on his immigration status, and therefore was an abuse of discretion that flowed from an incorrect interpretation of the CJRA, the trial court's decision to detain him should be reversed and he should receive a new detention hearing. Moreover, this Court should make clear that neither a defendant's immigration status nor their potential removal is a proper basis for pretrial detention under the CJRA.

Statement of Facts and Procedural History

For the purpose of this brief, *amicus* American Civil Liberties Union of New Jersey (ACLU-NJ) accepts the statement of facts and procedural history found in Defendant-Appellant's brief dated March 11, 2020.

Argument

In general, when a defendant challenges a pretrial detention decision under the CJRA, "the proper standard of appellate review is whether the trial court abused its discretion by relying on an impermissible basis, by relying upon irrelevant or inappropriate factors, by failing to consider all relevant factors, or by making a clear error in judgment." *State v. S.N.*, 231 N.J. 497, 500 (2018). As explained in more detail below, it is clear that in this case the trial court abused its discretion by relying on Mr. Rios's immigration status and potential involuntary removal, irrelevant factors that the CJRA does not permit the court to consider.

Moreover, it is unclear whether the trial court is even entitled to that deferential standard of review. When a trial court "renders a decision based upon a misconception of the law, that decision is not entitled to any particular deference." *Id.* at 515. Similarly, "a reviewing court generally will give no deference to a trial court decision that fails to provide factual underpinnings and legal bases supporting its exercise of judicial discretion." *Id.* (internal quotation marks and alterations omitted). Here, the trial court did not explain what facts led it to believe Mr. Rios would be removed, and misconceived the law by assuming that immigration status and involuntary removal could be the basis for Mr. Rios's detention.

Regardless of the standard of review, the correct outcome of this appeal is clear. The trial court both misapprehended the law and abused its discretion by detaining Mr. Rios solely based on his immigration status and potential involuntary removal.

I. The CJRA does not permit pretrial detention on the basis that a defendant may be forced to miss a court date against their will.

The CJRA allows for pretrial detention of defendants like Mr. Rios where the government has shown by clear and convincing evidence that "no amount of monetary bail, non-monetary conditions of pretrial release" or combination of the two "would reasonably assure the eligible defendant's appearance in court when required[.]" N.J.S.A. 2A:162-18(a)(1).[1] The best interpretation of this language is that the government must show that no combination of bail and conditions will prevent the defendant from volitionally *choosing* not to appear in court. This interpretation is strongly supported by both federal and state case law. Moreover, the contrary interpretation – that even if a defendant's potential non-appearance would be entirely

[1] Pretrial detention is also permitted where no combination of monetary bail and conditions would reasonably assure "the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process." N.J.S.A. 2A:162-18(a)(1). Because Mr. Rios's case primarily concerns the trial court's belief that he would not appear, *amicus* does not address those alternate bases for pretrial detention in this brief.

involuntary, the government may preventively detain him – would lead to absurd and potentially unconstitutional results.

A. State and federal case law demonstrate that the CJRA does not authorize detention where a defendant's anticipated failure to appear is not volitional.

The New Jersey Supreme Court has recognized that there is a close relationship between the CJRA and the federal Bail Reform Act (BRA). *State v. Robinson*, 229 N.J. 44, 56 (2017). Moreover, the portions of the statutes that are most relevant to Mr. Rios's case are nearly identical.[2] Thus, as this Court recognized in its *sua sponte* order of February 21, 2020, it is appropriate to consider the views of federal courts analyzing the BRA when evaluating the correct outcome in this case.

As Appellant-Defendant explained in his brief of March 11, 2020, federal courts have repeatedly decided that the BRA permits detention to prevent only *intentional* non-appearance. *See, e.g.*, *United States v. Santos-Flores*, 794 F.3d 1088, 1091-2 (9th Cir. 2015); *United States v. Diaz-Hernandez*, 943 F.3d 1196, 1199 (9th Cir. 2019); *United States v. Villanueva-Martinez*, 707 F. Supp. 2d 855, 856-58 (N.D. Iowa 2010). As one court put it, the failure to appear that judges consider under the BRA "is

[2] Where the CJRA permits detention only if no combination of bail and conditions "would reasonably assure the eligible defendant's appearance in court when required," N.J.S.A. 2A:162-18(a)(1), the federal BRA permits detention only if a "judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required[]." 18 U.S.C. 3142(e).

limited to the risk that the defendant may flee or abscond, that is, that he would fail to appear by virtue of his own volition, actions and will." *United States v. Montoya-Vasquez*, 2009 U.S. Dist. LEXIS 2148, at *13-*14 (D. Neb. Jan. 13, 2009). Forced non-appearance as a result of removal is an entirely different matter, and not one that should be taken into account when making decisions regarding pretrial detention. *See id*. This Court should not depart from that well-reasoned conclusion.

