SUPREME COURT OF NEW JERSEY
A-57-24 (090313)

STATE OF NEW JERSEY, *Plaintiff-Appellant,* v. JESUS E. REYES-RODRIGUEZ, *Defendant-Respondent.*	CRIMINAL ACTION Appellate Division Docket No.: A-003169-23T1 On Motion for Leave to Appeal an Interlocutory Order of the Superior Court, Law Division (Criminal), Monmouth County Sat Below: Hon. Jessica R. Mayer, P.J.A.D. Hon. Lisa Rose, J.A.D. Hon. Lisa A. Puglisi, J.A.D.

BRIEF OF AMICUS CURIAE THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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Submitted July 29, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

EXECUTIVE ORDERS

RULES

STATUTES

REGULATIONS

CONSTITUTIONS

OTHER AUTHORITIES

Benjamin J. Hulac, *Trump Administration Plans to Detain Immigrants at NJ Military Base*, NJ Spotlight News (July 17, 2025), https://www.njspotlightnews.org/2025/07/trump-administration-to-use-nj-military-base-as-temproary-immigrant-detention-site/ 7

Human Rights Watch, *"You Feel Like Your Life is Over": Abusive Practices at Three Florida Immigration Detention Centers Since January* (2025), https://www.hrw.org/sites/default/files/media_2025/07/us_florida0725%20web_2.pdf 27

Nat'l Immigr. Project, *A Guide to Obtaining Release* (2024), https://nipnlg.org/sites/default/files/2024-05/2024_Guide-Obtaining-Release-Imm-Detention.pdf..... 23

Nat'l Immigr. Project, *Practice Advisory, The Laken Riley Act's Mandatory Detention Provisions* (2025)..... 24

Order: The Future of Court Operations — Updates to In-Person and Virtual Court Events (Oct. 27, 2022)..... 17

René Lima-Marín & Danielle C. Jefferis, *It's Just Like Prison: Is a Civil (Nonpunitive) System of Immigration Detention Theoretically Possible?*, 96 Denv. L. Rev. 955 (2019)..... 23

Ted Sherman, *No ICE for N.J. Counties, with Bergen Joining Essex, Hudson to End Immigration Detainee Contracts*, NJ.com (Oct. 10, 2021), https://www.nj.com/politics/2021/10/no-ice-for-nj-counties-with-bergen-joining-essex-hudson-to-end-immigration-detainee-contracts.html 24

U.S. Citizenship & Immigr. Servs., Instructions for Application for Permission to Re-apply for Admission into the United States After Deportation or Removal (2025), https://www.uscis.gov/sites/default/files/document/forms/i-212instr.pdf 26

U.S. Immigr. & Customs Enf't, *ICE Detention Statistics*, https://www.ice.gov/detain/detention-management#:~:text=Detention%20Statistics (last visited July 17, 2025) 6

PRELIMINARY STATEMENT

The overarching issue in this case and lurking in the companion case of *State v. Garcia-Moronta* is whether those who have pending criminal charges while in immigration detention or have been deported can be deprived of their fundamental right to a speedy trial. The number of persons detained or deported by federal immigration enforcement has dramatically increased and promises to continue for the foreseeable future. Prosecutors and defense attorneys alike would benefit from the Court's guidance regarding how to weigh a defendant's time in immigration detention or after deportation in a speedy trial analysis.

To that end, amicus the American Civil Liberties Union of New Jersey submits there is but one answer: Unless the State has diligently pressed for a speedy trial date, using the many tools at its disposal, and assuming the defendant has asserted their right to a speedy trial and not otherwise caused delay, all of the time attributed to civil immigration detention and/or deportation constitutes delay that must be weighted heavily against the State in the speedy trial analysis.

The experience of Mr. Reyes-Rodriguez is typical of that shared by thousands of people. He not only faced criminal charges in the State of New Jersey, but, as a result of the charges, was detained by federal immigration

enforcement authorities. He was later deported from the United States, away from his family, community, and the state where he still faces charges. He has consistently sought to resolve his criminal charges. Yet the State has failed to bring him to trial.

The State's practice of moving for bench warrants for defendants who are confined in immigration detention or removed from the United States – especially when defendants seek to proceed in their criminal proceedings – does nothing to advance their cases to trial, and instead runs roughshod over defendants' right to a speedy trial. To that end, the American Civil Liberties Union of New Jersey ("ACLU-NJ") urges the Court to examine the related issue of a defendant's constitutional right to a speedy trial, and how any delay in proceeding to trial due to the defendant's deportation or civil immigration detention should impact the speedy trial analysis.[1]

A straightforward application of the factors set out in governing precedent *Barker v. Wingo* shows that any delay during periods of civil immigration detention or post-deportation should weigh heavily against the State, if the State is aware of the circumstances and the defendant has asserted their right to a speedy trial. The State has both the burden to timely prosecute

[1] ACLU-NJ is simultaneously filing a motion for leave to appear as amicus curiae and an accompanying brief in *State v. Fernando J. Garcia-Moronta* (090118), A-58-24, where nearly identical legal arguments are offered.

