

# COVID-19 Does Not Have to Mean Indefinite Detention



## Many Criminal Defendants are Sitting in Jails Awaiting Their Literal Day in Court—With No End in Sight

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**T**he COVID-19 pandemic disrupted the New Jersey Judiciary from top to bottom, but few were more affected than criminal defendants under pretrial detention. After the initial rise of cases in New Jersey, the courts shut down in-person proceedings including grand and petit jury selection. This created a disruption in criminal cases and greatly contributed to increasing the backlog of criminal post-indictment cases by 82.8% and criminal/quasi-criminal matters by 2323.8% from June 2019 to June 2020.<sup>1</sup> This backlog has left many in jail who would have otherwise resolved their cases and been either released or sentenced, as is evident by the 49.7% drop in criminal post-indictment resolutions in trial courts from July 2020 to January 2021. Criminal defendants are sitting in county jails awaiting their literal day in court with no end in sight. The judiciary finds itself between a rock and a

hard place having to protect the health of litigants, judges, attorneys, court staff, and the public while also trying to adhere to constitutional mandates as well as the Criminal Justice Reform Act.<sup>2</sup> But have they done enough to protect defendants?

Some contend that continued detention violates the relatively new CJRA,<sup>3</sup> which requires that a defendant not remain detained for more than 90 days without an indictment, and not more than 180 days following the issuance of an indictment.<sup>4</sup> The act, however, allows for excludable time, meaning that not every calendar day is counted when determining how many days a person has been detained for purposes of the act. Chief Justice Stuart Rabner issued the Judiciary's first Omnibus Order on COVID-19 Issues on March 27, 2020, excluding the period of March 30 to April 26, 2020, in the computation of time limits for return of indictments and trials.<sup>5</sup> Subsequent orders have continued to extend excludable time.<sup>6</sup> On Nov. 16, 2020, the Court suspended grand jury sessions and selection for in-person jury trials pending further order. Virtual grand juries have resumed but no virtual criminal trials are permitted, only civil. In-person trials remain suspended.

Both public and private attorneys have been arguing that continued tolling of time violates the Due Process Clause of the Fifth Amendment of the United States Constitution and Article I of the New Jersey Constitution.<sup>7</sup> Detention without a trial date in sight, it has been argued, becomes punitive rather than regulatory, as pretrial detention is intended to be, and therefore violates due process. Likewise, criminal defense lawyers have asserted that speedy trial rights under the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the New Jersey Constitution may be violated with this arguably indefinite pretrial detention. However, those arguments have fallen

flat before the courts as the Office of the Public Defender reports that only 33 of 550 motions filed seeking release of defendants pretrial have been granted.<sup>8</sup> Anecdotal evidence suggests that the success rate among private attorneys is similar or worse.

There is also concern that lengthened detention due to the pandemic is increasing the racial and economic disparities existent in the New Jersey criminal justice system. Prior to the pandemic, the New Jersey Courts recognized the unequal treatment of persons of color in our policing, courts, and jails even after the CJRA.<sup>9</sup> Although 15% of New Jersey's population identifies as Black,<sup>10</sup> Black individuals represent 55% of New Jersey's jail population.<sup>11</sup> They receive a disproportionate number of complaint-warrants (versus complaint-summons)<sup>12</sup> compared to their white counterparts and are more likely to spend more time in jail waiting for a disposition of their charges.<sup>13</sup> Communities of color also show higher levels of COVID-19 illness and deaths.<sup>14</sup> We have yet to see how these inequalities have affected illness and health care within the jail population, but one can deduce that if Black defendants are disproportionately represented in the jail population, additional delays and detentions will increase the disparities.

The OPD and the American Civil Liberties Union presented the constitutional and CJRA arguments before the New Jersey Supreme Court. Jointly, they filed a request for an Order to Show Cause seeking the release of certain defendants who had been detained for six months or longer. The request was limited to those whose most serious pending charge was a second-degree offense or lower. If the requested relief were granted, eligible defendants would have been released on conditions unless the County Prosecutor or Attorney General objected and demonstrated beyond a reasonable doubt that no set of condi-

tions could assure the defendant's appearance in court and protect others or the community. The Office of the Attorney General essentially replied that judges and prosecutors are already accounting for COVID-19 during detention hearings and that the OTSC would be a wholesale rewriting of the CJRA.<sup>15</sup>

On Feb. 11, 2021, the New Jersey Supreme Court granted the request in part and denied it in part.<sup>16</sup> The Court dismissed the proposed categorical approach to release but determined that under the current framework, relief could be available on an individual basis. Under N.J.S.A. 2A:162-19(f), a detention hearing may be reopened if the court finds the existence of information that was not known to the parties at the time of the hearing and which has a material bearing on the defendant's continued appearance in court, the protection of others, or obstruction of the criminal justice process. For months, defense attorneys had been unsuccessfully arguing that the duration of the pandemic and continued detention without the prospect of speedy trials constituted new information that necessitated the reopening of detention hearings. The Court agreed that the pandemic and its consequences presented new information within the meaning of N.J.S.A. 2A:162-19(f) but declared that trial judges had to determine materiality on an individual basis. The Administrative Office of the Courts issued a directive emphasizing the Court's instruction that these matters must be handled on an expedited basis.<sup>17</sup>

Neither the Supreme Court's rule clarification nor the eventual resumption of criminal jury trials will immediately solve the disruptions caused by COVID-19. Prior to 2020, the Court was already experiencing a backlog of cases.<sup>18</sup> Add to that the fact that practically no criminal trials have taken place since March 2020 and we will continue to see delays for the foreseeable future

even after in-person jury trials resume. So, what is a criminal defense practitioner to do?