Although the New Jersey Supreme Court has not explicitly considered this question, the language it uses to discuss the CJRA suggests it would agree that the CJRA permits detention to prevent only *volitional* non-appearance. For instance, when describing the CJRA's basic structure the Court explained that the law "allows for pretrial detention of defendants who present . . . a serious risk of danger, *flight*, or obstruction[.]" *Robinson*, 229 N.J. at 54 (emphasis added). Similarly, in *State v. Mercedes*, the Court stated that "whether detention is warranted" under the CJRA is a question of "whether any combination of conditions will reasonably protect against the risk of *flight*, danger, or obstruction." 233 N.J. 152, 163 (2018) (emphasis added). In *State v. Ingram*, the Court once again referred to defendants who may be detained under the CJRA as those who "pose a serious risk of danger, *flight*, or obstruction." 230 N.J. 190, 194 (2017) (emphasis added).

Thus, the Supreme Court has consistently referred to the CJRA's concern with non-appearance as being a concern with "flight" in particular. The word "flight" clearly suggests volitional action, not involuntary removal. *See*, *e.g.*, *United States v. Alejo*, 2018 U.S. Dist. LEXIS 130696, at *9-*10 (W.D. Va. Aug. 3, 2018)(explaining that "a person who 'will flee' or poses a serious 'flight risk'" is one who "will intentionally make himself or herself unavailable.").

The Supreme Court's choice of language when describing the CJRA suggests that it understands the risk of non-appearance contemplated under the CJRA to be a risk of voluntary flight. This, combined with the federal case law cited here and in the brief of Defendant-Appellant, demonstrates that the CJRA should not be interpreted to permit detention based on the possibility that the federal government will force a defendant like Mr. Rios not to appear by removing him.

B. If the CJRA were interpreted to permit detention to prevent involuntary non-appearance, the results would be both absurd and potentially unconstitutional.

The question of whether the CJRA permits a trial court to detain a defendant on the basis that third-party actors may force the defendant not to appear is one of statutory interpretation. It is well established that courts should reject interpretations of statutes that lead to absurd results. *See*, *e.g.*, *State v. Provenzano,* 34 N.J. 318, 322 (1961).

As Defendant-Appellant's brief noted, allowing detention on the basis that a defendant may be forced not to appear could lead down troubling roads. For instance, by that logic, courts could detain defendants who live in dangerous neighborhoods, or those whose race or gender suggest they are statistically more likely to be prevented from coming to court due to violence. *Amicus* agrees with Defendant-Appellant that this Court should not open the door to these possibilities.

Moreover, the use of pretrial detention must be carefully restricted by due process protections. *See United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."). An interpretation of the CJRA that allows detention to prevent involuntary non-appearance would be quite broad, and could raise questions regarding whether detention under the statute is sufficiently exceptional to pass constitutional muster. This Court should interpret the statute as focusing only on volitional failures to appear in order to avoid raising these constitutional issues. *See State v. Johnson*, 166 N.J. 523, 540 (2001)(describing the doctrine of constitutional avoidance).

II. Even if the CJRA did permit pretrial detention on the basis of involuntary removal, it could only do so where removal was both certain and imminent.

Even if this Court does not agree that the best interpretation of the CJRA considers only volitional failures to appear, it is still clear that the trial court erred in this case. This is because even if it were permissible to detain a defendant to prevent his removal from the United States, thus assuring his appearance at trial, the only way such a detention scheme would be workable is if it were limited to instances where the defendant's removal was both certain and imminent.

This is so for two primary reasons. First, if removal-based pretrial detention were not limited to instances of certain and imminent removal, trial courts would be required to take on the impossible task of pre-evaluating the likely outcomes of complex and discretionary immigration proceedings. Second, permitting detention where removal is not certain and imminent would disincentivize the State from using the many options at its disposal to prevent the removal of defendants with pending trials, thus resulting in an overuse of detention that is contrary to the purpose of the CJRA.