cases and the tools at its disposal to facilitate defendants' participation – physically or virtually – in their criminal trials. (Point I.A). Defendants subjected to immigration detention or removal, on the other hand, do not fail to appear for criminal proceedings of their own volition (Point I.B), and they face substantial prejudice when their detention or deportation flows from their open criminal charges, (Point I.C). Under these circumstances, fundamental fairness dictates that the State, not defendants, bear the onus of justifying why defendants have not been deprived of their right to a speedy trial.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus curiae adopts the facts and procedural history laid out in Appellant's Brief filed with the Appellate Division on August 2, 2024. *See* DBr at 3-7.[2]

ARGUMENT

I. Delay in the criminal trial of a person in immigration detention or post-deportation weighs heavily against the state in a speedy trial analysis.

The State has an incontrovertible duty "to prosecute cases in a timely fashion." *State v. Cahill*, 213 N.J. 253, 266 (2013). "A defendant has no duty to bring himself to trial . . . ." *Barker v. Wingo*, 407 U.S. 514, 527 (1972).

[2] DBr refers to Mr. Reyes-Rodriguez's Appellate Division brief.

Instead, the onus falls on the State to ensure that any delay in prosecuting a defendant does not violate their fundamental right to a speedy trial. *See id.*

The right to a speedy trial has long been guaranteed under both Federal and State Constitutions. *U.S. Const.* amend. VI; *N.J. Const.* art. I, § 10. Nearly sixty years ago, the U.S. Supreme Court found it to be a fundamental right guaranteed by the Sixth Amendment to the U.S. Constitution, imposed on all states through the Fourteenth Amendment.[3] *See Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967); *see also State v. Szima*, 70 N.J. 196, 200 (1976) (providing a brief history of the right to a speedy trial in New Jersey). Several years later, the U.S. Supreme Court issued a decision that established a four-factor test for evaluating alleged violations of the right to a speedy trial. *Barker*, 407 U.S. at 529-30. New Jersey adopted this test shortly thereafter, *see Szima*, 70 N.J. at 200, and continues to apply the *Barker* analysis today, *see State v. Cahill*, 213 N.J. at 271 (reaffirming use of the four-factor *Barker* analysis to evaluate claims alleging a denial of the federal and state constitutional right to a speedy trial).

Barker eschewed a rigid analysis, instead establishing a fact-specific balancing test. The four factors – (1) length of delay in bringing the accused

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[3] Importantly, "all persons within the territory of the United States," regardless of immigration status, are entitled to the protections guaranteed by the Sixth Amendment. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

to trial, (2) reason for the delay, (3) defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant caused by the delay – "are related" and "must be considered together with such other circumstances as may be relevant." 407 U.S. at 533. While the federal government and other states have adopted statutes that set specific time limits for various stages of criminal prosecution which, when not met, would result in dismissal of the charges, *see, e.g.*, Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (establishing time limits for various stages of federal criminal prosecution, including a 70-day deadline by which to begin trial after the filing of the indictment); New York Speedy Trial Act, C.P.L. § 30:30 (requiring commencement of a criminal trial within six months when the defendant is accused of at least one felony), New Jersey has declined to adopt a brightline "try-or-dismiss rule." *Cahill*, 213 N.J. at 270.[4] Accordingly, this Court's analysis remains flexible under the *Barker* analysis.

This Court has not addressed the issue of *Barker*'s application to circumstances such as those at bar, where persons accused of crimes have been awaiting trial while in immigration detention or after deportation. There is considerable urgency for guidance from this Court on that issue. Between

[4] In contrast, New Jersey has adopted specific deadlines for returning an indictment and starting trial under the Criminal Justice Reform Act of 2017 ("CJRA"). *See* N.J.S.A. 2A:162-22.

October 2024 and June 2025, the average number of people in immigration detention with "pending criminal charges" nationwide rose steadily, from a low average of 4,912 people in detention in October, to a high average in June of 14,564 people. U.S. Immigr. & Customs Enf't, *ICE Detention Statistics*.[5] Based on pronouncements from the present federal administration, these figures are likely to increase even more. While the prior administration exercised prosecutorial discretion to focus enforcement efforts on people who allegedly presented threats to national security, public safety, and border security, *see* Exec. Order No. 13993, 86 Fed. Reg. 7051 (Jan. 20, 2021), the current administration revoked those enforcement priorities, *see* Exec. Order No. 14148, 90 Fed. Reg. 8237 (Jan. 20, 2025). Absent any enforcement priorities, *all* noncitizens are potential targets for detention and deportation, including people with any open criminal charges.

Immigration detention space is also growing, including in New Jersey. The administration is poised to spend tens of billions of dollars to expand detention space, and has recently opened a 1,000-bed facility in Newark and announced plans to detain people on the military base at Fort Dix. *See*

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[5] https://www.ice.gov/detain/detention-management#:~:text=Detention%20Statistics (last visited July 17, 2025). The agency updates these statistics over time.

