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JERSEY OFFICE OF THE PUBLIC
DEFENDER, FLOYD FREEMAN, and
DENNIS PARRISH,

Plaintiffs,

v.

COUNTY OF CUMBERLAND AND ITS
BOARD OF CHOSEN FREEHOLDERS,
COUNTY OF ATLANTIC AND ITS
BOARD OF CHOSEN FREEHOLDERS,
COUNTY OF BURLINGTON AND ITS
BOARD OF CHOSEN FREEHOLDERS,
and COUNTY OF SALEM AND ITS
BOARD OF CHOSEN FREEHOLDERS,

Defendants.

Superior Court of New Jersey
Cumberland County
Law Division

Docket No.:

Civil Action

**MEMORANDUM OF LAW IN SUPPORT
OF PREROGATIVE WRIT AND FOR AN
ORDER TO SHOW CAUSE WITH
PRELIMINARY RESTRAINTS UNDER
R. 4:69-3 AND R. 4:52-1**

INTRODUCTION

On October 9, 2020, the Cumberland County Board of Chosen Freeholders made the sweeping decision to close down substantial portions of the Cumberland County Jail (CCJ) and scatter hundreds of current, and thousands of future, inmates detained pre-trial, awaiting disposition, and serving sentences, across southern New Jersey, to *three* separate jails in other counties. Each of these facilities — the Atlantic County Justice Facility (ACJF), the Burlington County Jail (BCJ), and the Salem County Jail (SCJ) — is a significant distance from the

Cumberland County Courthouse and the Cumberland County regional office of the Office of the Public Defender (OPD), both located in Bridgeton, largely passable only through congested and slow-moving highways or backroads. Defendant County of Cumberland attempts to execute this tripartite scheme, a herculean logistical challenge even in the best of circumstances, without a plan whatsoever to, among other things, ensure Cumberland inmates will be transported back to Bridgeton to appear in court on time, or ensure Cumberland County inmates will be able to effectively meet and confer with their court-appointed counsel. Defendant County of Cumberland has no written plan, no written policy, no proposed procedures, no memorandum of understanding — literally, nothing — for how it intends to successfully accomplish such an alteration to its justice system — in the middle of a public health crisis, no less. This ill-conceived plan, which lacks both legal and regulatory authorization, will wreak havoc on the lives of the individuals slated for transfer and their families, and cause untold delays and disruptions in the operations of an already overtaxed court system and public defense bar.

Closing the CCJ will fundamentally alter the County's criminal justice system. Even on its own, the sheer distance and travel time required to get from Bridgeton to any of the remote facilities would make it exceptionally difficult for attorneys from the Cumberland County OPD to maintain regular, in-person attorney-client consultation, as demanded by the Sixth Amendment. But when coupled with the high caseloads and time constraints that busy OPD attorneys already endure, the travel time — and existing long wait times at the other county facilities due to deficient policies and lack of visitation space — presents an insurmountable hurdle. Practically speaking, OPD attorneys may be unable to see their clients at all as they await trial or sentencing at the ACJF, BCJ, or SCJ.

The commuting time and distance to Atlantic, Burlington and Salem Counties, not to

mention expense, will also make it virtually impossible for Cumberland County inmates to see family, friends, and loved ones. These individuals not only provide important emotional support to individuals facing the trauma of a criminal prosecution, but also assist in the preparation of a legal defense by sharing information and identifying potential witnesses. Moreover, Defendant County of Cumberland is attempting to execute this scheme in the midst of a once-in-a-century global pandemic. New Jersey is still under a State of Emergency and Public Health Emergency as declared by the Governor, and will remain under this emergency declaration when transfers are slated to begin next month. Despite this, Cumberland County seeks to co-mingle large numbers of individuals from different institutions, against the advice of public health experts, and then ship them hundreds of miles around the state on a daily basis. This plan would endanger not only their constitutional rights, but their lives as well, along with those who work in each of these carceral facilities.

Cumberland County's plan provides no safeguards or assurances that Cumberland County inmates can continue to see their attorneys and loved ones in-person once they are housed dozens miles away from their communities. The entire idea consists of nothing more than three ten-page contracts, cobbled together only days before they were voted upon at a special Freeholder meeting, which are devoid of any concrete terms or plans for how the criminal justice system will carry on in light of the closure and transfers. Shockingly, the Freeholders has not received approval from the New Jersey Department of Corrections or the Cumberland County Superior Court, both of which are charged with various oversight responsibilities for the housing and transfer of county inmates.

The complex web of transfers contemplated by the Freeholders will deny all current and future pre-trial detainees in the CCJ their constitutionally-protected rights to effective assistance

of counsel and to a speedy trial, and to all inmates their rights to due process and the equal protection of the law. Plaintiffs Floyd Freeman and Dennis Parrish are current inmates housed in the CCJ while they await trial, and are among those whose constitutional rights will be violated by the transfers. The transfers will also prevent Plaintiff Public Defender, Joseph E. Krakora, and his office, Plaintiff OPD, from meeting their statutory obligations of providing indigent criminal defendants of Cumberland County with effective assistance of counsel.

Thus to prevent these constitutional, statutory, and regulatory violations from immediately taking place, Plaintiffs move to preliminarily enjoin the closing of significant portions of the CCJ and the attendant mass transfers of Cumberland County inmates, including those detained pre-trial, those convicted and awaiting sentences, and those serving sentences to distant Hudson County. Plaintiffs proceed under Rule 4:69-3 and Rule 4:52-1 and ask the Court to issue an Order to Show Cause as to why such relief should not be granted.

STATEMENT OF FACTS

Criminal proceedings in Cumberland County are already subject to frequent delays despite Cumberland County housing inmates in a building adjacent to the Courthouse.

The County of Cumberland owns and operates the Cumberland County Jail (CCJ), which at any given time houses several hundred people, detained pending the disposition of their criminal case in the Cumberland County Superior Court, or serving sentences of less than one year.¹ Verified Compl. ¶¶ 9, 10, 17. Located in Bridgeton,² the CCJ occupies an adjacent building to the Cumberland County Courthouse, and is only .3 miles — a short walk — away from the Cumberland County regional office of the Office of the Public Defender (OPD).³ Verified Compl.

¹ Cumberland County, like all counties, is responsible for housing and detaining inmates in accordance with regulations set forth by the Commissioner of the Department of Corrections. See N.J.S.A. 2C:43-10(c); N.J.A.C. 10A:31-1.1 et seq.

² The CCJ is located at 54 West Broad Street in Bridgeton, New Jersey. Verified Compl. ¶ 22.

³ The Cumberland County Courthouse is located at 60 West Broad Street in Bridgeton, New Jersey. The Cumberland

¶¶ 17, 18.

Three judges preside over criminal matters in Cumberland County, each of whom have full court calendars every Monday and Friday. Verified Compl. ¶ 114. On court days, an average of 20 CCJ inmates per courtroom are transported to the Courthouse for hearings, trial, and other proceedings. Verified Compl. ¶ 114. Despite the extremely short distance between the CCJ and the Courthouse, logistical challenges in the highly-coordinated and choreographed process of preparing and moving dozens of inmates abound, frequently leading to delays. Verified Compl. ¶ 115. Routinely, many courtrooms already work past 4:30 p.m., triggering overtime for many county employees. Verified Compl. ¶ 114.

CCJ's proximity to both the OPD regional office and the Courthouse is a crucial component of OPD's effective representation of individuals charged with crimes in Cumberland County.

OPD staff attorneys and pool counsel⁴ represent the substantial majority of the individuals currently detained at the CCJ. Verified Compl. ¶¶ 19, 20. It is OPD policy and practice for staff attorneys, pool attorneys, and investigators to routinely visit with, interview, and consult with their assigned clients in person. Verified Compl. ¶ 24. The Cumberland County Courthouse has no space for contact consultation, and only very limited access to brief window visits, which do not allow for passing documents or reviewing electronic discovery. Verified Compl. ¶ 25. Thus, for substantive consultation with detained clients, assigned counsel are wholly dependent upon in-person contact at the CCJ's visiting area. Verified Compl. ¶ 25.

The Cumberland County regional office of the OPD has 8 attorneys, 6 of whom have regular adult felony caseloads. Verified Compl. ¶ 26. The average caseload for an adult trial

County Office of the Public Defender, operated by Plaintiffs Joseph E. Krakora and OPD, is located at 40 East Broad Street in Bridgeton, New Jersey. Verified Compl. ¶¶ 22, 23.

⁴ Plaintiffs Krakora and OPD are obligated to maintain a pool of qualified private counsel, and retain and appoint them to represent clients, pursuant to N.J.S.A. 2A:158A-7(c), (d); N.J.S.A. 2A:158A-10.

attorney is about 145 matters. Verified Compl. ¶ 26. Given these high caseloads, in-court time absorbs a substantial percentage of attorneys' working hours, leaving them with limited opportunities for in-office tasks essential to effectively representing their clients, including: written correspondence; legal research; drafting court submissions; reviewing thousands of pages of paper discovery and hours of digital discovery; meeting with released clients, witnesses, and families; and various administrative duties. Verified Compl. ¶¶ 27, 28. Between these in-court and out-of-court demands, Cumberland OPD attorneys struggle to find time to visit their clients detained in the CCJ. Verified Compl. ¶¶ 27.

Nevertheless, OPD attorneys manage to eke out time for attorney-client consultations. Verified Compl. ¶¶ 29, 30. These meetings run the gamut, from reviewing discovery to conferring on motions, to obtaining information for potential investigation, to discussing plea negotiations. Verified Compl. ¶ 29. They often visit with multiple clients in each jail visit, totaling several hours. Verified Compl. ¶ 29. Frequently, attorneys must add additional clients at the last minute because they receive new information from the State, or because the client has requested a meeting, often because a client has important new information regarding their case, or is interested in possibly resolving it; a client may also have experienced an emergency that requires immediate attention. Verified Compl. ¶ 30. In addition, regular visits are essential to maintaining the good client relationships necessary for effective representation. Verified Compl. ¶ 30. The proximity of the MCCC to both the courthouse and the OPD regional office makes these visits possible. Verified Compl. ¶¶ 30, 32. Having to travel substantial distances to meet with clients would make both regular and last-minute meetings virtually impossible for assigned counsel. Verified Compl. ¶¶ 30, 32

Currently, Cumberland OPD staff attorneys represent 117 pre-trial detainees housed at

CCJ, including Plaintiffs Floyd Freeman and Dennis Parrish. Verified Compl. ¶¶ 19, 20, 31. Since pre-trial detention in New Jersey is generally reserved for individuals facing the most serious charges, which invoke the most severe sentences, individuals detained pre-trial require substantially more frequent and longer attorney-client visits. Verified Compl. ¶ 31. For example, Plaintiff Freeman was charged with two counts of first-degree murder, among other charges. Verified Compl. ¶ 31A. To date, his Cumberland County OPD attorney has been provided with hundreds of pages of paper discovery, as well as an abundance of digital discovery, including: 6 video statements; 2 surveillance videos from local businesses; 8 law-enforcement body camera videos; 3 cell phone dumps, and hundreds of crime scene photographs. Verified Compl. ¶ 31A. In addition to the voluminous discovery, the case is rife with complicated legal and evidentiary issues which will require a complicated trial with extensive motion practice. Verified Compl. ¶ 31A. In order to thoroughly review this electronic discovery and address the complicated legal issues in the case, which can only be done in-person, Plaintiff Freeman's attorney has visited him over 25 times in the CCJ since he was incarcerated on June 26, 2018, with each visit requiring hours of consultation. Verified Compl. ¶ 31A.

Plaintiff Parrish has also been charged with first-degree murder, among other charges, and he has been incarcerated at the CCJ since July 12, 2018. Verified Compl. ¶ 31B. Mr. Parrish's Cumberland County OPD attorney has been provided with a total 52 video and audio statements; 13 surveillance videos from local businesses; 9 cell phone dumps; 2 social media account dumps; and hundreds of additional photos on 5 CD-Rs. Verified Compl. ¶ 31B. There are significant scientific and forensic issues, requiring expert reports, extensive motion practice, and likely a complicated trial. Verified Compl. ¶ 31B. To date, his attorney has visited Plaintiff Parrish 20 times to review these materials, spending hours with him each visit. Verified Compl. ¶ 31B.

If Plaintiff Freeman's and Plaintiff Parrish's OPD attorneys had to travel distances of 20, 32, or 63 miles from their office in Bridgeton to the Salem, Atlantic, or Burlington County Jails, and then make the lengthy trek back again, they would not have been able to meet and confer with their clients as needed, and they will be unable to meet with them in the future to continue to effectively represent them. Verified Compl. ¶ 32. It is only because of the 5-to-7 minute walk to the CCJ that that such frequent, meaningful and necessary client contact is possible. Verified Compl. ¶ 32.

In spite of the deleterious impact on individuals' constitutional rights and the orderly administration of justice, Defendant County of Cumberland contracts to close CCJ as a correctional facility and ship inmates to distant facilities in Atlantic, Burlington and Cumberland Counties.

On or about October 21, 2019, Defendant County of Cumberland broke ground on a new county jail, located on Burlington Road in Bridgeton, adjacent to South Woods State Prison. Verified Compl. ¶ 56. Less than year later though, in July 2020, after construction had begun in earnest and the foundation of the new facility had already been laid, Defendant County of Cumberland publicly announced that it was halting the project to consider other options for its correctional needs, including sending its inmates to other county facilities throughout the state. The cancellation of the project was never subject to a resolution or otherwise publicly voted upon by Defendant Cumberland County Board of Chosen Freeholders. Verified Compl. ¶ 57.

To justify this drastic change in plans, Defendant County of Cumberland publicly stated that it was based on financial considerations and that COVID-19 was a significant contributing factor. Verified Compl. ¶ 58. Presumably, the County reasoned that some county jail detainees had been released to reduce the risk of spread of the virus within the CCJ, which reduced the number of detainees at the CCJ and, accordingly, the County's need to operate a correctional facility; and because the physical housing location of Cumberland inmates is largely irrelevant, given that court

proceedings have been conducted remotely during the pandemic. Verified Compl. ¶ 58.⁵ The County also stated that another significant contributing factor for its decision to cancel the project was that its jail census numbers had decreased in light of New Jersey's bail reform act. Verified Compl. ¶ 59.⁶

A representative from the Cumberland County OPD quickly reached out to representatives from Defendant County of Cumberland to express the OPD's concerns with housing its clients in remote facilities throughout the state. Verified Compl. ¶ 60. The parties met twice in late July and early August 2020; the OPD representatives left the meetings with the understanding that Defendant County of Cumberland would keep them abreast of any developments. Verified Compl. ¶ 60. Undersigned Counsel followed up the final meeting with a detailed letter, dated August 24, 2020, explaining the OPD's genuine concerns over some of the options the County was considering with respect to transferring inmates to other counties, and offering to work amicably toward a solution. Verified Compl. ¶ 61; Ex. B.

No additional meetings or substantive dialogue occurred between the OPD and Cumberland County. Verified Compl. ¶ 62. Less than a month later, the Cumberland County Board of Chosen Freeholders began quickly passing a series of resolutions to facilitate the closing of the CCJ and the transfer of hundreds of inmates. Verified Compl. ¶ 63. Over two meetings, the

⁵ OPD attorneys generally have not been able to, nor had the pressing need to, consult with their clients in person during the pandemic — solely because the adjudication of criminal cases in New Jersey has been significantly delayed, if not halted altogether in some respects (such as the case with jury trials) during the pandemic. The OPD has thus been in a state of homeostasis with respect to its representation of clients since the Governor issued a series of orders in March 2020 declaring a State of Emergency and Public Health Emergency. However, this is now ending, as in-person proceedings are incrementally resuming, including jury trials, as evidenced by the Supreme Court's recent omnibus Order. See Ex. A.. There is now the critical need, as there has been since the inception of New Jersey's public defender system, to meet in person with clients to effectively represent them. Therefore, to the extent that COVID-19 is the true rationale provided by Defendant County of Cumberland's decision to close its jail, that rationale is incredibly short-sighted.