A. The CJRA would not be workable if removal that was merely possible could be taken into account.

Under the CJRA, trial courts have only a matter of days between when a prosecutor files a motion for pretrial detention

and when that motion must be decided. *See* N.J.S.A. 2A:162-19(d)(1). The CJRA also requires that a trial court ordering pre-trial detention must set forth facts that show, by clear and convincing evidence, that no combination of bail and conditions would reasonably assure appearance. *See* N.J.S.A. 2A:162-19(e)(3); N.J.S.A. 2A:162-21(a). The system the CJRA envisions thus relies heavily on the fact that New Jersey's trial courts are highly competent at making decisions regarding pretrial detention and release efficiently and accurately.

If potential (as opposed to certain and imminent) removal were taken into account when considering possible non-appearance by a defendant, state trial courts would no longer be equipped to find the facts and make the decisions needed to implement the CJRA. This is because state trial courts cannot effectively evaluate the likelihood that an immigrant defendant will be removed from the United States before trial, and thus cannot effectively determine if detention is necessary to prevent that outcome.

As Defendant-Appellant explained thoroughly in his brief, the fact that a defendant lacks legal immigration status is by no means a guarantee that he will be removed from the United States. Rather, such a defendant must first come to the attention of immigration authorities, who must then choose to initiate a removal process, which typically involves legal

proceedings before immigration courts. Before such courts, immigrants have the opportunity to assert claims for relief from removal that may permit them to remain in the United States such as asylum, T-Visas for victims or witnesses of human trafficking, cancellation of removal, and protection under the Convention Against Torture. *See*, *e.g.*, Washington State, *Immigration Resource Guide for Judges* (July 2013), at 1-32 – 1-37.[3] Both the immigrant and the government have the ability to appeal the outcome of initial hearings on these questions, meaning that proceedings can take months or even years to resolve. *See* Katie Benner & Charlie Savage, *Due Process for Undocumented Immigrants, Explained*, New York Times (June 25, 2018), https://nyti.ms/2lBJDei. And regardless of the outcome of these legal proceedings, there also exists the separate possibility of discretionary relief from immigration authorities.

Due to the existence and nature of these complex processes, determining the likelihood of a defendant's removal would often require evaluating the merits of a potential immigration case. This might involve assessing the strength of a claim for asylum or similar legal relief based on danger an immigrant would face in their country of origin. Such claims typically involve

[3] *Available at* http://www.courts.wa.gov/content/manuals/Immigration/ImmigrationResourceGuide.pdf.

extensive evidence regarding the conditions in that country, which cannot reasonably be produced or evaluated in the timeframe the CJRA requires. *See*, *e.g.*, Nat'l Immigrant Justice Center, *Basic Procedural Manual for Asylum Representation Affirmatively and in Removal Proceedings* (Oct. 2017), at 28.[4] Even claims for relief which do not depend on this kind of evidence are governed by complex statutes, regulations, and bodies of administrative case law with which New Jersey trial courts and defense attorneys cannot be expected to effectively familiarize themselves in just a few days. *See*, *e.g.*, Immigrant Legal Resource Center, *Non-LPR Cancellation of Removal: An Overview of Eligibility for Immigration Practitioners* (June 2018).[5]

Aside from the outcomes of immigration court hearings, there are also numerous discretionary decisions immigration authorities must make for removal to become a realistic possibility. For instance, even if immigration authorities suspect someone is undocumented, will they choose to initiate a removal case against them? If they do, and the immigrant prevails at an initial hearing, will the government continue to pursue the removal case on appeal? If the process eventually

[4] *Available at* https://www.unhcr.org/en-us/5aa6cfac4.pdf.
[5] *Available at* https://www.ilrc.org/sites/default/files/resources/non_lpr_cancel_remov-20180606.pdf.

reaches a stage at which physical removal could take place, will immigration authorities instead choose to grant discretionary relief, and permit the defendant to stay?[6] Even if New Jersey's trial courts could somehow evaluate the strength of possible defenses to removal within the CJRA's required timeframe, they could not possibly be privy to the priorities and preferences of the individual federal officials who make these decisions.