Benjamin J. Hulac, *Trump Administration Plans to Detain Immigrants at NJ Military Base*, NJ Spotlight News (July 17, 2025).[6]

The principles underpinning *Barker* provide the groundwork for addressing delayed criminal proceedings in these circumstances. The second *Barker* factor – the reason for the delay – assigns different weights to different reasons for delay, and attributes these weights between the prosecution and defense. *See Barker*, 407 U.S. at 531; *see also Doggett v. United States*, 505 U.S. 647, 651 (1992) (characterizing the second factor as "whether the government or the criminal defendant is more to blame for that delay"). When the State fails to justify the delay, this factor weighs against the prosecution. *See Cahill*, 213 N.J. at 274. Indeed, even neutral reasons "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. Only if defendants are responsible for the delay does this factor weigh against them. *See, e.g.*, *State v. LeFurge*, 222 N.J. Super. 92, 99-100 (App. Div. 1988) (weighing "over one-and-a-half years of delay" against the defendant

[6] https://www.njspotlightnews.org/2025/07/trump-administration-to-use-nj-military-base-as-temproary-immigrant-detention-site/.

"as a result of significant delays on his own part with no suggestion of purposeful stalling by the government.").

Applying this consistent reasoning, if the State fails to fulfill its duty to move the case forward because a defendant is in immigration detention or has been deported, the second *Barker* factor argues forcefully in favor of finding of a speedy trial violation. Additional weight supporting a speedy trial violation comes from consideration of the fourth *Barker* factor – prejudice of the delay to the defendant – which is substantial. [7] For these reasons, *Barker* counsels against attributing any time spent in immigration detention or post-deportation to the defendants for purposes of the speedy trial analysis.

A. The State has the duty and the tools to make diligent efforts to bring detained or deported defendants to trial.

The U.S. Supreme Court has determined that the State is not absolved "from any duty at all under the [Sixth Amendment] constitutional guarantee" because the defendant is in federal custody. *Smith v Hooey*, 393 U.S. 374, 377 (1969). Indeed, the State must "make a diligent, good-faith effort to bring [the defendant] before the . . . court for trial." *Id.* at 383. So long as they are aware

[7] The first and third *Barker* factors obviously also factor into the analysis. Amicus's suggestion that detention and deportation time weigh most heavily against the State presumes that the court also determines that the time of delay has been unreasonably long and that defendants have asserted their rights to a speedy adjudication of the charges against them.

of the defendant's location, prosecutors have tools to advance a criminal case when the defendant is in immigration detention or outside the United States. The State's failure to make a good-faith effort to bring a defendant to trial in this context should therefore weigh heavily against the State in any speedy trial analysis.

Shortly after the U.S. Supreme Court held that the Sixth Amendment guaranteed the right to a speedy trial, the Court examined the case of an individual in federal prison who had a pending state charge in Texas, and who "by various letters, and more formal so-called motions, continued periodically to ask that he be brought to trial." *Id.* at 375 (internal quotation marks omitted). Nevertheless, Texas failed to do so. *Id.* Setting aside the decision by the Supreme Court of Texas, the Court ruled that because "the Sixth Amendment right to a speedy trial may not be dispensed with so lightly," the State had a duty to bring the defendant to trial even though he was in federal custody. *Id.* at 383.

This Court has not yet had an occasion to consider this issue as it relates to immigration detention. But the Appellate Division examined this issue and properly held the State to its burden. In its analysis of the second *Barker* factor, the court "attribute[d] to the State the delay in prosecution after issuance of the September 5, 2023 warrant," weighing "the State's refusal to

extradite defendant" against the prosecution. *Reyes-Rodriguez*, 480 N.J. Super. at 545. This conclusion aligns with the State's duty to diligently bring defendants to trial.

Several other courts – both state and federal – have determined that a defendant's time in the custody of U.S. Immigration and Customs Enforcement ("ICE") weighs against the State under the second *Barker* factor when the prosecution makes no effort to move the case forward. A case in New Mexico, for example, applied the four *Barker* factors and, while ultimately concluding that the defendant's right to a speedy trial was not violated, attributed a four-and-a-half-month delay to the State "because it failed to demonstrate that it could not have gained custody of Defendant during [his detention by ICE]." *State v. Palma*, No. A-1-CA-35401, 2018 WL 7021967, at *6 (N.M. Ct. App. Dec. 19, 2018) ("Where a mechanism exists to bring a defendant to trial, the state has a duty to use it.") (internal quotation marks omitted).[8]

A case out of the Northern District of Georgia is also instructive. In *United States v. Beltran*, the government intentionally delayed their prosecution "because so long as Beltran was in immigration detention, the Government was satisfied he would not be a threat to the public." No. 1:13-cr-

[8] *Palma*, an unpublished case, is in the Appendix to this brief at Aa15. Counsel is aware of no cases with contrary holdings. *R.* 1:36-3.