⁶ This rationale also makes little sense. Defendant County of Cumberland passed resolutions to build a new county jail well after New Jersey's bail reform act was implemented in the state, including in Cumberland County. Also, there are currently 284 inmates in the CCJ—a significant number of individuals warranting a correctional center.

Cumberland County Board of Chosen Freeholders approved three contracts, one for each county:

- *The Salem Contract.* On September 22, 2020, the Freeholders approved a contract (hereinafter “Salem Contract”) that calls for 50 adult inmates from the CCJ—25 male inmates and 25 female—to be housed at the Salem County Jail (SCJ), effective October 1, 2020. Verified Compl. ¶ 64; Ex. C.
- *The Atlantic Contract.* On October 9, 2020, the Freeholders approved a contract (hereinafter “Atlantic Contract”) that calls for up to 200 adult inmates to be housed at the ACJF, effective October 1, 2020. Under the contract, inmates from the CCJ are to be transferred in waves to the Atlantic County Justice Facility (ACJF), starting with 30 inmates on November 1, 2020, followed by an additional 30 inmates on the first day of each month thereafter until Defendant County of Atlantic has accepted their total allotment of human beings from Defendant County of Cumberland. Verified Compl. ¶ 65; Ex. D.
- *The Burlington Contract.* At the same meeting on October 9, the Freeholders approved a contract (hereinafter “Burlington Contract”) that calls for up to 30 adult inmates to be housed at the Burlington County Jail (BCJ), effective October 1, 2020, plus an additional 20 inmates should Defendant County of Cumberland exhaust its ability to place inmates with another county. Verified Compl. ¶ 66; Ex. E.

Each of the three contracts is substantially similar. They consist of only 10 pages, the last 5 of which are related exclusively to discrete legal issues between the contracting parties, such as indemnification and insurance provisions. Verified Comp. ¶ 67. The first 5 pages briefly discuss general provisions, like how the Counties will arrange for payment, and which County is responsible for providing medical treatment to a transferred inmate. Verified Compl. ¶ 67. Each contract contains short, one paragraph section discussing transportation of inmates, stating:

The Cumberland County Department of Corrections shall be responsible for transporting the inmates . . . to and from any (arranged conferences with attorneys representing an inmate at the Cumberland County Holding Facility) and court appearances in which personal appearances are required,

[Verified Compl. ¶ 68; Exs. C, D, E].

Beyond this, the contracts are devoid of any details—or any other information entirely—about transportation. Verified Compl. ¶ 68. Similarly, there are no details or information about attorney-client visitation, other than the parenthetical cited above regarding transportation for “arranged

conferences with attorneys representing an inmate at the Cumberland County Holding Facility.” Verified Compl. ¶ 69.⁷ There is a section in each contract entitled, “Visitation,” but it consists of only one sentence—that “visitation with Cumberland County Inmates shall be permitted by the [receiving county] in accordance with its rules and regulations.” Verified Compl. ¶ 69.

In short, there is nothing in any of the three contracts that explains how and when Cumberland inmates will be transported back to Bridgeton for court appearances, that explains how and when attorney-client consultations may occur, or that offers any information or details pertaining to family visits for Cumberland inmates housed in one of the other Defendant Counties. Verified Compl. ¶¶ 70-71. The contracts also do not distinguish between pre-trial detainees, those convicted but awaiting sentencing, and those who have been sentenced. Verified Compl. ¶ 72.

The Current Resource Constraints at the ACJF, BCJ, and SCJ.

The three facilities to which Cumberland seeks to ship its inmates are already crowded, have stretched their resources thin during the pandemic, and do not offer sufficient facility space — particularly with respect to legal representation — to accommodate dozens of new inmates. These inadequacies have only worsened in recent months.

The existing inadequacies at the ACJF. In Atlantic County, the ACJF currently houses 559 inmates, of which 466 are on pre-trial detention, and 69 are awaiting sentencing. Verified Compl. ¶ 33. The facilities for attorney-client visitation are extremely limited and insufficient: the jail provides a large room with tables that accommodate about six to eight inmate visits at a time, but this set-up requires speaking in low voices to preserve confidentiality, and does not allow for privacy to show a video or play a statement. Verified Compl. ¶ 34. If privacy is required, there is only one private room that can be requested for this purpose Verified Compl. ¶ 34.

⁷ Notably, the Atlantic Contract does not even contain the parenthetical regarding arranged conferences. See Ex. D.

The COVID-19 pandemic has only exacerbated these resource constraints. Prior to the public health crisis, Atlantic OPD attorneys frequently had to wait a long time in the visitation room for jail staff to bring their clients for the consultation, at times thirty minutes for each client; but presently, in-person consultations involve significantly greater delays. Verified Compl. ¶¶ 36, 37. There are only two booths available that afford the minimal privacy required for confidential consultation. These booths are available on a first come, first serve basis, and there are multiple others individuals who are also vying to use them. Verified Compl. ¶ 36. Due to social distancing constraints, only two inmates are allowed in the visiting at a time, and the jail staff must move each inmate one-by-one. Verified Compl. ¶ 36. Thus, Atlantic OPD attorneys sometimes wait between two and three hours to see a single client who is housed in the ACJF, and there is often an additional wait in between consultations. Verified Compl. ¶ 36. Attorneys are also limited to two inmate consultations at a time, and requests for extended hours or special times for OPD staff attorneys have yet to be addressed by the administration at the ACJF. Verified Compl. ¶ 37. As result, Atlantic OPD attorneys are frequently forced to meet with clients at the courthouse if they need to see them prior to a court date. Verified Compl. ¶ 37.

The existing inadequacies at the BCJ. In Burlington, the BCJ already houses 291 inmates, including 178 on pre-trial detention. Verified Compl. ¶ 38. Only three rooms in the entire facility available to OPD attorneys afford the minimum privacy required for confidential consultation; each of these rooms is also used by clergy and other professionals meeting with inmates, and one of those rooms is also used for video municipal court proceedings. Verified Compl. ¶ 39. Further, these same three rooms are the only spaces available for video attorney consultation, and they must be booked in advance for such purposes. Verified Compl. ¶ 41. Due to these space limitations, some Burlington OPD staff attorneys must meet with their clients in the contact visit room, which

is used for multiple purposes including video first appearances and detention hearings. Verified Compl. ¶ 40.

The existing inadequacies at the SCJ. Finally, in Salem, the SCJ also suffers from similar resource constraints that have worsened during the pandemic. These constraints are further exacerbated by the SCJ's existing agreement to house Gloucester County inmates.

Currently, SCJ houses 309 inmates, including 72 total from Salem County: 66 on pre-trial detention, and 3 are awaiting sentencing. Verified Compl. ¶ 42. The SCJ also houses 132 detainees being held on charges from Gloucester County, as well as detainees being held on charges from other counties and on federal charges. Verified Compl. ¶ 42. The SCJ's space for attorney-client visitation is thus woefully inadequate, even for existing inmates from two counties. Verified Compl. ¶ 43. Each housing section has only one interview room, meaning that only one attorney can meet with a single client from each housing pod at any given time, and the attorney must compete with other professionals who need to meet with inmates. Verified Compl. ¶¶ 43, 44. It is not possible to schedule a room or time in advance. Verified Compl. ¶ 44.

Prior to the COVID-19 public health crisis, Salem OPD attorneys typically had to wait to meet with clients until a room was available, and there were often long delays to retrieve clients who were in other areas of the jail. Verified Compl. ¶ 44. The booths are also hardly confidential. They are not soundproof, and attorneys are required to keep the door ajar, thus conversations within the room can be overheard from outside. Verified Compl. ¶ 45. There are also privacy concerns when attorneys meet with clients in the disciplinary and medical units. An officer sits right outside the open door to the room on the disciplinary unit, and on the medical unit, the consultation space is simply an area between the doors to and from the unit. Verified Compl. ¶ 46.

As noted, in addition to Salem County inmates, the SCJ also houses inmates from

Gloucester County. The SCJ is only about 20 miles from the Gloucester County Jail, OPD office, and Courthouse; and Gloucester inmates are transported from the SCJ to the Gloucester County Jail for attorney-client consultations. Verified Compl. ¶ 48. Despite the relatively short distance, unsurprisingly, there have been myriad problems. Even when Gloucester OPD attorneys follow all required procedures to request to meet with their clients, often the client is not transported from the SCJ, and despite having waited, potentially for hours, the attorney is informed the client “refused” the visit. Verified Compl. ¶ 48. Clients report that they are often not informed by the jail that their attorney wants a visit, or they are discouraged by corrections officers from meeting with their attorneys in-person versus over videoconference. Verified Compl. ¶ 48. At times, the SCJ has failed to advise Gloucester OPD attorneys that their client is held elsewhere, and thus the attorney only learns that the client is not housed at SCJ once he has already traveled there at the scheduled consultation time. Verified Compl. ¶ 48.

Currently, in the midst of the pandemic, SCJ does not allow any in-person attorney-client consultation, requiring attorneys from both the Salem and the Gloucester offices of the OPD to rely on video and phone communication. Verified Compl. ¶ 49. There are only six video booths which Salem County OPD attorneys must share not only with Gloucester County OPD attorneys, but with the courts that use the booths to conduct legal proceedings for both of the counties. Verified Compl. ¶ 50. These four courts—Salem Superior Court, Gloucester Superior Court, Salem Municipal Court, and Gloucester Municipal Court—all receive priority for video scheduling over attorneys. Verified Compl. ¶ 50. First appearances and detention hearings occur via video every day starting at noon, and on most if not all weekdays, the booths are used for court appearances from the two Counties. Verified Compl. ¶ 50.

As a result, Salem and Gloucester OPD attorneys have frequently been unable to schedule

video or phone calls with their clients due to the overwhelming demand for use of the video booths. Even scheduling a call is challenging, and frequently days pass between an OPD attorney requesting to speak to their client, and the call being scheduled, particularly since the SCJ employee who schedules calls does not work on Fridays. Verified Compl. ¶ 51. And even when an attorney is able to schedule a call, they are extremely limited in terms of open time slots, and attorneys are also limited both in duration — 30 minutes per phone call — and the number of inmates they can speak to each day. Verified Compl. ¶ 52. What’s worse, the video booths at SCJ pose health risks in the era of COVID-19. During video calls, clients do not wear personal protective equipment (PPE), and neither the phones nor the material of the booth is cleaned between uses despite the current COVID-19 outbreak. Verified Compl. ¶ 52. The SCJ video booths also pose confidentiality concerns: they are situated back to back, and they are not soundproof. Verified Compl. ¶ 54.

The Impact on Effective Legal Representation

The inadequacies at ACJF, BCJ and SCH will be further exacerbated by the proposed plan, which will severely impinge on Cumberland inmates’ right to effect legal representation. The three contracts at issue provide no specific information regarding facilitation of in-person attorney visits, and the Atlantic contract is entirely silent on the issue. Verified Compl. ¶¶ 75; Exs. C, D, E. Separate and apart from these significant concerns, though, the remote location of these facilities — particularly the ACJF and the BCJ — will also greatly impair access to counsel for Cumberland inmates housed there. Verified Compl. ¶ 78. As discussed above, the OPD represents most of the inmates at CCJ, including 117 pre-trial detainees represented by OPD staff attorneys. Verified Compl. ¶¶ 18-21. Given caseloads and limited resources, staff attorneys at the Cumberland OPD struggle even now to find time to visit clients housed only .3 miles away at the CCJ. Verified

Compl. ¶¶ 18, 27-32.

In comparison, a round trip from the Cumberland County OPD (and the Courthouse) to BCJ in Mount Holly is 124 miles. Verified Compl. ¶ 79. Depending on the time of day, this travel entails a nearly two-and-a-half-hour round trip by car. This estimate does not account for heavy traffic or other road delays due to weather, construction, or car accidents, which would only increase the required travel time. Verified Compl. ¶ 79. A round trip to the ACJF in Mays Landing is 64 miles. The ACJF is only passable from Bridgeton through slow moving county highways, entails an almost two-hour round trip. Again, heavy traffic or other routine road delays would only increase this travel time. Verified Compl. ¶ 80. And finally, a round trip to the SCJ in Woodstown is nearly 40 miles, and an hour round trip even without heavy traffic or routine road delays. Verified Compl. ¶ 81.

Given the wait times at each facility and the commute, even if an OPD staff attorney from Cumberland is meeting with a single client at just one facility, it will take the greater part of a workday to accomplish that one visit. Verified Compl. ¶ 82. For example, it could take an OPD staff attorney from Cumberland approximately five-and-a-half hours to meet with a single client at ACJF for a mere 45-minute consultation, given travel time and the wait times. Verified Compl. ¶ 82. Adding additional inmates to each of these facilities will surely increase the wait times at all of them, and thus the total time for a client visit. Verified Compl. ¶ 82. As a result, OPD trial attorneys would be forced to allot a full day, or even two or three days, per week, to meet with clients housed at each of the facilities, even if they are able to schedule multiple client meetings in a single day. Verified Compl. ¶ 83. If an attorney has to visit with clients at more than one facility in a single day – which could entail a multi-hour trek across large swaths of southern New Jersey, the imposition on their time is of course that much greater. Verified Compl. ¶¶ 84-85. Such an

increased demand on attorney time will result in markedly less availability, and less flexibility, for in-office meetings with non-detained clients, and will similarly impede attorneys' ability to meet with witnesses and clients' families, and prepare for all of their clients' cases, whether incarcerated or not. Verified Compl. ¶ 86.

To the extent that video-conferencing is offered as an alternative, it is a wholly inadequate substitute for in-person visits and infringes on the establishment and maintenance of a functional and productive attorney-client relationship. Verified Compl. ¶ 87. The attorney-client relationship, particularly for indigent defendants, requires incredibly complex and sensitive communication skills and the development of a rapport of trust with individuals who may suffer from emotional, cognitive, or language-based challenges. Verified Compl. ¶¶ 87-92.⁸ Effective communication given such challenges is difficult enough in person, and certainly hampered by video technology. Verified Compl. ¶¶ 90-93, 104. For example, researchers have found that misalignment of eye gaze is characteristic of video-conferencing, preventing participants from looking into each other's eyes; yet, eye contact is critical for emotional contact and feelings of connection and trust. In addition, even minor delay or mismatch of audio and video hinders fluid and natural dialogue and communication. Verified Compl. ¶ 104.

Moreover, to the extent that the Defendants propose to bus individuals on a several-hour trek for in-person consultation, this too is inadequate, as it would require that an inmate be roused extremely early and be subjected to strip-searching and prolonged shackling. Verified Compl. ¶ 98. This would lead to chilling effect on the attorney-client relationship, and the inmate's ability to fully participate in the consultation after having endured these additional obstacles to simply

⁸ See also American Bar Association, Standards for Criminal Justice: The Defense Function, Standard 4-3.1(f) (4th ed. 2017), at https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ (Immediately upon appointment or retention, defense counsel "should work to establish a relationship of trust and confidence with each client," and this "obligation...is not diminished by the fact that the client is in custody.").

meet with their counsel. Verified Compl. ¶ 98.

Further, the contracts between Defendants present additional challenges given the time constraints of the Criminal Justice Reform Act. Under the Act, hearings on motions for pre-trial detention are subject to tight timeframes, as it must occur “no later than the eligible defendant’s first appearance,” or “within three working days of the date on which the prosecutor’s [pre-trial detention] motion was filed, unless the prosecutor or the eligible defendant seeks a continuance.” N.J.A.C. 2A:162-19d(1); Verified Compl. ¶ 96. But the contracts do not contain any provision for Cumberland inmates to remain in Cumberland prior to their detention hearing, rendering it difficult, if not impossible, for Cumberland OPD attorneys to meet with their clients prior to their detention hearing. Verified Compl. ¶ 95. Cumberland OPD attorneys must therefore meet with their clients in the county jail almost immediately following their clients’ arrest (and certainly within the first 48 hours) to represent them at the detention hearings — a virtual impossibility if those clients are housed 32 or 62 miles away. Verified Compl. ¶ 96.