Do not take procedural safeguards for granted. It is important to maintain the record and preserve the client's rights. When evaluating speedy trial claims, one of the factors examined is whether the defendant asserted the right to a speedy trial.<sup>19</sup> One should not just assume that everyone knows that the defendant wants a trial as soon as available. It needs to be placed on the record and repeated as often as possible. Consents to excludable time should not be de rigueur but should be withheld when the outcome is unknown. Trial judges may question a defense attorney's refusal to consent to a finding of excludable time for speedy trial purposes, but disagreements can be placed on the record with an acknowledgement of awareness of the rule or order when the rule or order is prejudicial to the client. In these times of uncertainty and ever evolving orders, consent to excludable time due to COVID-19 may be viewed as a waiver of speedy trial and due process rights in the future, so let courts decide but do not consent.

Continued motion practice is essential. The recent New Jersey Supreme Court opinion allowing for the re-opening of detention hearings in appropriate circumstances provides ample justification for criminal defense lawyers to seek release of eligible defendants. In addition, Rule 3:4-7(a) requires preindictment hearings of eligible defendants as a COVID-19 interim measure. The rule forces the production of discovery and can serve to move a matter forward. Further, the CJRA sets a limit of two years for pretrial detention excluding any time attributable to the defendant.<sup>20</sup> Motions should be made on all matters with this approaching deadline.

Criminal practitioners should not be discouraged and must remain zealous advocates even when motion after

motion is denied. It is difficult to remain optimistic and push forward when you add COVID-19 fatigue to the already exhausting task of being a criminal defense practitioner. But all is not doom and gloom in criminal practice. Although, 517 of the OPD's motions for release were denied, 33 were granted. Those are 33 individuals that would not have been released had those motions not been filed.

Most importantly, practitioners are well advised to use this time as an opportunity for the court to know your client's case and your client. Although status conferences are often yielding nothing more than a new status date, they can be used to remind your client that they are not forgotten and to remind the courts that these rules and orders affect real people with families and friends who are waiting for them on the outside. ☪

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### Endnotes

1. New Jersey Trial Courts Backlog found at [njcourts.gov/public/backlogcourt.html](http://njcourts.gov/public/backlogcourt.html).
2. NJSA 2A:162-15 et al.
3. JSA 2A:162-15 et al.
4. NJSA 2A:162-22
5. [njcourts.gov/notices/2020/n200327a.pdf?c=OD9](http://njcourts.gov/notices/2020/n200327a.pdf?c=OD9)
6. Ten subsequent Omnibus Orders were issued with the last dated February 17, 2021 found at [njcourts.gov/public/covid19.html](http://njcourts.gov/public/covid19.html).
7. See *In the Matter of the Request to Release Certain Pretrial Detainees*, M-550-20 (N.J. Feb. 11, 2021).
8. OPD Br., IMO Request to Release Certain Pretrial Detainees and Grant New Detention Hearings to Other Detainees, Docket No. 085186 at 15 (N.J. 2021).
9. See Glenn A. Grant, J.A.D., Administrative Office of the Courts, Report to the Governor and the Legislature, Jan. 1–Dec. 31, 2019,

found at [njcourts.gov/courts/assets/criminal/cjannualreport2019.pdf?c=S0V](http://njcourts.gov/courts/assets/criminal/cjannualreport2019.pdf?c=S0V).

10. [census.gov/quickfacts/NJ](http://census.gov/quickfacts/NJ)
11. See Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2019.
12. Complaint-warrants require that the defendant be taken into immediate custody and transported to the county jail to await a court's determination concerning release, while a complaint-summons instructs the defendant to appear in court at a future date. R. 3:3-1, 3:3-2.
13. See Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2019.
14. Anna Flagg and Damini Sharma, *We knew communities of color in N.J. were hit hard by coronavirus deaths. New data shows how bad*, Aug. 22, 2020, at [nj.com/coronavirus/2020/08/we-knew-communities-of-color-in-nj-were-hit-hard-by-coronavirus-deaths-new-data-shows-how-bad.html](http://nj.com/coronavirus/2020/08/we-knew-communities-of-color-in-nj-were-hit-hard-by-coronavirus-deaths-new-data-shows-how-bad.html);
15. AG Br., IMO Request to Release Certain Pretrial Detainees and Grant New Detention Hearings to Other Detainees, Docket No. 085186 at 3 (N.J. 2021).
16. *In the Matter of the Request to Release Certain Pretrial Detainees*, M-550-20 (N.J. Feb. 11, 2021).
17. Directive #05-21—Motions to Reopen Pretrial Detention Hearings—In the Matter of the Request to Release Certain Pretrial Detainees (\_\_ N.J. \_\_ (2021)) found at [njcourts.gov/notices/2021/n210212a.pdf?c=AOk](http://njcourts.gov/notices/2021/n210212a.pdf?c=AOk).
18. In 2019, the backlog was 5,795 for criminal post-indictment matters, found at [njcourts.gov/public/backlogcourt.html](http://njcourts.gov/public/backlogcourt.html).
19. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).
20. N.J.S.A. 2A:162-22(a)(2)(a).