2-WSD-RGV, 2017 WL 3405464, at *8 (N.D. Ga. Aug. 8, 2017).[9] Prosecutors also believed that the defendant "ultimately would be removed and prosecution avoided, a result [the defendant] preferred." *Id.* Even though the defendant did not take steps to assert his right to a speedy trial – in fact, he wanted to avoid prosecution – the court still concluded that the delay must be attributed to prosecutors because "the Government's decision not to move forward on its prosecution of [the defendant] . . . was still a decision the Government made." *Id.*

Courts have come to the same conclusion when the defendant is outside of the United States, holding prosecutors to their "constitutional duty" to make a "good-faith effort" to bring the defendant to trial. *Smith v. Hooey*, 393 U.S. at 383. A Seventh Circuit decision concerning a defendant who was serving a prison sentence in England but who "was requesting that he be returned to the United States to answer the charges pending here" applied *Barker* to conclude that the indictment must be dismissed when the government made no effort to bring him to trial. *United States v. McConahy*, 505 F.2d 770, 773-74 (7th Cir. 1974) ("Unless there is a showing that an effort to have the defendant returned to this country for trial would be futile, the government must make such an

[9] *Beltran*, an unpublished case, is in the Appendix to this brief at Aa23. Counsel is aware of no cases with contrary holdings. *R.* 1:36-3.

effort. . . . It made no effort whatsoever and simply ignored McConahy's requests that he be returned here for trial."). When the government has tools at its disposal to secure the defendant's presence at trial yet fails to use them, the defendant cannot bear the blame for the delay. *See United States v. Resendiz-Guevara*, 145 F. Supp. 3d 1128, 1138 (M.D. Fla. 2015) (deciding not to exclude delay resulting from deportation under the federal Speedy Trial Act in part because "the Government has not provided any information to the Court on what steps, if any, it took to obtain his presence at trial"); *United States v. Salzmann*, 417 F. Supp. 1139, 1155 (E.D.N.Y. 1976) ("The government cannot complain of the defendant's continued unavailability when the government chooses not to employ means readily at its disposal to procure his presence."); *cf. People v. D.B.*, --- N.Y.S. 3d ---, 2025 WL 1900427, at *1 (N.Y. App. Div. July 10, 2025) (declining to weigh time against prosecutors under the state speedy trial statute when the defendant was in ICE custody unbeknownst to the State and because, upon their notification by defense counsel of defendant's detention, the State engaged in "diligent efforts in obtaining [him] from federal custody").

State and local prosecutors have processes available to them to facilitate bringing defendants to trial when they are in ICE custody. ICE's own "Tool Kit for Prosecutors" lays out a procedure to do just this. *See* U.S. Immigr. &

Customs Enf't, *Protecting the Homeland: Toolkit for Prosecutors* 2 (2011) [hereinafter *Protecting the Homeland*] ("ICE is committed to supporting the efforts of prosecutors to bring criminals to justice. Our prosecutor partners are encouraged to engage ICE officers, special agents, and attorneys and seek their assistance and expertise.").[10]

One option is through the writ ad prosequendum. *Id*. at 8-9. ("If an ICE detainee is needed as a defendant or witness in an upcoming criminal proceeding, [prosecutors] may obtain a writ [of habeas corpus ad prosequendum] from an appropriate state or local judge ordering the [noncitizen's] appearance in court on a specific date. While federal agencies are not bound by state court orders, ICE will generally honor the writ of a state or local judge directing the appearance of a detainee in court."); *see also Smith v. Hooey*, 393 U.S. at 381 (quoting a memorandum from the Texas Solicitor General saying that the state could have ensured the defendant's presence in state court because "[t]he Bureau of Prisons would doubtless have made the prisoner available if a writ of habeas corpus ad prosequendum had been issued by the state court" but prosecutors never "sought to initiate that procedure").

[10] https://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf.

The writ ad prosequendum has been successfully used to secure defendants' appearances in their criminal proceedings when they are held in immigration detention. *See Doe v. Dep't Homeland Sec.*, 2025 WL 360534, at *8 (W.D. Pa. Jan. 31, 2025) ("The in-person *writ* process has been available since April 2011… In 2023 and 2024, New Jersey has successfully used this process to transport eight individuals from [Moshannon Valley Detention Center] to their criminal proceedings."), *clarified by Doe v. U.S. Dep't Homeland Sec.*, 2025 WL 949846, at *4 (W.D. Pa. Mar. 28, 2025) (confirming that the court's preliminary injunction ordering the Department of Homeland Security to "honor writs that require in-person proceedings" and "virtually produce individuals" for their criminal proceedings applies to the putative class in addition to named plaintiffs), *appeal docketed*, No. 25-1628 (3d Cir. Apr. 2, 2025).[11]

ICE also suggests release on conditions of supervision as an alternative method for securing defendants' presence at their criminal proceedings. *See Protecting the Homeland* at 9 ("ICE has other tools to release an alien from custody, such as an order of supervision and an order of recognizance. Contact a local ICE office to discuss these options."). Similarly, ICE names

[11] *Doe*, and the subsequent clarification issued in the same case, are unpublished cases, and are in the Appendix to this brief at Aa1. Counsel is aware of no cases with contrary holdings. *R.* 1:36-3.