The Impact on Plaintiffs’ Ability to Maintain Family Contact and Support — Critical to Preparing a Defense

Maintaining contact with and support of family members and friends outside the jail is an important component of preparing a defense in a criminal case. Verified Compl. ¶ 99. Family and friends provide vital moral and logistical support to the defense, but the planned transfer of CCJ inmates will render such contacts substantially more expensive, difficult and infrequent. Verified Compl. ¶ 100.

The contracts contain no provision for any of the Defendant Counties to arrange, or even facilitate transportation for family or other loved ones who wish to visit a Cumberland County inmate, nor do the receiving counties have adequate accommodations or policies for both their inmates and Cumberland inmates to meet with family or loved ones. Verified Compl. ¶¶ 100, 101

Like OPD attorneys, family and friends from Cumberland County would need to drive between two to three hours and travel up to 124 miles. Verified Compl. ¶ 108. For those who lack access to a car, the travel times might be double when using public transportation. For example, the family of an inmate from Bridgeton would, if dependent on public transportation, face a five-hour roundtrip to the SCJ, requiring at least at least two transfers each way. Verified Compl. ¶ 108. The travel by public transportation to the BCJ is even more arduous – a more than seven-hour round-trip, with three transfers each way. Depending on the county where an inmate is remotely housed, a single roundtrip ticket could cost more than \$16.00. Verified Compl. ¶ 108.

Telephone and videoconference is also not an adequate substitute for live family visits, and in any event, the contracts make no such provisions. Verified Compl. ¶ 104. For example, ACJF has only six windows with phones available for inmates to meet with their family or loved ones, and prior to the COVID-19 public health crisis, the area was often full, with a long wait for visits. Verified Compl. ¶ 101. To the extent that video-conferencing for family visits is proposed, it is not even available at either the ACJF or BCJ. Verified Compl. ¶¶ 101, 102. Although SCJ provides family access to video conferencing, the SCJ charges families and friends \$11 per 20-minute phone call, which will be prohibitive for some individuals. Verified Compl. ¶¶ 103-107. Their web-based system also requires access to a computer, which many families may not have. Verified Compl. ¶ 107.

Both experience and research indicate that inmates who are housed near home have a greater chance of being released early and a lesser chance of returning to jail.⁹ Verified Compl.

⁹ See, e.g., Daniel P. Mears, et al, Prison Visitation and Recidivism, 29 Just. Q. 888 (2012) (finding that for inmates serving 12 months or less, visitation reduced generally recidivism, and increased number of visits led to even greater reduction in recidivism); Minnesota Department of Corrections, The Effects of Prison Visitation on Offender Recidivism (November 2011) (finding that a single visit reduces recidivism by 13% for new crimes and 25% for technical violations), available at https://mn.gov/doc/assets/11-11MNPrisonVisitationStudy_tcm1089-272781.pdf; Margaret DiZerega, Coaching Packet, Engaging Offenders' Families in Reentry (2010), (citing numerous studies demonstrating that increased contact from family and loved ones during incarceration leads to lower recidivism and

¶¶ 109, 110. Cumberland County inmates, housed hours from family, friends, and counsel, will thus face longer sentences and greater likelihood of reincarceration as a result of Defendants' actions. Verified Compl. ¶ 111. In addition, remote incarceration negatively impacts general psychological well-being and mental health, as well as ability to reason, make decisions, and participate in one's own defense, further disadvantaging Cumberland inmates under the contracts into which Defendants have entered. Verified Compl. ¶¶ 110, 111

The Impact on the Courts and the Administration of Justice

The remote housing of Cumberland inmates will also impede the Judiciary's ability to conduct court proceedings effectively. Verified Compl. ¶ 112. Historically, inmates brought to the CCJ from facilities outside of Cumberland have arrived late due to lengthy delays and slow movement to court. Verified Compl. ¶ 115. For example, when Cumberland inmates are transported from the SCJ, which is about 20 miles away in Woodstown, Defendant County of Cumberland routinely brings them very late to their court appearances. They often arrive at 10:30 or 11:00 a.m., substantially delaying the proceedings. Verified Compl. ¶ 115. And delays even occur when Cumberland inmates are transported from the CCJ to the Cumberland County Courthouse, which is only a short walk from one building to another other on the same city block. Verified Compl. ¶ 116.

The court-day protocol for Cumberland inmates, even when housed at the CCJ, is time- and

better post-release outcomes), available at <https://cepp.com/wp-content/uploads/2015/12/Engaging-Offenders-Families-in-Reentry.pdf>; Mike Bobbitt & Maita Nelson, Vera Institute of Justice Issues In Brief, The Frontline: Building Programs that Recognize Families' Role in Reentry (September 2004) (explaining that reentry programing "is most effective when it begins in the institution and continues in the community," but this is even more difficult when inmates are housed in locations far from family and difficult to access by public transportation), available at http://www.vera.org/downloads/Publications/the-front-line-building-programs-that-recognize-families-role-in-reentry/legacy_downloads/IIB_Front_line.pdf.

labor-intensive, taking more than two hours.¹⁰ Verified Compl. ¶ 118. Even on a good day, when the process unfolds as planned, Cumberland inmates are ready to appear on the record just in time, or shortly after, the scheduled time for court. Verified Compl. ¶ 119. This delicate schedule cannot be replicated if the same inmates are travelling 20, 32, or 62 miles from the courthouse (as opposed to less than 1 mile on the same city block). Verified Compl. ¶ 119. Indeed, as noted above, when Cumberland inmates are transported to court in Bridgeton from the SCJ, they routinely arrive up to two hours late. Verified Compl. ¶ 119. Those delays will be exacerbated when additional Cumberland inmates are transported from the SCJ and from two other facilities—the ACJF and the BJC—which are located at a substantially further distance than the SCJ. Verified Compl. ¶ 119.

As previously noted, the contracts between Defendant County of Cumberland and the other Defendant Counties contain no concrete information related to the transportation of Cumberland inmates from the SCJ, ACJF, or BCJ. Verified Compl. ¶ 120. But even if these other facilities were able to have all inmates up and ready for pick up by an early hour, there would be additional time spent presenting and checking credentials, along with the time-consuming task of actually bringing inmates to the transport vehicles and securing them inside. There is also no information in the contracts regarding when Defendant County of Cumberland would be departing from Bridgeton to retrieve inmates in the other Defendant Counties and how they would accomplish such frequent and daily transportations in three separate counties in terms of staffing, equipment, vehicles, and

¹⁰ Currently, on a day in which Cumberland inmates must appear in person in court, they are awoken between 6:30 a.m. and 7:00 a.m. Verified Compl. ¶118. They then have approximately 1 hour to dress, ready themselves for the day (e.g., wash up, brush teeth, comb hair etc.), and eat breakfast before they are escorted by Corrections Officers to a common holding cell near the Sergeant's desk of the jail. Verified Compl. ¶118. From there, the inmates are extracted from the holding cell one at a time; they are strip searched and shackled and then escorted into a large waiting room. Verified Compl. ¶118. Once this process is completed for every inmate attending court, all of the inmates are walked from the waiting room outside to an enclosed walkway or corridor leading to the Cumberland County Courthouse. Verified Compl. ¶118. They are finally delivered to holding cells within the Courthouse, adjacent to each courtroom, between 9:00 and 9:30 a.m. Verified Compl. ¶118.

the overall logistics of such an endeavor. Verified Compl. ¶ 121.

Further, because the court-day protocol is so extensive and time consuming, having every inmate dressed, groomed, and ready for pick up in time to be transported to court in Cumberland County will require an extremely early wake up. Verified Compl. ¶ 122. This need to wake detainees at extreme hours to make this trip will also greatly diminish their opportunities for sleep, self-care, and grooming, and ultimately deprive them of the ability to make a reasonable court appearance in front of a judge or jury and to participate fully in their defense. For an inmate on trial to be subjected to this routine, each day only compounds this deprivation. Verified Compl. ¶ 122.

The contracts will also result in unmanageable delays for Salem, Atlantic, and Burlington's court calendars. Verified Compl. ¶ 123. If Cumberland inmates are given priority, which they would have to be to allow any chance of an on-time arrival in Bridgeton, this will delay the process for Salem, Atlantic, and Burlington County inmates being transported to their appearances in the Superior Courts of those counties. And these delays will undoubtedly delay the proceedings themselves. The remote housing of Cumberland inmates will simply prolong the entire adjudicatory process, and generally wreak havoc on the Judiciary's ability to process cases. Verified Compl. ¶ ¶ 123, 124.

The Public Health Impact

Cumberland County's plan to scatter its inmates across three separate counties, requiring daily busing of dozens of inmates back and forth each day, will also have profound public health consequences given the current COVID-19 pandemic.¹¹

¹¹ In response to the threat of COVID-19, Governor Murphy declared a State of Emergency and a Public Health Emergency on March 9, 2020. See Executive Order No. 103 (2020) (Mar. 9, 2020). This emergency declaration has

There is currently no cure or vaccine for COVID-19; the primary and most effective precautionary treatment is social distancing. Social distancing, though, is next to impossible in a custodial setting. Jail and prison inmates are particularly vulnerable to pathogens like COVID-19, and incarceration is an ideal environment for the transmission of contagious disease.¹² According to public health experts, incarcerated individuals “are at special risk of infection, given their living situations,” and “may also be less able to participate in proactive measures to keep themselves safe” because “infection control is challenging in these settings.”¹³ Accordingly, in light of this danger, earlier this year our Supreme Court issued an unprecedented order requiring the immediate release of several categories of jail inmates, numbering in the thousands. See Consent Order, In the Matter of the Request to Commute or Suspend Certain County Jail Sentences, Supreme Court of New Jersey (Mar. 23, 2020). As the Court later made clear, “the risks [of] COVID-19 . . . are amplified in jail settings.” In re Request to Modify Prison Sentences, Expedite Parole Hearings, and Identify Vulnerable Prisoners, ___ N.J. ___, ___ (2020) (slip op. at 7).

New Jersey’s prison and jails have been ravaged by the disease. As a committee of the New Jersey Senate has recognized, “[t]he COVID-19 death rate of inmates in New Jersey is the highest in the country . . . and inmates in this State have been afflicted at a particularly alarming rate, as the inability of inmates to quarantine or practice social distancing creates a higher risk to their lives.” Statement of the Senate Commerce Committee to Senate, No. 2519 (July 23, 2020);

been extended six times, and remains in effect. See Executive Order No. 186 (2020) (Sept. 25, 2020).

¹² See Joseph A. Bick (2007). Infection Control in Jails and Prisons. Clinical Infectious Diseases 45(8):1047-1055 (Oct. 2007), available at <https://doi.org/10.1086/5219101>

¹³ See Achieving A Fair and Effective COVID-19 Response: An Open Letter to Vice-President Mike Pence, and Other Federal, State, and Local Leaders from Public Health and Legal Experts in the United States, (March 2, 2020), available at <https://bit.ly/2W9V6oS> (last accessed March 19, 2020).

available at https://www.njleg.state.nj.us/2020/Bills/S3000/2519_S1.HTM (last visited Oct 14, 2020).

Given the heightened risks of infectious disease transmission in jail settings, and the necessity of social distancing, there can be no question that Cumberland's plan to scatter hundreds of inmates around the state constitutes a risk to public health. Transferring hundreds of inmates across three facilities each day will increase the comingling of different inmate populations, and increase those inmates' contacts with corrections officers, attorneys, and court staff, thereby undoubtedly increasing the potential for disease transmission. It is simply not safe — for inmates, attorneys, court staff, judges, corrections officers, even the bus drivers — to comeingle and transport inmate populations to the extent contemplated by the Defendant Counties' contracts during the pendency of the declared public health emergency in New Jersey.

Further, the pandemic also amplifies all the existing logistical deficiencies identified above. Transporting dozens of inmates around the state is a complex endeavor even under the best of circumstances. Verified Compl. ¶¶ 48, 112-16. But adding in additional infection-related protocols, and the need to maximize social distancing by limiting the number of inmates that can be moved at any one time, renders the plan impossible to execute. Further transmission of the disease will also require quarantining of those exposed, which could ground court operations to a halt.

Neither the DOC nor the Judiciary has approved of the transfer for Cumberland inmates, en masse, to the out-of-county facilities.

The Commissioner of the DOC is responsible for, among other things, coordinating the need for correctional facilities, and regulating minimum standards for the housing of all inmates within the State of New Jersey, including those in local correctional facilities such as the MCCC. Verified Compl. ¶¶ 125-133. As such, the Commissioner issues rules and regulations governing

the operation of adult county correctional systems. Verified Compl. ¶¶ 125-133; See N.J.S.A. 30:1B-6, -10; N.J.A.C. 10A:31-1.1 et seq. State regulations require that prior to counties undergoing major changes to the appearance or condition of an existing correctional facility, they must submit such plans for approval by the Commissioner of the DOC. Verified Compl. ¶ 126.

Furthermore, regulations require that adult county correctional facilities be geographically accessible to the officers of the court, attorneys and law enforcement officers and members of the public. Verified Compl. ¶ 132. This includes being accessible by public transportation. Verified Compl. ¶ 132; N.J.A.C. 10A:31-3.4(b). The regulations also specifically provide that sufficient space for contact and non-contact visits must be provided in all adult county correctional facilities. Verified Compl. ¶ 133. There must be interview areas that allow for confidential consultation with attorneys, as well as visitors, clergy, and parole and probation officers. Verified Compl. ¶ 133; N.J.A.C. 10A:31-3.14(a), (b); N.J.A.C. 10A:31-3.4(s).

Plaintiffs have requested, through OPRA requests, documents relating to the closure of substantial portions of the CCJ, including any requests for approval of the decision made by the Defendant Counties to the DOC. Verified Compl. ¶ 134. Even if such permissions have been sought, Plaintiffs reasonably believe that key considerations, such as inmates' access to counsel, were not adequately addressed. The resolutions and contracts are largely, if not entirely, silent on this issue,¹⁴ and there is no indication that anyone in authority at any of the Defendant Counties considered input from the OPD as to effect on attorney-client relations that would result from the closing of the CCJ and the transfer of its inmates to various correctional facilities throughout the

¹⁴ The only contract to mention the issue is the one with Atlantic. To accommodate Cumberland inmates, the Atlantic Contract specifically requires Defendant County of Atlantic to make physical alterations to the ACJF through various construction projects totaling \$450,000. While the contract acknowledges the need to seek DOC approval before construction begins, Plaintiffs reasonably believe that no such approval has been granted to date, and the first wave of inmates to be transported to the ACJF is on November 1, 2020. Verified Compl. ¶ 131.

state. Verified Compl. ¶ 135.

The Superior Court of Cumberland County also has authority over certain Cumberland County jail inmates. N.J.S.A 2C:43-10(c) requires the court to commit persons sentenced to terms of less than one year, “common jail of the county, the county workhouse or the county penitentiary for the term of his sentence and until released.” No person serving a term of less than one year may be transferred from one county penal institution to another county penal institution without the authorization of, and an order of, the Superior Court. N.J.S.A. 2C:43-10(g). To Plaintiffs’ knowledge, no order authorizing the wholesale transfer of inmates sentenced pursuant to N.J.S.A. 2C:43-10(c) has been secured by Defendants, and neither the assignment judge of Cumberland County nor the sentencing judge for any individual inmate has designated the ACFJ, BCJ, or SCJ as an appropriate contractor for the housing of any Cumberland County inmates. Verified Compl. ¶ 139.

LEGAL ARGUMENT

I. THE COURT SHOULD PRELIMINARILY ENJOIN DEFENDANT COUNTY OF CUMBERLAND FROM TRANSFERRING INMATES IN THE CUMBERLAND COUNTY JAIL TO THE ATLANTIC COUNTY JUSTICE FACILITY, THE BURLINGTON COUNTY JAIL, OR THE SALEM COUNTY CORRECTIONAL FACILITY, AS PLAINTIFFS SATISFY THE CRITERIA FOR SUCH RELIEF UNDER CROWE V. DEGIOIA.