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[6] Respectfully, *amicus* submits that the New Jersey Supreme Court misunderstood the import of certain immigration statutes when it suggested in *State v. Fajardo-Santos*, 199 N.J. 520, 527-8 (2008), that the federal government was strictly required to remove any immigrant for whom an immigration judge has entered an order of removal within 90 days of statutory triggers. Rather, the reality is that immigration authorities permit immigrants with final orders of removal to remain in the United States on a regular basis. As Appellant-Defendant pointed out in his brief, it is a well-documented fact that thousands of individuals with final orders of removal remain in the United States with ICE's knowledge, for a variety of reasons. In addition, since *Fajardo-Santos* was decided, the existence of such discretionary arrangements has been highlighted by several high-profile cases involving immigrants who received final orders of removal but were nonetheless permitted to remain in the United States for years. These include the cases of immigration activist Ravi Ragbir and several groups who feared persecution in their countries of origin, such as a community of Iraqis living in Detroit and a community of Indonesians living in New Jersey. *See, e.g., ICE Tried to Deport an Immigration Activist. That May Have Been Unconstitutional*, Editorial, New York Times (Apr. 27, 2019), https://nyti.ms/2PGPJsd; Ted Hesson & Nahal Toosi, *Iraqi Man Dies After Trump Administration Deports Him*, Politico (Aug. 7, 2019), https://www.politico.com/story/2019/08/07/iraqi-man-dies-deportation-trump-administration-1643512; Chris Fuchs, *Judge Grants Christian Indonesians in New Jersey Time to Fight Deportation*, NBC News (Feb. 5, 2018), https://www.nbcnews.com/news/asian-america/judge-grants-christian-indonesians-new-jersey-time-fight-deportation-n844841.

[6] *Available at* https://www.unhcr.org/en-us/5aa6cfac4.pdf.

Thus, a New Jersey trial court is not in a position to effectively evaluate the likelihood that someone will be removed where that removal is less than certain. Indeed, several federal courts have noted that trial courts making pretrial release decisions cannot consider merely possible removal without engaging in improper and unproductive speculation.

As one federal district judge explained, "I cannot address the risk of ICE removing the defendant from the United States without speculating about what the Immigration Judge may do." *United States v. Montoya-Vasquez*, 2009 U.S. Dist. LEXIS 2148, at *11 (D. Neb. Jan. 13, 2009). The court declined to engage in that conjecture, noting that "speculation is not evidence, much less preponderating evidence." *Id*. Another district judge similarly explained that "[t]he risk of an order of removal is one over which this court has no control," and decided that the strength of the defendant's immigration case, and thus the likelihood of his removal, was "simply not for this court's review." *United States v. Jocol-Alfaro*, 840 F. Supp. 2d 1116, 1118 (N.D. Iowa 2011) (internal quotation marks omitted).

This court should follow the sound reasoning of these district courts, and recognize that speculation regarding potential immigration outcomes is neither effective nor permissible under the CJRA. For the reasons explained above, asking state trial courts to evaluate the likelihood that an

immigrant will be removed would be asking them to engage in a fool's errand. That cannot be what the Legislature intended.

B. Permitting consideration of merely possible removal would run contrary to the underlying purpose of the CJRA.

Where a statute is susceptible to more than one interpretation, courts "consider sources other than the literal words of the statute" in order to decide its meaning, and "above all . . . seek to effectuate the fundamental purpose for which the legislation was enacted." *Aponte-Correa v. Allstate Ins. Co.*, 162 N.J. 318, 323 (2000)(internal quotation marks omitted).

The Legislature has explained that the purpose of the CJRA is to "primarily rely[] upon pretrial release by non-monetary means to reasonably assure" that the defendant appears at trial, does not endanger the community, and does not obstruct justice. N.J.S.A. 2A:162-15; *see also S.N.*, 231 N.J. at 510. The Legislature further directed that the CJRA should be "liberally construed" to achieve that purpose. N.J.S.A. 2A:162-15. Interpreting the CJRA to permit the detention of immigrant defendants whose removal is a mere possibility, rather than an imminent certainty, runs contrary to the purpose of "primarily relying upon pretrial release."

This is because there are numerous steps the State can take to prevent removal from becoming certain and imminent. As Defendant-Appellant meticulously documented in his brief, these

include requesting deferred action, requesting an administrative stay of removal, and applying for a departure-control order. If trial courts could detain potentially-removable immigrants without first requiring the State to seek these various forms of relief from federal immigration authorities, immigrants whose detention is unnecessary to prevent their removal would await trial in jail, contrary to the Legislature's goal of primarily using pretrial release, rather than pretrial detention.

Amicus agrees with Defendant-Appellant that if pretrial detention could ever be considered necessary to prevent removal, then it would only be where: 1) there is a final order of removal which has not been stayed, 2) the defendant has no pending appeals of and no pending collateral challenges to the removal order, and 3) ICE has obtained travel documents.

III. Detaining a defendant solely on the basis of immigration status is an abuse of discretion that raises serious constitutional concerns.