administrative stays of removal as temporary relief for defendants who have final orders of removal, allowing them to remain in the United States to appear for criminal proceedings. *Id.* at 6-7. These methods are both examples of coordination between state prosecutors and ICE to "allow the criminal justice system to complete its work while charges are pending against non-citizens in state court." *State v. Lopez-Carrera*, 245 N.J. 596, 603 (2021).Post-deportation, prosecutors still have strategies to move a criminal case toward trial, including extradition.[12] "The United States currently has extradition treaties in force with over 100 countries." 7 FAM 1631.1(c).[13] To start the extradition process, "a state or federal prosecutor requests that a fugitive known or believed to be located in a foreign country be returned for prosecution or punishment." 7 FAM 1615(b). The prosecutor works with the Office of International Affairs within the Department of Justice to prepare an

[12] Of course, the analysis differs if the State is unable to find the defendant post-deportation despite a good faith effort, or if the defendant has otherwise evaded prosecution. *See, e.g.*, *People v. Torres*, 682 N.E.2d 261, 265 (Ill. App. Ct. 1997) (finding against the defendant under a speedy trial analysis because he "did not appear at scheduled hearings to inform the state court of the INS's decision of voluntary departure," and while the State could have extradited him from Mexico and never attempted to, this argument would only "have merit" if the defendant "made a request to face the charges against him").
[13] The FAM – Foreign Affairs Manual – is the authoritative source for the policy and procedures of the U.S. Department of State. Publicly accessible provisions of the FAM are available at https://fam.state.gov/.

extradition request, which is then presented to the foreign country through the Department of State. *Id.*

Notably, prosecutors declined to pursue extradition of Mr. Reyes-Rodriguez. *See* 480 N.J. Super. at 545 ("[T]he State acknowledged the MCPO could not commit to extraditing defendant on these third- and fourth-degree charges. To date, the State has not filed an extradition application."). Electing not to seek extradition of a deported defendant constitutes another decision of the State – not the defendant – that further delays prosecution and must weigh against the State in any subsequent speedy trial claim. Indeed, the State "can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it." *Doggett v. United States*, 505 U.S. at 657.

Finally, if other methods of securing a defendant's presence fail, the State can meet its duty to timely prosecute a deported defendant through remote proceedings if sufficient due process protections are put in place and the defendant consents to participate virtually. *See Rule* 1:2-1(b) ("Upon application in advance of appearance, unless otherwise provided by statute, the court may permit testimony in open court by contemporaneous transmission from a different location for good cause and with appropriate safeguards.").

Having concluded that other options were not available to secure his in-person appearance, and because the State refused to seek extradition, the Appellate Division reasonably concluded that Mr. Reyes-Rodriguez can proceed virtually "under the confluence of circumstances presented here." *Reyes-Rodriguez*, 480 N.J. Super. at 551. "Because the virtual process may not be perfect does not mean that it is not mostly effective or unconstitutional." *State v. Vega-Larregui*, 246 N.J. 94, 133-34 (2021). In the rare case where physical attendance is not possible, "guardrails should be put in place to ensure a fair trial for defendants." *State v. Juracan-Juracan*, 255 N.J. 241, 259 (2023). Trial courts "retain broad discretion to control the proceedings." *See State v. Pinkston*, 233 N.J. 495, 511 (2018). As the Appellate Division noted in this case, this Court's Order dated October 27, 2022, permits all judges in all matters "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." 480 N.J. Super. at 549 (quoting *Order: The Future of Court Operations — Updates to In-Person and Virtual Court Events* (Oct. 27, 2022)).

Given the well-established duty for prosecutors to make a good-faith effort to proceed to trial, and the numerous tools at the State's disposal to do so, any delay in criminal proceedings during a defendant's detention or after

their deportation should weigh heavily against the State under the second *Barker* factor. Defendants' fundamental right to a speedy trial demands no less.

B. Immigration detention and deportation are not volitional acts by defendants for speedy trial purposes.

This Court has implicitly adopted the position that defendants cannot be faulted for their time in detention because they are not detained of their own volition – they are in ICE custody[14] In *State v. Lopez-Carrera*, the Court was confronted with whether the State can revoke a defendant's pretrial release and re-detain him when prosecutors learn that ICE will imminently deport him. *See* 245 N.J. at 601. The Court's decision turned on whether the CJRA imposed a volitional act requirement, and while the statute did not explicitly require it, "the language, structure, purpose, and history of the CJRA reveal the Act was designed to address a defendant's own choice not to appear in court, not independent actions by third parties like the U.S. Immigration and Customs Enforcement (ICE)." *Id.* at 601; *see also State v. Molchor*, 464 N.J. Super. 274, 296 (App. Div. 2020), *aff'd sub nom. State v. Lopez-Carrera*, 245 N.J. 596 (2021) (describing "the risk a defendant may not appear . . . and is not 'physically capable' of appearing, because federal immigration officials have

[14] For this reason, and as explained in further detail by amicus the New Jersey Office of the Public Defender, bench warrants also are not appropriate when defendants are detained by ICE. The ACLU-NJ endorses the amicus curiae brief filed by the Office of the Public Defender.

taken that defendant into custody or removed that defendant from the country" to not be a consequence of the "defendant's own misconduct or volitional act"). Indeed, the Appellate Division cited to *Lopez-Carrera* in stating that "Defendant's inability to attend court hearings in person in this matter was the direct result of his removal from the United States by immigration officials, not by his voluntary conduct." *Reyes-Rodriguez*, 480 N.J. Super. at 550.