A preliminary injunction is justified under Rule 4:52-1 when: “(1) relief is needed to prevent irreparable harm; (2) the applicant’s claim rests on settled law and has a reasonable probability of succeeding on the merits; and (3) balancing the relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were.” Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013) (citing Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982)). The Plaintiffs in this matter have satisfied each of the Crowe factors for a preliminary injunction.

Once the transfers begin, Cumberland County inmates will be detained across three counties, encompassing hundreds of square miles, but their necessary court appearances — and court-appointed attorneys — will remain in Bridgeton. For court proceedings, then, Cumberland County will be required to execute an untenably complicated scheme of transportation to retrieve inmates from any one of three facilities and bus them up 62 miles to Bridgeton, often for a proceeding beginning before 9 a.m. For even the most sophisticated of organizations, this proposal would require a near-impossible level of logistical precision. But here, Cumberland County has no semblance of a plan in place to ensure inmates — up to 60 each day from three separate facilities on opposite ends of South Jersey — will be able to timely appear for court proceedings. For some inmates, like Plaintiff Freeman and Plaintiff Parrish, they will have to be shipped to court in Cumberland dozens of times over the course of years.

What's more, Cumberland County has made no provisions regarding the inmates' access to counsel while they are housed scores of miles away in remote facilities. While inmates in Cumberland County are accustomed to residing at the CCJ, a one-minute drive away from the court and their counsel's office, some of them would now be housed up to a two-and-a-half-hour round-trip drive away in Burlington County. Others, still, would be a nearly a two-hour round trip, across slow and often two-lane backroads, in Mays Landing. Despite these new barriers to inmates' effective relationship with their attorneys, Cumberland County's plan includes no details about needed additional conference room facilities for in-person consultation, ore even additional videoconference technology or increased internet capability, for attorneys or family members, who still live in Cumberland County, to communicate with inmates.

There can be no question that these deficiencies, inherent to Cumberland County's plan, will inflict irreparable harm on all Cumberland County inmates. Cumberland County inmates will

be deprived of necessary in-person time with their OPD attorneys, the ability to be present for their court appearances, and the ability to confer with family members and potential witnesses necessary to their defense. These are core Sixth Amendment rights that, once infringed, can never be reclaimed. The Plaintiffs' claims thus rest on the settled and fundamental rights of every criminal defendant to effective assistance of counsel and to present his or her own defense, which will be denied by Defendants' actions. And the balance of the hardships to the parties most certainly weighs in Plaintiffs' favor, as a preliminary injunction will simply force Defendant County of Cumberland to continue during this litigation to do what it has done for decades: house Cumberland County inmates in its jail.

A. Plaintiffs Will Suffer Immediate And Irreparable Harm If Defendants' Planned Transfers Are Permitted To Occur Because They Will Be Deprived Of In-Person Time With Their Attorneys And Loved Ones Which They Can Never Get Back And Which Is Vital And Necessary To Preparing A Criminal Defense.

Time and again, courts have reaffirmed the principle that, as a matter of law, a violation of a constitutional right constitutes "irreparable harm." See, e.g., Elrod v. Burns, 427 U.S. 347, 373-74 (1976); Mitchell v. Cuomo, 748 F.2d 804, 806 (2d. Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); City of Orange Tp. Bd. of Educ. v. City of Orange Tp., 451 N.J. Super. 310, 322 (Law Div. 2017) ("Plaintiff is describing a situation in which the City's residents had their constitutional rights infringed upon. This deprivation . . . cannot be redressed by any sum of money. Thus, the harm is irreparable under Crowe."); see also Greater Phila. Chamber of Commerce v. City of Phila., 949 F.3d 116, 133 (3d Cir. 2020) ("[I]rreparable harm, though . . . is generally presumed where the moving party's freedom of speech right is being infringed."); Cerro Metal Prods. v. Marshall, 620 F.2d 964, 974 (3d. Cir. 1980) ("[A]n inspection violating the Fourth Amendment would constitute irreparable injury for which injunctive relief would be

appropriate.”).

Here, Plaintiffs set forth allegations and evidence, by way of a verified complaint, that Defendant County of Cumberland’s closing of substantial portions of the CCJ and its transfer of hundreds of current and thousands of future inmates to Atlantic, Burlington and Salem Counties will violate their federal and state constitutional rights to effective assistance of counsel, a speedy trial, and due process and equal protection of the law. In fact, infringements of these constitutional rights in particular have resulted in the type of equitable relief Plaintiffs seek here. See Cobb v. Aytach, 643 F.2d 946, 961 (3d Cir. 1981); see also Joseph E. Krakora, et al., v. County of Mercer, et al., Docket No. MRS-L-002489-19 (Law Div. Dec 24, 2019). Thus, there is no question that Plaintiffs have amply satisfied the “irreparable harm” prong of the Crowe test.

In concrete terms, the transfer plan at issue will place CCJ inmates at such a distance from their counsel that it will function to deny them their Sixth Amendment rights. To be sure, the impact of inadequate access to counsel is profound at any stage, but it is particularly damaging for someone who is detained pre-trial. In fact, “[a]s the Supreme Court has recognized, ‘to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.’” Benjamin v. Fraser, 264 F.3d 175, 185 (2d Cir. 2001) (quoting Maine v. Moulton, 474 U.S. 159, 170 (1985)). This is because at the pre-trial stage, it is absolutely essential for a defendant to be able meet with his or her attorney regularly: to discuss the defense, review voluminous and complicated discovery, and to develop an attorney-client rapport that will be crucial throughout the trial.

For the CCJ inmates transferred to Atlantic or Burlington, though, the prohibitive travel time and distance alone will make it extremely difficult for those Cumberland attorneys to visit their clients, let alone with the regularity needed to effectively represent clients charged with

serious crimes like Plaintiff Freeman and Plaintiff Parrish. Verified Compl. ¶ 31A, B. Even for individuals charged with less serious offenses, the distance is prohibitive if the case involves an abundance of digital discovery that must be reviewed, and complex legal issues that must be explained. For a Cumberland OPD attorney to visit a client at the BCJ, the round-trip journey is 124 miles. Verified Compl. ¶ 79. Depending on the time of day, if there is traffic, this comprises up to a two-and-a-half hour trek. For an attorney going to the ACJF, the journey is approximately 64 miles round trip, but can take up to 50 minutes each way due to lower-speed-limit roads. Verified Compl. ¶ 80. Of course, any construction or traffic delays could extend the trip significantly. Given current wait times at AJCF, and the roundtrip distance, a visit to Mays Landing from Cumberland for even a single client visit would amount to a whole day affair. Verified Compl. ¶ 82.

In Salem, although the travel distance on its own is substantial but not as prohibitive, the SCJ is already plagued by delays and mismanagement. Verified Compl. ¶ 42-55. Even before the pandemic, out-of-county attorneys at the SCJ had to contend with overburdened facilities, long wait times, nonconfidential interview rooms, and a dysfunctional inmate transportation system that often failed to retrieve clients from Gloucester County when needed. Verified Compl. ¶ 44-49. Since COVID-19 has halted in-person attorney-client consultation, though, the situation has worsened considerably.¹⁵ The SCJ provides only six video booths for hundreds of inmates, and four county courts receive video scheduling priority over attorneys. Verified Compl. ¶ 50. There is already an overwhelming demand to schedule videoconferences, and even currently, without an

¹⁵ To be sure, each proposed transfer jail is dealing with backlog and delay as a result of existing facility-constraints that have been exacerbated by the pandemic. In Burlington, there are only three interview rooms and three videoconference for 291 inmates at the BCJ. Verified Compl. ¶¶ 40, 41. Additional detainees from Cumberland will undoubtedly burden these limited resources. Verified Compl. ¶ 41. The ACJF, too, provides extremely limited attorney consultation space, and given social-distancing mandates during the pandemic, OPD attorneys routinely wait between two and three hours to confer with a single client. Verified Compl. ¶ 34-37.

influx of new inmates, Salem and Gloucester OPD attorneys have at times been completely unable to confer with their clients. Verified Compl. ¶ 51. There is no question, then, that shipping 50 inmates from Cumberland to the SCJ's already overtaxed facilities will exacerbate the deficiencies, further resulting in a denial of inmates' right to counsel. And despite these glaring issues, the Salem Contract provides no concrete strategy or plans to ensure inmates' regular communication with their counsel. Verified Compl. ¶ 68-72. Salem has not indicated it will provide additional videoconferencing technology, or new dedicated facility space, and the Contract does not even detail how Salem will bus inmates to Cumberland for their court appearances. Verified Compl. ¶ 68, 70.

When prohibitive travel time and distance is coupled with the already tight windows in which time-strapped Cumberland OPD attorneys can visit their clients due to their other commitments in Cumberland County, Cumberland OPD attorneys will simply be unable to see their clients housed elsewhere. The rights of those clients to receive effective assistance of counsel will not only be impacted, but eviscerated entirely. With the current plan, a Cumberland inmate's time with his OPD attorney, or lack thereof, is something he will never get back; stated differently, it will cause that inmate irreparable harm.

Lack of time with their attorneys is just one harm that will befall inmates of Cumberland County. Inmates rely heavily on visitation from their family and friends, not only for emotional support, but to assist in mounting a defense. Family and friends are essential to identify witnesses or to simply provide useful information to a defendant, and this requires family visits as often as possible. But families would not be able to continue with such visits, at least at their current rate, if inmates are housed 32 miles away in Atlantic City, or more than 62 miles away in Burlington. Many family members are simply not going to make a nearly three-hour roundtrip journey. The

benefits of this time is something Cumberland County inmates can never get back.

To be sure, in order to receive preliminary relief, the irreparable harm cannot be speculative. See Peregoy v. Peregoy, 358 N.J. Super. 179, 203 (App. Div. 2003); see also Revel AC, Inc. v. IDEA Boardwalk LLC, 802 F.3d 558, 571 (3d. Cir. 2015) (“To establish irreparable harm, a stay movant must demonstrate an injury that is neither remote nor speculative, but actual and imminent”) (citation omitted). Here, however, there is nothing speculative about what will happen if Defendants’ planned transfers are permitted to occur. It is a verified fact that given their voluminous caseloads, and their myriad responsibilities both in and out of court, Cumberland County OPD attorneys have a very limited amount of time to visit their clients in the CCJ, and they are *only* able to accomplish such visits because the CCJ is located .3 miles from their office in Bridgeton. Verified Compl. ¶¶ 23; 30. (By car, the journey to the CCJ is approximately one minute.) It is also a verified, and indeed, an indisputable fact, that from the OPD office in Bridgeton, it is approximately 20 miles to the SCJ (30 minutes), 32 miles to the ACJF (50 minutes), and 62 miles to the BCJ (one hour and fifteen minutes minimum). Verified Compl. ¶¶ 79, 80, 81. It is also a verified fact that OPD attorneys in each of the three counties currently experience long wait times to see their clients, sometimes in excess of two hours. These facts are real and concrete and have been verified by the managers of the Cumberland, Salem, Burlington and Atlantic County OPD offices. The combination of these verified facts will make it virtually impossible for Cumberland County OPD attorneys to visit their clients in Atlantic, Burlington, or Salem Counties. Once Plaintiff Freeman and Plaintiff Parrish are shipped away, their attorneys will be unable to visit them there -- and there is nothing speculative about it.

B. *Plaintiffs’ Claims Rest on Settled Law and Have a Reasonable Probability of Succeeding on the Merits On Each of Its Claims.*

The second Crowe factor requires the applicant to show that its “claim rests on settled law

and has a reasonable probability of succeeding on the merits.” Garden State Equal., 216 N.J. at 320. Only when “the legal right underlying the claim is unsettled” should temporary relief be withheld. Crowe, 90 N.J. at 133. Under both the United States Constitution and the New Jersey State Constitution, the law is clear and settled: criminal defendants have the right to effective assistance of counsel, which includes the right to reasonable access to counsel. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Cobb, 643 F. 2d at 957-58; State v. Fritz, 105 N.J. 42, 60 n.2 (1987). Because the planned transfers of Cumberland County inmates to remote jails hours away, with inadequate facilities and policies, will render it virtually impossible for those individuals to receive effective assistance of and reasonable access to counsel, Plaintiffs are reasonably likely to succeed on their claim that Defendants’ planned transfers will violate those constitutional rights. And, as discussed further below, Plaintiffs are also reasonably likely to succeed on each and every additional claim in their Verified Complaint, including that the planned transfers will violate their rights to a speedy trial, due process and equal protection of the law, and further violate multiple regulatory and statutory provisions concerning the oversight of county inmates.

It is well-settled law that the right to counsel is a fundamental right guaranteed by the Sixth Amendment to the United State Constitution. Cobb, 643 F.2d at 957-58. Indeed, “[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.” Gideon v. Wainwright, 372 U.S. 335, 344 (1963). Moreover, the right to counsel presumes the right to *effective assistance* of counsel. Strickland, 466 U.S. at 687-88. A multitude of Supreme Court cases, including Padilla v. Kentucky, 559 U.S. 356 (2010), Lafler v. Cooper, 566 U.S. 156 (2012), and Missouri v. Frye, 566 U.S. 134 (2012), have recognized that, particularly in a system in which guilty pleas predominate, constitutionally effective representation

also requires constitutionally adequate client counseling. The Sixth Amendment requires that lawyers understand and correctly advise clients on the legal consequences of any plea, including collateral consequences such as deportation and also give clients legal advice that accurately reflects the application of the law to the client's particular situation. Padilla, 559 U.S. at 373. Courts now recognize that in the era of plea bargaining, client counseling by criminal defense lawyers plays an essential role, of constitutional dimensions. See, e.g., Lafler, 566 U.S. at 170.

Obstacles to a pre-trial detainee's access to counsel, then, such as detention at an unreasonable distance from the courthouse and counsel, or the imposition of unreasonable waiting times on attorney-client visits, have been held to violate both the constitutional guarantees of the Sixth Amendment right to effective assistance of counsel and the Sixth Amendment's right to a speedy trial. Cobb, F.2d at 959-60. For instance, in Cobb, the Court of Appeals for the Third Circuit upheld injunctive relief for pre-trial and post-trial (but unsentenced) detainees being shipped from Philadelphia to various facilities around the Commonwealth. In granting such relief, the court relied on the findings of fact of the federal District Court, which painted an eerily similar portrait to the situation here in Cumberland County:

The Defender Association of Philadelphia represents 80% of the incarcerated defendants in Philadelphia County prisons. Prior to trial the assistant defender representing a defendant goes to the prison and interviews him respecting the facts of the case, possible witnesses, his background and psychiatric services. [These] interviews are essential to the defense because they allow the attorney to develop the necessary attorney-client relationship and to prepare the case. It is often necessary for these attorneys to interview clients at the post-trial stage in order to prepare for sentencing. The Defender Association of Philadelphia . . . lacks . . . the resources of money and time to conduct either type of attorney-client interview at the Commonwealth institutions distant from Philadelphia to which transfers were made. Most of the untried inmates who were transferred . . . and represented by the Defender Association were deprived of these pretrial interviews. On several occasions, transferees missed court appearances and parole hearings when they were not returned to Philadelphia on time. Due to continuances and the prolongation of the pretrial period some transferred inmates spent more time in pretrial incarceration than the eventual length of their sentences.

[Id. at 951].

The Third Circuit also observed that the transfers removed inmates from proximity to “family and friends, which . . . obviously curtailed the ability of the defendants to communicate with potential witnesses through those most likely to be willing to assist.” Id. at 960. As a result, the court held that the transfers violated the inmates’ rights to effective assistance of counsel, to a speedy trial, and to assist in one’s own defense and, therefore, enjoined the transfers. Id. at 961-62.