Mr. Rios's case demonstrates how permitting pretrial detention on the basis of merely possible removal opens the door for trial courts to detain any undocumented immigrant solely on the basis of his immigration status. Mr. Rios was determined to be a low risk to the community and a low risk of flight, and pretrial services recommended his release with conditions. PSA;

see also T6:8-12.[7] The trial judge explicitly stated that "under normal circumstances" he would agree with the arguments of Mr. Rios's counsel for release. T9:4. However, these were not normal circumstances in the trial court's view, because Mr. Rios was reportedly undocumented. T9:5-6. No evidence was provided to suggest that Mr. Rios's removal from the country was likely. Other than Mr. Rios's status as an undocumented person, the judge gave no reason for his belief that Mr. Rios would be removed before trial. Nonetheless, Mr. Rios was detained. This type of decision is both an abuse of discretion and raises serious constitutional concerns.

A. Immigration status is irrelevant and inappropriate to consider during a pretrial detention hearing.

Trial courts abuse the discretion they are granted by the CJRA when they "rely[] upon irrelevant or inappropriate factors" to decide that someone must be detained. *S.N.*, 231 N.J. at 500.

The CJRA lists the factors that courts "may take into account" when making pretrial detention decisions. N.J.S.A. 2A:162-20. They include "the history and characteristics of the eligible defendant, including . . ." a long list of possibilities such as family ties, community ties, employment, financial resources, history relating to drug or alcohol abuse,

[7] "PSA" refers to the Defendant's Public Safety Assessment; "T" refers to the transcript of Mr. Rios's detention hearing held on January 14, 2020.

and record concerning appearance at court proceedings. *Id.* Notably excluded from this extensive list is immigration status.

Here, the trial court appears to have relied exclusively on Mr. Rios's immigration status and used that status as a proxy for likelihood of removal. As explained above, a defendant's mere lack of legal immigration status does not indicate that he will be immediately removed, or removed at all. Relying exclusively on immigration status, without also finding that removal is certain and imminent, constitutes reliance on an "irrelevant or inappropriate factor[]," and is an abuse of discretion that this court should reverse.

B. Permitting pretrial detention based solely on immigration status raises serious constitutional concerns.

Even if detaining Mr. Rios solely on the basis of his immigration status were not a clear abuse of discretion, it would raise serious constitutional concerns. This court should avoid raising those concerns by interpreting the CJRA as outlined above, and reversing the trial court's decision.

Defendant-Appellant's brief thoroughly describes the potential constitutional problems that arise from the trial court's decision in this case, including both due process and equal protection violations. *Amicus* joins those arguments, and adds that multiple federal courts have recognized the constitutional problems posed by a decision like this one.

For instance, one district court decided that "the risk of removal by ICE, if cognizable at all under the [Bail Reform Act], cannot be determinative of the question of a defendant's eligibility for release." *Montoya-Vasquez*, 2009 U.S. Dist. Lexis 2148, at *15. The court further decided not only that Congress never intended to require pretrial detention for all immigrants at speculative risk for removal, but also that if Congress had done such a thing, that "would raise serious Constitutional issues, not the least of which would be claims of . . . violation of equal protection of the laws." *Id.* at *14-*15.

Another court stated that "to avoid potential constitutional issues," it would analyze the question of whether any release conditions could reasonably assure the defendant's appearance at trial "without regard to" what immigration authorities might choose to do. *United States v. Villatoro-Ventura*, 330 F. Supp. 3d 1118, 1136 (N.D. Iowa 2018). Moreover, the Eighth Circuit acknowledged that "whether the likelihood of [defendant's] removal from the country by immigration authorities before the completion of the criminal case is grounds for [pretrial detention] is a complex legal question," and noted the defendant's argument that considering such likelihood would "raise[] serious constitutional questions." *United States v. Milan-Vasquez*, 2013 U.S. App. LEXIS 26562, at *7 (8th Cir. 2013). The appeals court took the constitutional

issues seriously enough to decide that "before reaching those questions," it would be "prudent" to seek a clarification of the district court's detention decision, such that the constitutional issues might be avoided altogether. *Id.*

Thus, the potential constitutional issues raised by a decision like the trial court's here are well known and widely acknowledged. This Court should avoid them by adopting the interpretation of the CJRA urged by both *amicus* and Defendant-Appellant, and making clear that immigration status is not a sufficient justification for pretrial detention.

Conclusion

Both because the Criminal Justice Reform Act does not permit pretrial detention to prevent involuntary removal from the United States, and because even if it did permit pretrial detention for that reason, such removal would need to be both certain and imminent, the trial court's decision should be reversed and Mr. Rios should receive a new detention hearing.

Respectfully submitted,

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