Other courts have agreed that ICE detention and deportation are not volitional and cannot be attributed to the defendant. When "an agency of the government caused [the defendant] to be removed from this district, it is more at fault for the delay than he is." *United States v. Urizar Lopez*, 587 F. Supp. 3d 835, 844 (S.D. Iowa 2022) (finding the *Barker* analysis to weigh in favor of the defendant and dismissing the indictment with prejudice); *see also United States v. Resendiz-Guevara*, 145 F.Supp.3d at 1138 ("Defendant's unavailability to face the charges against him is not due to his own volition but the Executive Branch's decision to deport him.").

Case law examining bond remission after a person has been deported comes to an analogous conclusion when the defendant cannot physically appear due to deportation. In *State v. Ventura*, for example, this Court parsed the record to determine whether the defendant purposefully evaded prosecution

or whether their deportation was "the sole reason a defendant [was] unable to attend court." 196 N.J. 203, 218 (2008).

> That is, whether the defendant while compliant with the terms of his or her release, voluntarily attended a deportation hearing or was brought there by the authorities and thereafter was deported; or, whether the defendant was a fugitive when captured and then subsequently deported. If the former, then some degree of remission should be considered; if the latter, then remission generally should be denied.
>
> [*Id.*]

In so holding, this Court framed deportation not as a defendant's volitional act justifying bond forfeiture, but as the result of action taken by federal authorities.

Mr. Reyes-Rodriguez's deportation was by no means volitional. Instead, desperate to prevent his deportation, he "repeatedly contact[ed] the State, request[ed] to be detained [in State custody] in this matter, and even filed a Motion to Revoke his own Release." DBr. at 4. Mr. Reyes-Rodriguez was actively attempting to avail himself of the criminal court system, but was denied at the hands of the State and the courts. Any delay in prosecution during this time and post-deportation therefore cannot be attributed to Mr. Reyes-Rodriguez when he was involuntarily detained by ICE and deported despite seeking to advance the case of his own volition.

Defendants who are confined in ICE detention or have been deported by the federal government are not willingly[15] absent from their criminal proceedings. Indeed, this Court has already found that a person's absence from their criminal proceedings due to "independent actions" by ICE is not volitional. *Lopez-Carrera*, 245 N.J. at 601. Accordingly, any delay in prosecution resulting from ICE detention or immigration deportation should not be attributed to defendants.

C. Noncitizen defendants experience substantial prejudice from any delay in their criminal proceedings.

Barker's fourth factor – prejudice to the defendant – must be "assessed in the light of the interests of defendants which the speedy trial right was designed to protect." 407 U.S. at 532. These interests include "prevention of oppressive incarceration, minimization of anxiety attributable to unresolved charges, and limitation of the possibility of impairment of the defense." *Cahill*, 213 N.J. at 266 (citing *Barker*). All of these interests are implicated by a defendant's detention or deportation, justifying that the fourth *Barker* factor must weigh in favor of the defendant. Because open charges can prolong detention and both detention and deportation frustrates defendants' ability to

[15] Some individuals who are detained during the pendency of their removal proceedings may elect to be removed rather than remain in the United States to continue to fight their deportation for a variety of reasons, including to avoid further time in detention.

mount a strong defense in their criminal proceedings, any delay in resolving criminal charges prejudices defendants in multiple ways.

Individuals who are detained by ICE pursuant to 8 U.S.C. § 1226(a) are statutorily eligible for release on bond. ICE has the authority to set or deny bond in the first instance, *see* 8 C.F.R. § 236.1(c)(8) (granting discretion to release provided that the person is statutorily eligible for bond and the individual has demonstrated "to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the [noncitizen] is likely to appear for any future proceeding"), and immigration judges have authority to review ICE's bond determination, *see* 8 C.F.R. § 236.1(d). Individuals seeking release from immigration detention must establish that they are not a danger to persons or property and are not a flight risk. *See In re Guerra*, 24 I. & N. Dec. 37, 38 (B.I.A. 2006).[16] "An Immigration Judge should only set a bond if he first determines that the alien does not present a danger to the community." *In re Urena*, 25 I. & N. Dec. 140, 141 (B.I.A. 2009). Pursuant to federal regulation, immigration judges can base their determination "upon *any* information that is available to the Immigration Judge or that is presented to him or her . . . ." 8 C.F.R. § 1003.19(d) (emphasis added). Nothing limits the

[16] While *In re Guerra* was abrogated in the First Circuit by *Hernandez-Lara v. Lyons*, 10 F.4th 19 (1st Cir. 2021), it remains good law in the immigration courts and other federal circuits.

judge's analysis to criminal convictions in bond proceedings; in fact, judges may consider arrests and "not only the nature of a criminal offense but also the specific circumstances surrounding" it. *In re Siniauskas*, 27 I. & N. Dec. 207, 208-09 (B.I.A. 2018).