The Cobb court also saw no difference between pre- and post-trial (but unsentenced) inmates under the Sixth Amendment:

Unsentenced inmates retain important sixth amendment rights to speedy trial and effective assistance of counsel. It would be a strained construction of the speedy trial clause to hold that it protected the right to a prompt trial but permitted indefinite postponement of sentencing of a defendant unable to make bail. Most significantly, however, sentencing is a critical stage of a criminal proceeding to which the sixth amendment’s guarantee of the effective assistance of counsel applies.

[Id. at 962 (citations omitted)].

Relying on Cobb, other federal courts have come to similar conclusions regarding the remote incarceration of inmates. See Covino v. Vermont Dep’t of Corr., 933 F.2d 128, 130 (2d Cir. 1991) (reversing District Court’s order for summary judgment and instructing court to address “whether the transfer [56 miles away] unconstitutionally impaired Covino’s sixth amendment right of access to his trial counsel”); Copeland v. Mercer Cty. Corr. Ctr., No. 17-5780, 2019 U.S. Dist. LEXIS 127754, at *13-14 (D.N.J. July 30, 2019) (finding that plaintiff’s complaint that his transfer from Mercer to Essex County violated his constitutional rights survived summary judgment because, inter alia, there was evidence that transfer resulted in at least two missed court appearances, difficulty communicating with his public defender, and denial of opportunity to be

interviewed for his pre-sentence report); Washington v. City of New York, No. 18-Civ-12306, 2019 U.S. Dist. LEXIS 77130 (S.D.N.Y. 2019) (denying motion to dismiss where plaintiff argued that transfer to facility 160-miles away impermissibly impaired visitation with counsel).

Furthermore, a jail's regulations, conditions, and policies violate the Sixth Amendment when they "unreasonably burden[] the inmate's opportunity to consult with his attorney and to prepare his defense." Fraser, 264 F.3d at 179; see also State v. Fusco, 93 N.J. 578, 589-90 (1983) ("[A] restriction on a defendant's right to communicate with counsel during an overnight recess . . . constitutes the deprivation of a right so fundamental that it is reversible error and prejudice need not be shown."). In Fraser, "defense attorneys routinely face[d] unpredictable, substantial delays in meeting with clients detained at Department facilities" throughout New York City. Id. at 179. The attorneys were "forced to wait between 45 minutes and two hours, or even substantially longer, after arriving at a facility to see a client," which was due to a number of factors, such as the facilities having "few counsel rooms relative to the number of detainees housed at the facility" and that "certain detainees may not be moved to counsel rooms without escort officers." Ibid. The Second Circuit held that these substantial delays violated the detainees' right to counsel under the Sixth Amendment. Id. at 188.

With respect to the State constitution, there is no published appellate case law on the issue of the remote incarceration of inmates. However, New Jersey courts have vigorously protected an indigent defendant's right to counsel, in many cases beyond the protections of the Sixth Amendment to the United States Constitution. As explained by our Supreme Court:

Although the language of Article 1, Paragraph 10 of the New Jersey Constitution is virtually identical with that of the Sixth Amendment, we have held in other contexts that the State Constitution affords greater protection of the right to counsel than is provided under the federal constitution So steadfast has been our commitment that we have secured the right to counsel in settings in which that right has not been assured by federal law. For example, the right to counsel of indigent defendants has

existed in this state since 1795 -- more than 150 years before the United States Supreme Court put the indigent's right to counsel on a federal constitutional basis. Indeed, this State recognized an indigent's right to counsel not only before the United States Supreme Court, but before any other state had recognized that right.

[State v. Sanchez, 129 N.J. 261, 274-75 (1992) (citations omitted)].

Thus, there is thus good reason to believe that our courts would and should treat the issue even more favorably than the federal courts.

In fact, there is recent evidence that, at least in the Law Division, the Sixth Amendment's constraint on remote incarceration is being taken seriously. In January of this year, the Honorable Lisa P. Thornton, A.J.S.C., enjoined the Monmouth County Prosecutor's Office from detaining a Monmouth County inmate 23 miles away at the Ocean County Jail. See Sloan v. Monmouth County Sherriff Shaun Golden et al., Docket No. MON-L-1941-19 (Law Div. January 7, 2020). (Pa 1-12)¹⁶ Citing the Third Circuit's opinion in Cobb, as well as a certification by counsel regarding the substantial challenges the increased distance posed to the inmate's Sixth Amendment rights, Judge Thornton ruled that the inmate's transfer violated the law because it was done without "notice or a right to be heard," and, critically, without a "legitimate purpose for the transfer." Id. at 9; see also id. ("It goes without saying that the Legislature did not contemplate a situation where detainees charged in one County would be committed in another, without justification."). Judge Thornton rejected the county defendants' argument that the inconvenience caused by the transfer would be minimal, ruling that the counties had failed "to acknowledge the difficulties courts endure when attempting to secure [criminal] defendants outside their respective counties." Id. She ordered the inmate returned to Monmouth County immediately. Id.

Further, just last year, Judge Minkowitz, A.J.S.C., considered the issue of the wholesale transfer of inmates from one county to another, and rejected a plan by Mercer County that was as

¹⁶ Pa refers to Plaintiff's appendix to this Memorandum of Law, which is attached hereto.

ill-advised and poorly thought-out as Cumberland County’s plan is now. See Joseph E. Krakora, et al., v. County of Mercer, et al., Docket No. MRS-L-002489-19 (Law Div. Dec 24, 2019). (Pa 13- 29) In that case, Mercer County sought to ship the vast majority of its jail inmates to the Hudson County Correctional Center (“HCCC”), 60 miles away. Mercer County Correctional Center was to transform “into merely an intake and processing center for those going or coming from HCCC.” (Pa 17) Despite an agreement calling for the HCCC to house a minimum of 300 Mercer County inmates per day, the deal was initially silent on the mechanics or plan of transportation, and further silent on how Mercer attorneys would be able to routinely confer with their clients, more than an hour’s drive away. Mercer County also failed to plan for how family visitation at such a distance would be accommodated, beyond noting that Mercer inmates would be allowed routine family visits. (Pa 17)

The OPD sued, seeking a preliminary injunction on account of the grievous and irreparable harm Mercer County’s plan would inflict upon Mercer County jail inmates’ access to counsel. In response to the litigation, Mercer County updated their plan somewhat — it made provisions for videoconferencing at HCCC, and daily busing. But the plan was hardly more than a rough outline of various practices Mercer and Hudson Counties proposed to one day implement, and none of their plans were contained in the initial agreement, they were only prepared for the purposes of litigation in the form of certifications prepared by the wardens of Mercer and Hudson’s jails. (See Pa 30-40)

The Court found even this updated set of proposals insufficient. On December 24, 2019, Judge Minkowitz ruled that the plan, as conceived, would impose irreparable harm upon all plaintiffs: OPD attorneys; their clients; and the union representing corrections officers, who had intervened due to the serious safety concerns of busing inmates across the state every day.

Regarding the two individual plaintiffs, Mercer County inmates, Judge Minkowitz found that “their right to effective assistance of counsel will be violated if the existing [a]greement is executed.” (Pa 26) Thus, the court granted the preliminary injunction, stopping the transfer plan during the pendency of the litigation, and finding that plaintiffs satisfied their burden to prove all four prongs of the Crowe test. (Pa 13-15, 29)

Judge Minkowitz, cognizant of the need — indeed, constitutional guarantee — of inmates to access their counsel and present a defense, was particularly troubled by the counties’ lack of specifics to ensure counsel and client would be able to communicate effectively. The court found that the transfer agreement must be preliminarily enjoined because, “[a]s it stands, there does not appear to be any plan, whatsoever, by either Mercer or Hudson, to facilitate the remote consultation of detainees with anyone in Mercer County.” (Pa 20) The court further found that “the appropriate video technology for remote attorney-client consultation and consultation with friends and family is not in place,” and that the absence of this technology placed an impermissible “strain[]” on Mercer County inmates’ right to effective assistance of counsel. (Pa 26) In balancing the harms, the court ruled that Mercer County’s desire to “save funds or earn revenue . . . do[es] not outweigh the greater harm associated with the potential violation of three-hundred and thirty-six (336) detainees’ constitutional rights.” (Pa 27)¹⁷

Here, Defendant Cumberland County’s plan suffers from the same — if not *more profound* — deficiencies that required enjoining the Mercer County plan. What troubled Judge Minkowitz the most was the lack of concrete and specific proposals on behalf of Mercer County, but here, Cumberland County offers even less. The contracts provide scant information regarding provisions

¹⁷ The Defendants did not seek interlocutory appeal of the preliminary injunction, but rather an interlocutory appeal of the denial of Defendants’ later motion for reconsideration (that had been denied). The Appellate Division summarily denied leave to appeal. Joseph Krakora v. County of Mercer and its Board of Chosen Freeholders, et al., No. AM-000340-19 (App. Div. April 16, 2020).

for attorney or family visits, and none of them contain any details regarding how to facilitate virtual attorney-client communication, or which county is responsible for ensuring the technology is ready and operable before the transfers are slated to begin. Verified Compl. ¶ 75. Just as Judge Minkowitz found that the Mercer County plan could not go forward because “there [did] not appear to be any plan, whatsoever . . . to facilitate the remote consultation of detainees” and that “the appropriate video technology for remote attorney-client consultation and consultation with friends and family [was] not in place,” (Pa 26) so too should this Court halt the half-baked and ill-conceived plan here.

Cumberland County’s proposal is also far more complex than the undertaking enjoined between Mercer and Hudson. While the Mercer plan involved transfer to only one other facility, here, Cumberland County plans to fan its inmates out to three different counties, across hundreds of square miles. This would create a transportation logistics challenge that Cumberland County is woefully unprepared to meet. Regarding transportation, each contract has but a short, one paragraph statement that merely indicates that “[t]he Cumberland County Department of Corrections shall be responsible for transporting the inmates” Verified Compl. ¶ 68. There are no other details regarding how this tripartite, cross-state endeavor would operate. There is no information in the contracts regarding how Cumberland would accomplish such frequent and daily shuttling to and from three separate counties in terms of staffing, equipment, vehicles, and the overall logistics of such an endeavor. Verified Compl. ¶ 121.

But what’s worse, this proposal would create an impossible situation for Cumberland OPD attorneys. As in the Mercer County jail, the majority of inmates in the CCJ, including pre-trial and post-trial (yet unsentenced) detainees, are clients of the Cumberland County regional office of the OPD and are represented by staff attorneys from that office. Verified Compl. ¶ 18. To effectively

represent their clients, these staff attorneys depend upon in-person access to their detained clients that does not involve hours of travel and waiting time. In fact, the *only* reason that such access is currently possible is because the CCJ is located a mere .3 miles, and a one-minute drive, from their office in Bridgeton and from the courthouse. Between their in-court and out-of-court demands, Cumberland OPD staff attorneys are able to find or create small windows of time to go to the CCJ and meet with a client about “the facts of the case, possible witnesses, his background and psychiatric services,” as well as review discovery (particularly digital discovery), all of which can only be done in-person. Cobb, 643 F.2d at 951. “These interviews are essential to the defense because they allow the attorney to develop the necessary attorney-client relationship and to prepare the case.” Ibid.¹⁸

But if Cumberland OPD attorneys are required to drive anywhere between 60 and 120 miles further away, roundtrip, on New Jersey’s congested or slow-moving roads, they simply will not be able to conduct client interviews – at least not at the expense of ignoring every other professional responsibility waiting for them in Cumberland County, including court appearances. For Cumberland County OPD attorneys forced to trek to the BCJ, the commute — one hour and fifteen minutes on a good day — is as bad, if not worse, than the commute between Mercer and Hudson. And under this plan, attorneys at the Cumberland OPD could have clients in all three

¹⁸ This is particularly problematic in light of the Criminal Justice Reform Act (“CJRA”), N.J.S.A. 2A:162-15 to -26, which overhauled the existing bail system and created a system that “favors pretrial release and monitoring as the presumptive approach and limits preventive detention to defendants who actually warrant it.” State v. C.W., 449 N.J. Super. 231, 249 (2017) (internal quotation marks omitted). Under the CJRA, a court ordinarily “shall make a pretrial release decision for the eligible defendant . . . [no] later than 48 hours after the eligible defendant’s commitment to jail.” N.J.S.A. 2A:162-16b(1) (emphasis added). And even when the State moves for pre-trial detention upon arrest, the hearing on such a motion is also subject to tight timeframes, as it must occur “no later than the eligible defendant’s first appearance,” or “within three working days of the date on which the prosecutor’s [pretrial detention] motion was filed, unless the prosecutor or the eligible defendant seeks a continuance.” 2A:162-19d(1). Cumberland OPD attorneys must therefore meet with their clients in the county jail almost immediately following their clients’ arrest (and certainly within the first 48 hours) to represent them at the detention hearings—a virtual impossibility if those clients are housed 32 or 62 miles away.

counties at once, necessitating an impossible 145-mile trek across South Jersey, simply to fulfill their statutory and constitutional duties to their clients.

And even if Cumberland attorneys only had to drive to one facility in Mays Landing or Mount Holly to conduct an interview, they would arrive there and be faced with upwards of a two-hour wait due to inadequate visitation policies and space constraints — which alone is a Sixth Amendment violation. Verified Compl. ¶¶ 117; 119, 123. Each of these results standing alone, but certainly together, would result in the significant impairment, if not the total destruction, of Plaintiffs' right to effective assistance of counsel under the federal and state constitutions.

To the extent that videoconferencing is offered as the exclusive alternative to in-person client visits, it is a wholly inadequate substitute and infringes on the establishment and maintenance of the attorney client relationship that is at the core of a zealous defense. Criminal defense attorneys already face great challenges in developing a rapport with clients: individuals who, facing perhaps the greatest crisis of their lives, are reeling from their loss of liberty and already distrustful of lawyers. Verified Compl. ¶ 88. Many clients also have additional challenges as members of vulnerable populations, including those with mental illness, disabilities, substance abuse issues, and language barriers, that can make even in-person communication tremendously difficult. Verified Compl. ¶ 88. But an attorney's ability to communicate with his client is no doubt further hampered by video conferencing, as natural spoken communication is stilted because video-conferencing technology only permits one person to speak at a time, and there are also frequently delays and audio distortion. Videoconferencing also limits essential non-verbal communication through gestures, touch, or facial expressions. Verified Compl. ¶ 90.

This is compounded by the fact that attorneys must gather large amounts of information from their clients, usually concerning extremely sensitive personal matters, and further, must relay

large amounts of information to their clients, like complex legal issues or complicated and voluminous digital discovery. Verified Compl. ¶ 92-93. In the cases of Plaintiff Freeman and Plaintiff Parrish, their attorneys have to relay information contained in dozens of video statements, surveillance clips, body camera videos, cell phone dumps, expert reports, and hundreds of photographs. Verified Compl. Verified Compl. ¶ 31. This has required each attorney, until now, to visit 25 times with Plaintiff Freeman and over 20 times with Plaintiff Parrish. Verified Compl. ¶ 31. Such meetings simply cannot take place over videoconference; there is certainly an impingement to the attorney-client relationship under such circumstances.

The curtailment of Cumberland OPD attorneys' access to their clients housed in the out-of-county will also have a ripple effect that impinges on other fundamental rights. By virtue of not meeting with their Cumberland OPD attorneys, the Cumberland County inmates housed elsewhere will be completely unprepared to make any decisions about their cases, thus prolonging their incarceration as they wait to resolve their criminal cases, in violation of the Sixth Amendment's guarantee to a speedy trial. The inevitable transportation delays and cancellations will further prolong and impair the entire adjudicatory process.

In the end, shipping Cumberland County inmates so far away from their communities, the venue of their case, and the locale of their counsel will destroy their access to counsel, isolate them from their family and friends, prolong their time of incarceration and make all their appearances in court the subject of a travel ordeal – with attendant diminishment of energy, attention, grooming and ability to assist in their own defense. Verified Compl. ¶ 154. Given the impact of the transfers on Plaintiffs' Sixth Amendment right to counsel and to a speedy trial, the State and Federal Constitutions forbid these wholesale transfers to distant counties.

Plaintiffs are also likely to succeed on their claims under the due process and equal

protection guarantees of the Federal and State Constitutions – Count III of their verified complaint. The Equal Protection Clause as well as the Due Process provisions of the State and Federal Constitutions, operate to protect the accused from detention at distant jails. See Gideon, 372 U.S. at 344 (“From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.”).

At its core, the Equal Protection Clause of the Fourteenth Amendment requires all persons who are similarly situated to be treated alike. Guided by this principle, all classifications that governmental bodies create must be at a minimum “rationally related to a legitimate state interest.” City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). In other words, a legislative classification will be invalid if its “relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.” Id. at 446. Similarly, due process demands at least a rational basis for all legislation burdening personal rights. See Obergefell v. Hodges, 574 U.S. 644, 672 (2015).

New Jersey’s Constitution also forbids violations of equal protection and due process. Sojourner A. v. N.J. Dep’t of Human Servs., 177 N.J. 318, 332-33 (2003). Its doctrines, though, are more flexible than federal law. In general, Article One, Paragraph One requires legislation that “distinguish[es] between two classes of people” to “bear a substantial relationship to a legitimate governmental purpose.” Lewis v. Harris, 188 N.J. 415, 443 (2006) (emphasis added). This analysis operates “on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction.” Ibid. (citation omitted). Accordingly, “the more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right.” Ibid. (citation omitted). “Unless the public need justifies statutorily limiting the exercise of a

claimed right, the State's action is deemed arbitrary." Id. at 443-44.

Here, Defendants' transfer agreements, in effect, create a distinct class of county inmates in New Jersey — criminal defendants charged with crimes that occurred in Cumberland County — and treats them differently than every other county inmate in New Jersey. Unlike every other inmate in the state, this distinct class of individuals will no longer be able to meet and confer with a lawyer to prepare their legal defense. As previously indicated, the courts of this state have never approved a policy whereby criminal defendants are shipped 30 to 60 miles away from the county courthouse in which their cases are heard — especially without any mechanism or plan to maintain their in-person access to a lawyer. Defendant Cumberland County's only justification for creating this class of inmates and treating them so poorly is that it may save the County some money in its annual budget. Verified Compl. ¶ 58. That is most certainly not the type of "public need" that can justify stripping Plaintiffs of their fundamental right to effective assistance of counsel and to a speedy trial. Indeed, budgetary considerations or other economic factors play no role in defining a constitutional right, nor do they help determine if a violation of that right has occurred. See Watson v. City of Memphis, 373 U.S. 526, 537 (1963); see also Monmouth Cty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 337 (3d Cir. 1987) ("[W]here conditions within a prison facility are challenged as constitutionally inadequate, courts have been reluctant to consider costs to the institution a major factor in determining whether a constitutional violation exists."). Defendants' agreements thus violate the Federal and State guarantees to Due Process and Equal Protection of the law.

Finally, Plaintiffs should also prevail because in closing substantial portions of the CCJ and shipping off the vast majority of inmates to distant facilities, Defendants have circumvented the authority of the New Jersey DOC and the Courts.

The Commissioner of the DOC, pursuant to statutory authority, N.J.S.A. 30:1B-10, has promulgated regulations regarding minimum standards for the care, treatment, government, and discipline of any person held in a county correctional facility, including the CCJ. Those regulations, found at N.J.A.C. 10A: 31-1.1 et seq., relate to nearly all aspects of the maintenance and administration of any New Jersey adult county correctional facility. Among the regulations is the requirement that any county, including the County of Cumberland, must first request the approval of the DOC before it may begin the construction of a new facility or make major changes in the appearance or condition of any existing county adult correctional facility. The plans must meet the minimum standards established by the Commissioner of the DOC.

Also, adult county correctional facilities must be geographically accessible to the officers of the court, attorneys and law enforcement officers and members of the public. This includes being accessible by public transportation. N.J.A.C. 10A:31-3.4(b). The regulations also require that sufficient space for contact and non-contact visits must be provided in all adult county correctional facilities to allow for confidential consultation with attorneys, as well as visitors, clergy, and parole and probation officers. N.J.A.C. 10A:31-3.14(a), (b); N.J.A.C. 10A:31-3.4(s).

Here, to Plaintiffs' knowledge, Defendant County of Cumberland has not received permission from the DOC to close substantial portions of its county jail, which would certainly constitute a major change to a condition of the facility. And its plan certainly does not account for the regulations (and constitutional guarantees) regarding a facility's proximity to the court, counsel, and public transportation, as well as adequate space for contact attorney visits. Defendant County of Cumberland made the unilateral and capricious decision to enter into its agreement with the Counties of Atlantic, Burlington and Salem without any regard whatsoever for the DOC's role in the matter or for the regulations and laws that govern the housing and transfer of inmates in

New Jersey.

With respect to the role of the Judiciary, the Superior Court of each vicinage has statutorily defined responsibilities over those persons sentenced to serve time in its local institution. N.J.S.A. 2C:43-10(c), for example, requires the Superior Court to commit persons sentenced to terms of less than one year to the “common jail of the county, the county workhouse or the county penitentiary for the term of his sentence and until released.” Under subsection (g), no person serving a term of less than one year may be transferred from one county penal institution to another county penal institution without the authorization of, and an order of, the Superior Court. This regulation specifically requires “the board of chosen freeholders of such county” to seek the transfer order from the Superior Court. Ibid.

Here, as in the case with the DOC, there is no indication Defendants sought or received the approval of the Cumberland County Superior Court, which has authority over the inmates serving sentences at CCJ. Defendants flout the Court’s oversight role over these inmates in deciding to close substantial portions of the CCJ and ship hundreds of inmates dozens of miles away. The regulations governing Superior Court authority over certain inmates of the CCJ have plainly been violated, and Plaintiffs are likely to succeed on this claim as well.

C. *The Harm to Plaintiffs if the Injunction is Denied Greatly Outweighs the Harm to Defendants if the Injunction is Granted.*

The third Crowe factor requires a “balancing of the relative hardships to the parties.” Garden State Equal., 216 N.J. at 320. In this matter, Plaintiffs plainly will suffer the greater harm from the denial of injunctive relief, compared to the harm, if any, that would result to Defendants from a granting of that relief. To say the least, movement of several hundred inmates from the CCJ will wreak immediate and irreversible havoc and upheaval upon the attorney-client relationships and infringe on, if not entirely eviscerate, the inmates’ rights to effective assistance of counsel.

On the other hand, Defendants will suffer, at most, some monetary disadvantage, if indeed the agreement turns out to be a “good deal” for the Counties of Cumberland, Atlantic, Burlington or Salem. In any event, while this Court may consider “economic factors” in evaluating the balance of harms, “such considerations ordinarily cannot justify imposition of a restrictive regulation that infringes on a constitutional right.” Lanzaro, 834 F.2d at 337. “[T]he alleged imposition of administrative inconvenience” cannot “outweigh the retained fundamental rights of inmates.” Ibid.; see also, e.g., Oburn v. Shapp, 521 F.2d 142, 151 (3d Cir. 1975); Nat’l Reprographics, Inc. v. Strom, 621 F. Supp. 2d 204, 229 (D.N.J. 2009).

Thus, there is simply no comparison between the vital constitutional interests at stake on the plaintiffs’ side, on one hand, and the mere monetary considerations of the defendant’s, on the other. (See also Pa 27)(Judge Minkowitz reasoning that Mercer County’s desire to either “save funds . . . do[es] not outweigh the greater harm associated with the potential violation of three-hundred and thirty-six (336) detainees’ constitutional rights.”).

Plaintiffs clearly satisfy the third and final Crowe factor.

II. THE COURT SHOULD PRELIMINARILY ENJOIN DEFENDANT CUMBERLAND COUNTY FROM ITS PLANNED TRANSFERS TO MAINTAIN THE STATUS QUO DURING THE PENDENCY OF PLAINTIFFS’ CIVIL ACTION, ESPECIALLY GIVEN THE PUBLIC IMPORTANCE OF THE ISSUE BEFORE THE COURT.

When considering the issuance of a preliminary injunction, courts should strive to preserve the status quo until the final outcome of the litigation, even if it means placing “less emphasis on a particular Crowe factor if another greatly requires the issuance of a remedy.” Garden State Equal., 216 N.J. at 320. Further, “[w]hen a case presents an issue of ‘significant public importance,’ a court must consider the public interest in addition to the traditional Crowe factors.” Ibid. (citations omitted).

In this matter, even if the Court questions the existence or strength of any one Crowe factor, it should still grant Plaintiffs a temporary stay of the transfers. As detailed throughout this submission and Plaintiffs' verified complaint, Cumberland County is attempting to execute a complex scheme that it has made no showing it will be able to implement without wholesale denial of inmates' Sixth Amendment rights. Once the transfers take place, Cumberland County inmates truly will be deprived of time with their attorneys, which they can never get back. This will make it difficult, if not impossible, for them to expeditiously resolve their criminal cases, and it also places them at an extreme disadvantage as compared to other inmates throughout the State. This should not be permitted to happen until the Court has at least fully examined the constitutional and statutory issues presented in this case. Moreover, the substantial closure of the CCJ, which has been in existence for decades, and the transfer of its inmates to distant far off counties, is certainly a significant issue of public importance. In fact, it is difficult to imagine a more important issue affecting the criminal justice system in Cumberland County, particularly in the midst of a global pandemic. Therefore, as instructed by our Supreme Court, the Court should disallow Defendant County of Cumberland from taking any action until this important public issue is fully resolved by the Court.

CONCLUSION

Plaintiff Freeman and Plaintiff Parrish challenge the planned closing of substantial portions of the CCJ as a policy and practice that will imminently and irreparably violate their fundamental constitutional rights to effective assistance of counsel, to a speedy trial, and to due process and equal protection of the law.

Likewise, the OPD and Plaintiff Krakora, as representatives of all Cumberland County inmates, assert their clients' rights and the OPD's own institutional, professional and statutory

interest in access to their clients, in order to perform their statutory, constitutional and professional obligations to afford them constitutionally effective representation. The closure of substantial portions of the CCJ and shipment of hundreds of inmates, scattershot around the state, will inflict immediate and irreparable harm to those interests and rights.

Plaintiffs challenge, by way of prerogative writ, the Cumberland County Board of Chosen Freeholders' decision to transfer substantially all inmates from the CCJ, both pre-trial detainees and persons serving sentences of less than one year. This ultra vires act, taken in the form of an agreement between Defendants County of Cumberland and Counties of Atlantic, Burlington and Salem, should be enjoined as violating both state statutory law governing the transfer of inmates serving sentences in county facilities, and of DOC regulations requiring notice to, and the approval of, the Commissioner of the DOC, before such a decision may be implemented.

To prevent the substantial constitutional and public harm that the closing of the CCJ will cause, the Court should grant a temporary and preliminary injunction restraining transfers of inmates from the CCJ pending full and fair hearing of this matter.

Respectfully,

s/ Lauren S. Michaels, Esq.
Counsel to the Public Defender

s/ Fletcher C. Duddy, Esq.
Deputy Public Defender

NEW JERSEY OFFICE OF THE PUBLIC DEFENDER
ATTORNEYS FOR PLAINTIFFS

s/ Douglas R. Helman, Esq.
Assistant Deputy Public Defender
On the Brief

Dated: October 15, 2020

ORDER PREPARED BY THE COURT

LOUIS SLOAN,

Plaintiff,

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. MON-L-1941-19

v.

MONMOUTH COUNTY SHERIFF
SHAUN GOLDEN, OCEAN
COUNTY SHERIFF MICHAEL G.
MASTRONARDY, MONMOUTH
COUNTY CORRECTIONAL
INSTITUTE, OCEAN COUNTY
DEPARTMENT OF CORRECTIONS,
MONMOUTH COUNTY
FREEHOLDERS, OCEAN COUNTY
FREEHOLDERS, and MONMOUTH
COUNTY PROSECUTOR'S OFFICE,

Defendants.

THIS MATTER having been opened to the court by plaintiffs' action in lieu of prerogative writs;

IT IS on this 7th day of January, 2020 **ORDERED**:

1. That plaintiff shall be immediately returned to MCCI to await trial for the reasons stated in the court's opinion dated January 7, 2020.

/s/ Lisa P. Thornton
LISA P. THORNTON, A.J.S.C.

**NOT FOR PUBLICATION WITHOUT THE APPROVAL
FROM THE COMMITTEE ON OPINIONS**

LOUIS SLOAN,

Plaintiff,

v.

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO.: MON-L-1941-19

MONMOUTH COUNTY SHERIFF
SHAUN GOLDEN, OCEAN
COUNTY SHERIFF MICHAEL G.
MASTRONARDY, MONMOUTH
COUNTY CORRECTIONAL
INSTITUTE, OCEAN COUNTY
DEPARTMENT OF CORRECTIONS,
MONMOUTH COUNTY FREEHOLDERS,
OCEAN COUNTY FREEHOLDERS, and
MONMOUTH COUNTY PROSECUTOR'S
OFFICE,

Defendants.

Decided: January 7, 2020

Richard P. Lomurro, & Emeka Nkwou, attorneys for plaintiff (Lomurro, Munson,
Comer, Brown & Schottland, LLC.)

Lori D. Reynolds, attorney for defendants (O'Donnell McCord, P.C.)

THORNTON, A.J.S.C.

I.

In this action in lieu of prerogative writs, the court is asked to consider the rights of pretrial detainees as they relate to unilateral transfers from one correctional facility to another, without notice or a right to be heard. In the case at bar, defendant

Monmouth County Prosecutor's Office ("MCPO") ordered defendant's transfer from the Monmouth County Correctional Institute ("MCCI") to the Ocean County Jail ("OCJ"). Prior to the transfer, plaintiff was not afforded notice or a right to be heard. In addition, the transfer was not prompted by any concern for the safety of plaintiff, other inmates or jail personnel. The transfer was prompted simply to aid the State's prosecution by preventing the plaintiff and other co-defendants from communicating with each other prior to trial. Because pretrial detainees "have liberty interests firmly grounded in federal constitutional law," a transfer "may not ordinarily be made until the untried defendant has received notice of the proposed transfer and an opportunity to be heard." Cobb v. Aytch, 643 F.2d 946, 957-961 (3d Cir. 1981). No evidence in the form of certifications or otherwise was provided by defendants that would justify the transfer without affording plaintiff due process. Without more, the actions of the MCPO were inappropriate under the circumstances and plaintiff should be immediately transferred back to MCCI pending trial.

II.

The relevant facts are undisputed. On November 10, 2018, plaintiff, Louis Sloan, was charged with robbery, contrary to N.J.S.A. 2C:15-1(a)(1), and felony murder, contrary to N.J.S.A. 2C:11-3(a)(3). On January 2, 2019, the Honorable James J. McGann detained plaintiff without bail and remanded him to MCCI. On January 10, 2019, the Monmouth County Regional Office of the Public Defender reassigned plaintiff's case to a private attorney, Richard P. Lomurro, Esq. The

practice of assigning private counsel as “pool attorneys” is a common practice that allows the Office of Public Defender to provide for the needs of their clients when cases cannot be assigned to staff counsel due to conflicts or other reasons.

On January 28, 2019, the MCPO unilaterally directed the MCCI to transfer plaintiff to the OCJ. Prior to his transfer, plaintiff was not consulted or afforded an opportunity to be heard. On January 30, 2019, plaintiff’s mother notified Mr. Lomurro of plaintiff’s transfer. There was no indication that plaintiff was transferred for safety reasons or disciplinary infractions. In fact, the reply brief submitted on behalf of the Monmouth County defendants fails to articulate any reason that explains why plaintiff was transferred at all. The court requested the appearance of counsel for the MCPO in the criminal case. Assistant Prosecutor Michael Luciano, who is prosecuting the matter against plaintiff, appeared at oral argument. When asked why plaintiff was transferred, Mr. Luciano replied that his office ordered the transfer to prevent the co-defendants from communicating and changing their stories. In addition, Mr. Luciano certified on June 28, 2019 that the transfer was initiated to prevent plaintiff and his criminal co-defendants from having “the opportunity to confer and strategize about their defense.” (Certification of Michael Luciano, Esq., 2:4, June 28, 2019). He reasoned that by transferring plaintiff to OCJ, “investigators can track all oral and written communications between the two men.” (Certification of Michael Luciano, Esq., 2:4, June 28, 2019). Lastly, Mr. Luciano

admitted that the transfer was requested because having both defendants in MCCI “may adversely affect prosecution of [the] case.” (Certification of Michael Luciano, Esq., Ex. A., June 28, 2019).