Accordingly, given the weight assigned to "dangerousness" in bond determinations and the breadth of evidence available to immigration judges, open criminal charges – regardless of the strength of the State's case or likelihood of conviction – can severely impact a person's ability to win bond. Any delay in disposing of open charges will likely prolong the defendant's time in ICE custody, resulting in the "oppressive pretrial incarceration" that the fourth *Barker* factor considers. *Barker*, 407 U.S. at 532.[17] While the defendant's detention is civil rather than criminal, it nonetheless denies them their liberty. And in fact, civil immigration detention has all the indicia of criminal detention to qualify as "oppressive pretrial incarceration." *See generally* René Lima-Marín & Danielle C. Jefferis, *It's Just Like Prison: Is a Civil (Nonpunitive) System of Immigration Detention Theoretically Possible?*,

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[17] For this reason, "[p]ractitioners should consider whether the client's chances for a good bond outcome would be increased if the client postponed the bond hearing and sought to resolve the pending criminal charges first." Nat'l Immigr. Project, *A Guide to Obtaining Release* 69 (2024), https://nipnlg.org/sites/default/files/2024-05/2024_Guide-Obtaining-Release-Imm-Detention.pdf. This strategy is not possible if prosecutors continue to delay bringing the defendant to trial.

96 Denv. L. Rev. 955, 963-65 (2019) (explaining the parallels between civil immigration detention and punitive criminal incarceration). Until recently, most people held in ICE detention in New Jersey were confined in county jails – the same facilities that hold pre-trial defendants. *See* Ted Sherman, *No ICE for N.J. Counties, with Bergen Joining Essex, Hudson to End Immigration Detainee Contracts*, NJ.com (Oct. 10, 2021).[18]

The impact of open charges does not stop at bond proceedings. Unresolved criminal charges can result in mandatory detention. Under the federal Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025), signed into law in January 2025, even individuals who are merely "charged with" shoplifting, theft, and a handful of other criminal charges are subject to mandatory detention, 8 U.S.C. § 1226(c)(1)(E)(ii). While there is little caselaw examining the new Act, use of the present tense ("is charged with") suggests that dismissed charges or amended charges to exclude the enumerated criminal acts should not trigger mandatory detention. *See* Nat'l Immigr. Project, *Practice Advisory, The Laken Riley Act's Mandatory Detention Provisions* 7 (2025).[19]

Pending charges can also lead to deportation by making individuals ineligible for immigration relief. For example, individuals who originally

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[18] https://www.nj.com/politics/2021/10/no-ice-for-nj-counties-with-bergen-joining-essex-hudson-to-end-immigration-detainee-contracts.html.
[19] https://nipnlg.org/sites/default/files/2025-02/Alert-Laken-Riley-Act.pdf.

entered without inspection and have been living in the United States without status can qualify to avoid deportation through a discretionary form of relief known as "cancellation of removal" if they meet certain eligibility requirements: (1) they have been physically present in the United States for at least ten years, (2) they have been a "person of good moral character," (3) they have not been convicted of criminal offenses that would make a person ineligible, and (4) their removal would cause "exceptional and extremely unusual hardship" to the person's spouse, parent, or child who is a U.S. citizen or lawful permanent resident. 8 U.S.C. § 1229b(b)(1). Pending criminal charges can sometimes foreclose a good moral character determination, or can otherwise be a negative discretionary factor in the cancellation analysis.

Pending charges can also prevent a person from reentering the United States after they have been deported. That is reportedly the case for Mr. Reyes-Rodriguez. *See* DBr. at 4-5 ("[W]ere the instant charges to be dismissed or adjudicated not-guilty, Mr. Reyes-Rodriguez could then petition to return to the United States and be reunited with his family.").[20] Generally, people who have been deported on a ground that triggers inadmissibility, or who have been

[20] Amicus does not opine on the avenues for relief and return that Mr. Reyes-Rodriguez may be eligible for, but provides the examples herein to illustrate the challenges that pending charges can pose to people seeking admission to the United States after deportation.

deported after accruing unlawful presence in the U.S., are subject to reentry bars and require a waiver of inadmissibility to return before the reentry bar has expired. For example, a person who has accrued more than one year of unlawful status and who is subsequently deported is inadmissible for ten years from the date of removal. *See* INA §§ 212(a)(9)(A)(ii), 212(a)(9)(B)(i)(II). Thereafter, they can seek permission to reenter by applying for a waiver, but even if they are eligible for the waiver, approving the application is at the discretion of the agency, and any open criminal charges may still prevent them from reentering. *See* U.S. Citizenship & Immigr. Servs., Instructions for Application for Permission to Re-apply for Admission into the United States After Deportation or Removal 14 (2025).[21]

Barker recognized that even when an individual is not incarcerated pre-trial, "he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." *Barker*, 407 U.S. at 533. This anxiety is only exacerbated when the defendant is in immigration detention or has been removed from the country. The egregious conditions documented in immigration detention – including medical neglect, lack of access to basic hygiene supplies, separation from loved ones, and discriminatory and