III.

Plaintiff contends the MCPO has no authority to “unilaterally transfer” him from one jail to another without affording him notice and a right to be heard. He reasons that “[p]retrial detainees have federally protected liberty interests that are different than those of sentenced inmates” and cites Cobb, 643 F.2d at 957 for this proposition. He further explains that unlike a sentenced inmate, pretrial detainees have “a sixth amendment right to the effective assistance of counsel”, and a right to a speedy trial.

A certification provided by his attorney indicates that communication with his client is more difficult because instead of travelling four (4) miles to visit him in MCCI, he now travels twenty-three (23) miles to OCJ. His attorney’s office is only nine (9) minutes from MCCI and forty-two (42) minutes from OCJ. Mr. Lomurro notes that pool attorneys are not reimbursed for gas mileage.

He also asserts that his transfer to OCJ “interferes with his access to counsel” because OCJ “has not been accommodating when [his] counsel has tried to see [him].” (Pl.’s Br. at 8). He alleges that “[o]n more than one occasion [his] counsel traveled over forty (40) minutes to [OCJ] and was told that he could not see Mr. Sloan” without receiving an explanation. (Pl.’s Br. at 8). He also contends that his

ability to communicate with family, friends, and potential witnesses is curtailed by his transfer to the OCJ. He notes that his family resides in Monmouth County and asserts that his transfer makes it difficult for them to visit. He observes that the court in Cobb recognized the significant role of family visits and the ability of a pretrial detainee to have access to potential witnesses to aid in his own defense.

The Monmouth County defendants contend that “[p]laintiff was not denied due process when his transfer was accomplished without notice to his counsel or a prior hearing” because “[u]nlike other individual states, this jurisdiction does not require a pretransfer hearing and/or notification to the inmate or counsel.” (Def.’s Br. at 2). They rely on cases involving sentenced defendants as opposed to pretrial detainees. Defendants also assert that plaintiff’s transfer did not violate his right to the effective assistance of counsel because the additional time and expense imposed on his attorney is, “at best, nominal.” (Def.’s Br. at 3). Defendants further assert that plaintiff failed to provide proof that “the transfer rendered his family and/or the witnesses unable or unwilling to meet ... and/or participate in his defense,” or caused unnecessary delays. (Def.’s Br. at 3). Finally, defendants provide a certification from Sergeant Ketelaar of the OCJ who oversees the “lobby area, classification area, video courts conducted at the jail and the video visitation system,” and claims that her review of the records reveals that “Richard P. Lomurro, Esq. had a video visitation visit with Louis Sloan on February 4, 2019 ... [, and] [t]here are no records

indicating that Mr. Lomurro, or anyone else from the law firm of Lomurro, Munson, Comer, Brown & Schottland, LLC, requested to meet or have a video visit with Louis Sloan on any other day.” (Certification of Sergeant Ketelaar, 3:9).

In response, plaintiff notes that the transfer to OCJ does not prevent him from communicating with his codefendants because when they appear in court, they have contact with each other in the holding cell. In fact, he claims he shared a holding cell with co-defendant, Mr. Morrissey on one occasion and was able to communicate with him for hours. (Certification of Richard P. Lomurro Esq., 2:6, June 26, 2019). He also provides a certification from Mr. Lomurro that reiterates that he attempted to visit plaintiff and was denied access.

IV.

N.J.S.A. 30:8-1 provides that “Sheriffs and jailers shall receive from constables or other officers all persons apprehended by such constables or officers for offenses against this state.” In addition, N.J.A.C. 10A:31 provides regulations for Adult County Correctional Facilities. N.J.A.C. 10A: 31-3.4 requires the County jail to be “geographically accessible” to the public, facility staff, officers of the court and law enforcement officers. N.J.A.C. 10A:31-15.4 sets standards for visitation between inmates and their attorneys and provides that “[o]nly necessary security requirements may be permitted to interfere with such visits.”

Pretrial detainees have liberty interests firmly grounded in federal constitutional law. Cobb 643 F.2d at 957. These rights are “different in kind from

those of sentenced inmates” who must “look to state law for the protection of their personal liberties”. Ibid. Unlike sentenced defendants, pretrial detainees “retain several constitutionally protected liberty interests relative to the conditions of their confinement”, such as the effective assistance of counsel, and the right to a speedy trial, both guaranteed by the 6th amendment. Id. at 957-58. More importantly, because pretrial detainees have a constitutional right to confer with potential witnesses or family and friends who are willing to assist in their defense, they ordinarily should not be transferred from one facility to another without “notice of the proposed transfer and an opportunity to be heard.” Id. 961. The opportunity to be heard does not require an evidentiary hearing, if adequate pleadings are provided. Ibid. On review, a court must “weigh the reason for the transfer against the degree of interference with the federal protected rights on which the detainee relies.” Ibid.

“In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law ... the proper inquiry is whether those conditions amount to punishment of the detainee.” Bell v. Wolfish, 441 U.S. 520, 535 (1979). To determine whether certain conditions or restrictions amount to punishment of a pretrial detainee, Bell set the following standard:

A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of the

detention facility officials, that determination will generally turn on ‘whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].’ Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to ‘punishment.’ Conversely, if a restriction or condition is not reasonably related to a legitimate goal -- if it is arbitrary or purposeless -- a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees. Courts must be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court’s idea of how best to operate a detention facility.

Id. at 538-39 (internal citations omitted).

Legitimate government interests not only include “ensuring a detainees presence at trial,” but also “legitimate operational concerns [that] may require administrative measures ... beyond those ... necessary to ensure that the detainee shows up at trial.” Id. at 540. An example of a legitimate government operational concern is “maintain[ing] security and order at the institution and mak[ing] certain no weapons or illicit drugs reach detainees.” Ibid. “The effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment.” Ibid.

V.

Both the relevant statute and regulations should make it clear that generally, detainees charged in a particular County are to be remanded to the County jail where the charges arose. An exception to this rule may occur when the detainee is serving a sentence in a state prison or for a matter in another County jail. It goes without saying that the Legislature did not contemplate a situation where detainees charged in one County would be committed in another, without justification. The costs and inconvenience to the receiving County could be great, and such a practice would encourage counties with limited funds and a significant number of defendants to simply transfer a defendant to reduce costs.

The undisputed facts reveal that Judge McGann committed plaintiff to MCCI, not OCJ. In addition, there is no question that the State failed to afford plaintiff with notice or a right to be heard prior to his transfer to OCJ, as required by Cobb. More importantly, the State failed to offer a legitimate purpose for the transfer. As Mr. Luciano acknowledges in his certification, the transfer was ordered to deny plaintiff and his co-defendants “the opportunity to confer and strategize about their defense.” (Certification of Michael Luciano, Esq., 2:4, June 28, 2019). However, plaintiff has a constitutional right to confer with his co-defendants or other witnesses to aid in his defense, as long as he refrains from making threats. In asking this court to sanction

their actions, the State is effectively asking the court to inappropriately place its thumb on the scales of justice in favor of the State.

Defendants cite to several cases that are distinguishable from the case at bar. They assert that New Jersey does not require a pretrial transfer hearing, and cite to Tully v. Tramburg, 57 N.J. Super. 377 (App. Div. 1959). However, Tully involved a convicted defendant. Id. at 379. More importantly, defendants fail to acknowledge plaintiff's federally protected constitutional rights.

Defendants also claim that any inconvenience caused by the transfer is minimal. They fail to acknowledge the difficulties courts endure when attempting to secure defendants who are committed to institutions outside their respective counties. In fact, on the date of oral argument, plaintiff arrived late to the hearing. In addition, due to limited resources, many counties are resistant to transport inmates out of County. In the present matter, the officers used to transport plaintiff could have tended to other courthouse duties and responsibilities.

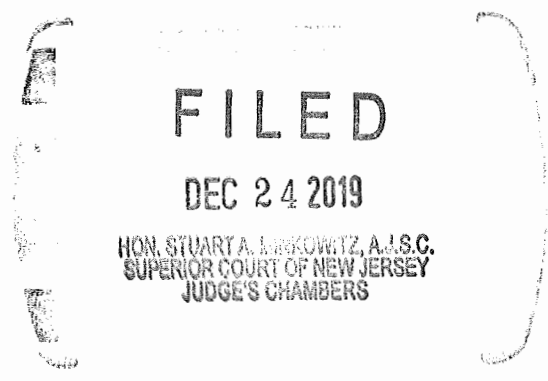
Finally, with limited resources and the existence of conflicts that frequently arise, the Office of Public Defender is forced to use pool attorneys on a regular basis. They strive to retain competent counsel who are skilled in complex criminal litigation but willing to accept the less than competitive fees that the office can afford to pay. As a society, we should not discourage counsel from taking on these assignments that are vitally important to our system of justice.

The State's interest in bolstering its prosecution does not outweigh plaintiff's rights to due process before transfer. In addition, the State's desire to prevent plaintiff and his co-defendants from developing trial strategy is not a legitimate concern that takes precedence over plaintiff's right to consult his counsel and have access to his family and prospective witnesses. Finally, no security concern was raised to justify the transfer and according to the relevant regulations, the transfer to a facility forty (40) minutes away constitutes an unnecessary interference with plaintiff's visits with counsel.

VI.

For the reasons stated above, plaintiff shall be immediately returned to MCCI to await trial.

PREPARED BY THE COURT:



JOSEPH E. KRAKORA, as
Public Defender for the State of
New Jersey, THE NEW JERSEY
OFFICE OF THE PUBLIC
DEFENDER, ISSIAHA BIVENS,
and TYLEEB REESE,

Plaintiffs,

v.

COUNTY OF MERCER AND
ITS BOARD OF CHOSEN
FREEHOLDERS, and COUNTY
OF HUDSON AND ITS BOARD
OF CHOSEN FREEHOLDERS,

Defendants.

and

PBA LOCAL 167 AND PBA
DELEGATE WINSLOW LAND,

Plaintiff/Intervenor,

v.

COUNTY OF MERCER AND ITS
BOARD OF CHOSEN
FREEHOLDERS, and BRIAN
HUGHES, in his official capacity,

Defendants.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION – CIVIL PART
MORRIS COUNTY

Docket No. MRS-L-2489-19

Civil Action

ORDER

THIS MATTER, having been opened to the Court upon Plaintiffs' Verified Complaint in Lieu of a Prerogative Writ, by Lauren S. Michaels, Esq. and Fletcher C. Duddy, Esq.; and upon Plaintiffs-Intervenors' Verified Complaint in Lieu of a Prerogative Writ, by David Beckett, Esq.; and upon notice to Defendant Mercer County, through its counsel, Paul R. Adezio, Esq.; and upon notice to Defendant Hudson County, through its counsel, Steven Menaker, Esq.; and the Court having reviewed all submissions, and for good cause shown;

IT IS, on this 2nd day of December, 2019;

ORDERED, Plaintiffs, Joseph E. Krakora, Issiaha Bivens, and Tyleeb Reese's, application for preliminary restraints, is **granted**; and it is further

ORDERED, that Plaintiffs-Intervenors, PBA Local 167 and PBA Delegate, Winslow Land, application for preliminary restraints, is **granted**; and it is further

ORDERED, that, pending the outcome of this litigation, Mercer County and Hudson County are preliminarily enjoined from transferring detainees from Mercer to Hudson, as set forth in its proposed Agreement; and it is further

ORDERED as follows:

1. The parties shall serve interrogatories, requests for production of documents, and requests for admissions by no later than January 23, 2020.
2. The parties shall serve their responses to any interrogatories, requests for production of documents, and requests for admissions by no later than February 22, 2020.
3. Depositions of fact witnesses, to the extent necessary, shall take place by no later than March 13, 2020.
4. A case management conference shall be held on March 20, 2020, at 10:00 a.m. in the Historic Courtroom, Morris County Courthouse, Morristown, New Jersey; and it is further

ORDERED, that a copy of this Order shall be served on all parties within five (5) days of the signing of this Order.



HON. STUART A. MINKOWITZ, A.J.S.C.

(X) Opposed
A Statement of Reasons accompanies this Order.

Joseph E. Krakora, et al. v. County of Mercer, et al.
MRS-L-2489-19

Statement of Reasons – Order to Show Cause

I. Procedural History

This matter comes before the Court by way of Plaintiffs, Joseph E. Krakora, as Public Defender for the State of New Jersey, Issiaha Bivens, and Tyleeb Reese’s (collectively, “Plaintiffs”), November 19, 2019 Verified Complaint in Lieu of Prerogative Writ (“Plaintiffs’ Verified Compl.”), filed initially in Mercer County. On November 21, 2019, the Hon. Mary C. Jacobson, A.J.S.C., entered an Order to Transfer Venue, to Morris County. On November 27, 2019, an Order to Show Cause, with temporary restraints, was entered by the Hon. Stuart A. Minkowitz, A.J.S.C. On December 6, 2019, PBA Local 167 and PBA delegate Winslow Land (collectively, “the PBA”) filed a motion to intervene on short notice, and filed its own Verified Complaint in Lieu of a Prerogative Writ in Mercer County, under the docket number, MER-L-2337-19. On December 9, 2019, Defendant Mercer County (“Mercer”) and Hudson County (“Hudson”) filed separate oppositions. On December 12, 2019, the Court entered an Order consolidating both matters under the docket number, MRS-L-2489-19. On December 13, 2019, the Court entered an Order granting the PBA’s motion to intervene. On December 16, 2019, Mercer submitted further opposition. On December 18, 2019, Mercer submitted opposition against the PBA. On December 19, 2019, after all parties had an opportunity to submit filings, the Court held oral argument on the Order to Show Cause.

II. Background and Relevant Facts

i. Plaintiffs, Krakora, Bivens, and Reese’s Verified Complaint

The following facts are alleged in Plaintiffs’ Verified Complaint: On or about February 11, 2016, Mercer County Executive Brian M. Hughes announced a pending contract with

Joseph E. Krakora, et al. v. County of Mercer, et al.
MRS-L-2489-19

Hudson to transfer the vast majority of Mercer detainees to the Hudson County Correctional and Rehabilitation Center (“HCCC”), and to transform the Mercer County Correctional Center (“MCCC”) into “merely an intake and processing center for those going to or coming from the HCCC.” See Plaintiffs’ Verified Compl. ¶¶ 33-35. Thereafter, Defendant Mercer contracted with NW Financial Group, LLC (“NW Financial”) – a Hudson County-based consulting firm, for further study. Id. ¶¶ 36-37.

On or about September 10, 2019, NW Financial produced a report titled “Mercer County Correction Center Cost Analysis,” which recommended that Mercer sign a contract to house detainees at HCCC. Id. ¶ 38, citing Ex. A, at 1-29. The report is “focused exclusively” on cost-analysis of the arrangement. Id. On October 22, 2019, Mercer adopted a resolution authorizing the execution of an “Agreement ... for the Provision of Hudson County Correctional Center Services.” (the “Agreement”). Id. ¶ 40. The following day, on October 23, 2019, Hudson adopted a resolution authorizing the Agreement. Id. ¶ 41.