[21] https://www.uscis.gov/sites/default/files/document/forms/i-212instr.pdf.

degrading treatment[22] – intensifies the trauma and anxiety that accompanies a loss of freedom. When people are detained, they also often lose their employment – a specific prejudice that the Appellate Division has previously found. *See State v. Tsetsekas*, 411 N.J. Super. 1, 13 (App. Div. 2009) (stating that "significant prejudice may also arise when the delay causes the loss of employment or other opportunities"). In the case of individuals who have been deported, they may have been returned to countries they previously fled due to violence or poverty, or they may have been removed to an entirely unfamiliar country. *See* 8 U.S.C. §§ 1231(b)(1)(C), (2)(E) (enumerating alternative countries to which a noncitizen may be removed, including a country "whose government will accept the [noncitizen] into that country").

Among the three interests enumerated by *Barker* under the fourth factor, "impairment of the defense was considered the most serious since it went to the question of fundamental fairness." *Szima*, 70 N.J. at 201. Both prolonged detention and deportation can severely restrict defendants' access to their

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[22] *See generally* Human Rights Watch, *"You Feel Like Your Life is Over": Abusive Practices at Three Florida Immigration Detention Centers Since January* (2025), https://www.hrw.org/sites/default/files/media_2025/07/us_florida0725%20web_2.pdf; Alina Das, *The Law and Lawlessness of U.S. Immigration Detention*, 138 Harv. L. Rev. 1186 (2025); Altaf Saadi, Caitlin Patler & Paola Langer, *Duration in Immigration Detention and Health Harms*, Jama Network Open, Jan. 24, 2025, https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2829506.

attorneys and to records or evidence that is necessary to mount a strong defense. Immigration detention centers have long restricted detainees' access to their attorneys, from inadequate telephone access within facilities, to outright denial of meetings with attorneys, to a lack of private space in which to have confidential conversations with counsel. *See generally* Am. C.L. Union, *No Fighting Chance: ICE's Denial of Access to Counsel in U.S. Immigration Detention Centers* (2022);[23] Complaint, *C.M. v. Noem*, No. 1:25-cv-23182 (S.D. Fla. July 16, 2025) (class action challenging severe attorney access restrictions at "Alligator Alcatraz" immigration detention facility).

Allowing detention to morph into deportation without resolution of a defendant's criminal case has particularly serious ramifications. Courts have found that defendants are disadvantaged in preparing a defense to their criminal charges post-deportation. A federal court in Florida agreed with the defendant that his deportation left him "unable in any way to prepare a defense to the charge" of illegal reentry. *Resendiz-Guevara*, 145 F. Supp. 3d at 1138. "Defendant's deportation present[ed] a clear challenge, as his counsel rightly states, to his ability to consult with counsel, to review the evidence against him and to prepare a defense to the charge." *Id.* A federal court in Arizona came to

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23 https://assets.aclu.org/live/uploads/publications/no_fighting_chance_aclu_research_report.pdf.

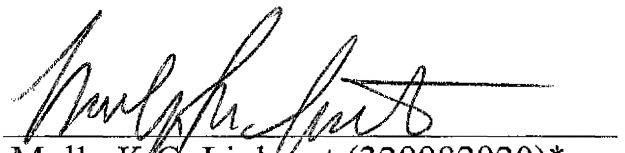
the same conclusion when the defendant – a lawful permanent resident who had resided in Arizona with her family for thirty years – was removed to Mexico and defense counsel struggled to make contact with her. *United States v. Munoz-Garcia*, 455 F.Supp.3d 915, 921 (D. Ariz. 2020) ("[A]s a result of executive branch operation, the Defendant has been deported and is consequently disadvantaged in preparing a defense in her case, jeopardizing this Court's ability to fairly try her.").

The severe prejudice flowing from prolonged detention and deportation meets all three interests under *Barker* factor four: delay in resolving defendants' criminal charges can lead to oppressive and excessive time in detention; defendants experience significant anxiety over their outstanding charges given their impact on defendants' eligibility for bond and immigration relief, which is only exacerbated by the harms and stressors of detention and deportation; and the practical realities of detention and deportation often frustrate defendants' ability to work with defense counsel to present a strong defense. Therefore, the fourth *Barker* factor should weigh heavily against the State in a speedy trial analysis when the defendant is in ICE custody or has been removed.

CONCLUSION

For the foregoing reasons, the second and fourth *Barker* factors – reason for the delay and prejudice to the defendant – should weigh heavily against the State in a speedy trial analysis when a defendant has been detained by ICE or deported. Because the Appellate Division did not give the full weight that should have been accorded to Mr. Reyes-Rodriguez's detention and deportation time or to the prejudice to him, Amicus urges the Court to issue clarification to this effect and remand with instructions to readminister the *Barker* balancing test to the circumstances in Mr. Reyes-Rodriguez's case.

Respectfully submitted,



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* Counsel is grateful to Rutgers University Law School student William Pritchett for his research support during his summer 2025 internship at the ACLU-NJ.