The Agreement provided that Mercer would close significant portions of the MCCC, and that HCCC, located in Kearny, New Jersey, more than seventy (70) miles from MCCC, would house all Mercer detainees, effective January 1, 2020. Id. ¶ 42, citing Ex. C. MCCC currently houses three-hundred and thirty-six (336) detainees. Id. ¶ 14. One hundred and forty-seven (147) of these detainees are pretrial detainees represented by the Office of the Public Defender (“OPD”). Id. ¶ 15. Plaintiffs Bivens and Reese are among the pretrial detainees currently housed in MCCC and represented by OPD staff attorneys. Id. ¶ 16. The Plaintiffs and the regional office of the OPD have “as a policy and practice regular in-person contact between attorneys and clients in MCCC custody, principally through in-person contact at the MCCC’s visiting area.” Id. ¶ 19. The Mercer County OPD employs seventeen (17) attorneys, ten (10) of whom have regular

Joseph E. Krakora, et al. v. County of Mercer, et al.
MRS-L-2489-19

adult felony caseloads. Id. ¶ 21. Given their “high caseloads,” and that “many attorneys” are obligated to be in court “all day twice a week” Mercer OPD attorneys “have little time” to visit clients in MCCC to, for example, review discovery, confer on motions, or discuss plea negotiations. See id. ¶¶ 22-25. MCCC is currently only a “15- to 20-minute drive” away from the OPD office in Mercer County. Id. ¶ 27. Plaintiffs assert that it is only because of the proximity of the MCCC that such frequent, meaningful and necessary client-contact is possible. Id.

As of October 21, 2019, there were nine-hundred and seventy-six (976) detainees housed at HCCC, of which five-hundred and thirty-seven (537) are pretrial detainees. Id. ¶ 28. Currently, only seven (7) rooms “afford the minimal privacy required for confidential consultation.” Id. ¶ 29. At HCCC, the “estimated wait time for a professional visiting room is anywhere between a half an hour up to two hours.” Id. ¶ 31. A round trip from the Mercer OPD office in Trenton (and the Mercer County Criminal Courthouse) to HCCC is approximately one-hundred and twenty (120) miles. Id. ¶ 57. Depending on traffic, this commute can take “between two hours and more than four hours by car[.]” Id. Accordingly, “it will take an OPD staff attorney from Mercer approximately four-and-a-half hours to meet with a single client [at HCCC].” Id. ¶ 58.

Plaintiffs assert in their Verified Complaint that videoconferencing, “as an alternative to in-person attorney-client visits, [] is a wholly inadequate substitute.” Id. ¶ 63. Since attorneys must often review voluminous discovery with their clients, and this increasingly includes electronic and digital discovery, videoconferencing is inadequate because the “appropriate program to play [the majority of files] is not available on jail computers.” Id. Thus, OPD attorneys often review electronic media with clients on OPD computers in-person. Id. However, HCCC policy requires that if counsel intends to use videoconferencing, counsel must provide 24-hours’ notice, or they will be unable to meet with the client. Id. ¶ 64. Charles Ellis, Warden of

Joseph E. Krakora, et al. v. County of Mercer, et al.
MRS-L-2489-19

MCCC, has certified that the following procedure will govern the transportation of detainees to MCCC for attorney-client consultations:

“[N]o later than 5:00 p.m., defense counsel (public or private) may provide the MCCC with name(s) of any inmate/client that they wish to confer with during the next day, or any future date selected by counsel. MCCC officials will coordinate this request with HCCC officials so that the individual(s) will be prepared to be picked up by the MCCC transport team. Requested detainees will be brought to MCCC on the requested day, and will be available to their attorneys. The detainees will be returned to HCCC by the MCCC transport team by the end of the day. This process and policy will provide attorneys with the same access to their clients as is currently available at MCCC.”

See Certification of Warden Charles Ellis (“Ellis Cert.”) ¶ 12.

In contrast, however, the Certification of Ronald Edwards, Director and Manager of the HCCC, provides that “[i]f *voluminous* discovery (such as wiretap or surveillance recordings) must be reviewed with the [detainee], a request to transfer the [detainee] back to Mercer will be accommodated.” (emphasis added). See Certification of Ronald Edwards (“Edwards Cert.”) at p. 4. The Ellis Cert. does not distinguish between reviewing “voluminous” discovery and general consultation when discussing the requirements for arranging in-person, attorney-client visits.

As it relates to videoconferencing accommodations, HCC has dedicated four (4) conference rooms “for the exclusive use of attorneys to consult with their Mercer clients.” Edwards Cert. at p. 3. These rooms are “in a pod reserved to house Mercer detainees[,]” and that “OPD attorneys may invite the [detainee’s] family friends or witnesses to communicate with the [detainee] using the same videoconferencing equipment.” Id.

Plaintiffs contend that “[t]he transfers will render such contacts [with family and friends] substantially more expensive, difficult, and infrequent.” See Plaintiffs’ Verified Compl. ¶ 67.

Joseph E. Krakora, et al. v. County of Mercer, et al.
MRS-L-2489-19

Currently, HCCC charges family and friends \$4 per minute for a video call, which, Plaintiffs aver, makes it cost-prohibitive for many OPD clients and their families. Id. ¶ 68. The HCCC’s web-based videoconferencing requires internet access and access to a computer, smartphone or tablet, and those who do not have their own device must travel to the HCCC to use their equipment. Id. ¶ 69. Additionally, HCCC Director Edwards has certified that “Hudson will make five (5) videoconference booths available to the [detainee’s] friends, family members or witnesses for video visitation[,]” and that “[t]hese booths will be available six days a week, from 7:00 a.m. until 9:00 p.m.” See Edwards Cert. at pp. 4-5. However, up to this point, the Court has not been made aware of any arrangements that have been implemented to facilitate friends and family members’ ability to videoconference detainees from Mercer County. At the December 19, 2019 hearing, counsel for Hudson suggested that the Mercer OPD could facilitate family remote visitation at their office, including, potentially, privately represented clients as well, although no agreement has been entered between Hudson, Mercer, and OPD. Counsel for Hudson concedes that there is no legal obligation for the OPD to provide video teleconferencing for anyone at their office. As it stands, there does not appear to be any plan, whatsoever, by either Mercer or Hudson, to facilitate the remote consultation of detainees with anyone in Mercer County. Furthermore, counsel for all parties have stipulated to the fact that, currently, there is not sufficient technology in place, at the Mercer OPD office or elsewhere, that can facilitate the videoconferences for either family and friends or private defense attorneys in Mercer County. Moreover, the Court has not been apprised of any alternative plan to facilitate videoconferencing from Mercer County.

In addition, the Agreement requires that Hudson have detainees “dressed and ready for pick up by 6 a.m.” Id. ¶ 73. HCCC Director Edwards has certified that “[w]hen [a detainee] is to

Joseph E. Krakora, et al. v. County of Mercer, et al.
MRS-L-2489-19

be transported to Mercer, the [detainee] will be awakened at 4:00 a.m. (approximately 30 minutes earlier than a Hudson [detainee] scheduled for court in Jersey City), given time to shower and shave, processed, and put into transportation by 5:45 a.m.” See Edwards Cert. at p. 4. By contrast, detainees currently housed in MCCC are awoken at 6:00 a.m. and given thirty (30) minutes to dress and ready themselves for the day before being escorted from their “pod” to a common holding cell. Id. ¶ 77. Plaintiffs argue that, if the Agreement’s terms are adhered to, and detainees are “ready for pick up by 6 a.m.,” this will require “an extremely early wake up.” Id. ¶ 80. Accordingly, the “need to wake detainees at extreme hours” will impair their ability to make a reasonable court appearance in front of a judge or jury and to participate fully in their defense.” Id.

The Agreement further provides that the County of Mercer will provide transportation of the detainees between HCCC and the courthouse, as well as transporting those “released on bail” back to Mercer County to retrieve property. See Plaintiffs Verified Compl. ¶¶ 42-44. MCCC Warden Charles Ellis has stated that the transportation of Mercer detainees will be dealt with “on the fly.” Id. ¶ 45. Furthermore, the Agreement provides that the County of Hudson may transfer Mercer detainees from HCCC to other facilities, upon getting “permission” from Mercer County. Id. ¶ 47, citing Ex. D at 111.

ii. The PBA’s Verified Complaint in Lieu of a Prerogative Writ

The PBA is the “sole and exclusive representative for the purpose of collective negotiations to determine the salaries, wages, hours of work, working conditions and conditions of employment required for a safe and healthful environment for the more than 170 Mercer County Corrections Officers employed at the MCCC[.]” See PBA’s Verified Complaint in Lieu

Joseph E. Krakora, et al. v. County of Mercer, et al.
MRS-L-2489-19

of a Prerogative Writ (“PBA Verified Compl.”) ¶ 1. Plaintiff-Intervenor Winslow Land (“Land”) brings this action in his individual and representative capacity on behalf of the Mercer County Corrections Officers who “are being harmed by the arbitrary and capricious acts” in the Agreement. Id. ¶ 2. Specifically, the PBA alleges that Mercer has failed to propose a transfer plan to ensure “minimally safe working conditions” for the sixty (60) mile journey of the initial transfer of all detainees, and subsequent regularly scheduled trips for court appearances. Id. ¶ 9.

The Agreement, executed by Mercer on October 22, 2019, and authorized by Hudson the following day, provides that “current Mercer officers who are laid off will be offered an intergovernmental transfer to Hudson under specified terms.” Id. ¶ 20. Mercer has further stated that “it will retain posts to be staffed at MCCC at a reduced level so that it can process and house individuals going to or coming from HCCC[.]” Id. ¶ 22.

The PBA asserts that Mercer has not provided any plan or policy dictating how the daily transport of detainees from Hudson to Mercer, and back to Hudson, will operate in practice. Id. ¶ 23. Mercer produced a document labeled as a “Staffing Plan,” dated September 19, 2019, which “lists certain posts and shifts without any reference to how the MCCC will guard” the remaining detainees or safely transport detainees from Hudson. Id. ¶¶ 24, 25.

The PBA has repeatedly requested details regarding staffing and operations to ensure the safety of corrections officers who remain, including the different housing plans for differently classified detainees at MCCC, detailed staffing plans and Standard Operating Procedures (“SOP”) for non-transportation posts, as well as safety guidelines and operational plans for transportation posts at MCCC. Id. ¶¶ 31-33. Specifically, the PBA requested guidelines for the number of detainees projected to be transported each day, as well as the number of officers per

Joseph E. Krakora, et al. v. County of Mercer, et al.
MRS-L-2489-19

transport for various numbers of detainees. Id. ¶ 33. Mercer responded with a letter from Deputy Administrator Lillian Nazzaro, stating that no further information would be provided. Id. ¶ 35. On November 18, 2019, the PBA replied that the continuing lack of a plan presented legal, safety and operational problems. Id. ¶ 36. There is no indication that the PBA has received a plan addressing their concerns to date.

III. Standard of Review

A party seeking injunctive relief must demonstrate (1) the injunction is necessary to prevent irreparable harm; (2) the legal right underlying the party's claim is settled; (3) it is reasonably likely that the party will succeed on the merits of its claim; and (4) an analysis of the relative hardship to the parties favors the party seeking the injunction. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982). It is generally understood all the Crowe factors must weigh in favor of injunctive relief. Waste Management of New Jersey, Inc. v. Union County Utilities Authority, 399 N.J. Super. 508, 520 (App. Div. 2008).

The court may take a less rigid view of these factors when the relief sought is designed to preserve the status quo. Id. When a party seeks to preserve the status quo during the suit's pendency, the court may place less emphasis on a particular Crowe factor if another greatly requires the issuance of the remedy. Id. Additionally, "[t]he remedy of injunction is an extraordinary one and may not be awarded to any suitor unless and until his right to it is established by clear and convincing testimony, free of all reasonable doubt." Harrison v. Floyd, 26 N.J. Super. 333, 347 (Ch. Div. 1953). See also Subcarrier Commc'ns, Inc. v. Day, 299 N.J. Super. 634, 639 (App. Div. 1997)("[T]here must be clear and convincing proof in order to grant an injunction") (quoting Zoning Bd. of Adjustment v. Service Elec. Cable T.V., 198 N.J. Super. 370, 379 (App. Div. 1985)).

Joseph E. Krakora, et al. v. County of Mercer, et al.
MRS-L-2489-19

Irreparable harm is generally considered to be harm that “cannot be addressed adequately by monetary damages.” Crowe, 90 N.J. at 133. Furthermore, the irreparable harm cannot be speculative. See Peregoy v. Peregoy, 358 N.J. Super. 179, 203 (App. Div. 2003); see also, Revel AC, Inc. v. IDEA Boardwalk, LLC, 802 F.3d 558, 571 (3d Cir. 2015) (“[t]o establish irreparable harm, a stay movant must demonstrate an injury that is neither remote nor speculative, but actual and imminent.”). Generally, an alleged violation of a constitutional right satisfies the “irreparable harm” prong of the Crowe test. See Elrod v. Burns, 427 U.S. 347, 373-374 (1976) (holding that a violation of First Amendment right of association constituted irreparable injury); see also Cerro Metal Prods. v. Marshall, 620 F.2d 964, 974 (3d Cir. 1980) (acknowledging that a Fourth Amendment violation would constitute irreparable injury).

The second and third prongs of the Crowe analysis are related. A party seeking injunctive relief must show that it has a reasonable likelihood of eventual success of on the merits in accordance with well-settled principles of law. Crowe, 90 N.J. at 133.

“The final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying relief.” Crowe, 90 N.J. at 134. This prong of the Crowe test is often referred to as a balancing of the equities. Once a judge determines that irreparable harm will result to the plaintiff if injunctive relief is denied, the judge must balance this harm against the harm to be suffered by defendant if the injunctive relief is granted. Waste Management of New Jersey, Inc., 399 N.J. Super. at 535.

IV. Analysis

a. Plaintiffs’ Sixth Amendment Claim

Pretrial detainees—unlike sentenced detainees, who must look to state law for the protection of their personal liberties—have liberty interests firmly grounded in federal

Joseph E. Krakora, et al. v. County of Mercer, et al.
MRS-L-2489-19

constitutional law. Cobb v. Aytch, 643 F.2d 946, 956 (3d Cir. 1981) (internal citations omitted). The Sixth Amendment protects certain fundamental rights of the accused to defend against any charges against them, including the right to the effective assistance of counsel. The right to assistance of counsel “attaches at the initiation of criminal proceedings and continues through sentencing.” Id. at 957 (citations omitted). Furthermore, “[o]ne of the most serious deprivations suffered by a pretrial detainee is the curtailment of his ability to assist in his own defense.” Wolfish v. Levi, 573 F.2d 118, 133 (2d Cir. 1978), rev’d on other grounds sub nom., Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). To succeed on a Sixth Amendment claim based on limited access to counsel, a plaintiff must show prejudice, or at the least “substantial interference.” See Ervin v. Busby, 992 F.2d 147, 150 (8th Cir. 1993) (requiring evidence of actual prejudice); United States v. Lyons, 898 F.2d 210, 216 n. 6 (1st Cir. 1990) (requiring evidence of actual prejudice); Cobb, 643 F.2d at 959-960 (upholding injunctive relief after finding “substantial interference”).

In Cobb, the Third Circuit upheld injunctive relief for pretrial and post-trial (but pre-sentenced) detainees who had been subjected to a transfer of facilities. 643 F.2d at 959-960. The District Court made several findings relevant to the instant case. In Cobb, the Defender Association of Philadelphia represented 80% of the incarcerated defendants in Philadelphia County prisons, and the Defendant Association of Philadelphia lacked the resources of money and time to conduct either type of attorney-client interview at the Commonwealth institutions distant from Philadelphia to which transfers were made. Id. at 950. Furthermore, on several occasions, transferees missed court appearances and parole hearings when they were not returned to Philadelphia on time. Id. In one eight to ten-week period, 25% of the transferees’ cases had to be continued because the defendants were not brought to court. Id. In addition, the mail

Joseph E. Krakora, et al. v. County of Mercer, et al.
MRS-L-2489-19

privileges of at least some transferees were restricted in state institutions, and following the transfer, there was a “drastic reduction” in visits by friends and families of the incarcerated transferees, which was likely “occasioned by the increase in distance between the homes of the visitors and the state facilities.” Id. at 951. The lack of contact between the pretrial detainee with “family and friends, [] curtailed the ability of the defendants to communicate with potential witnesses through those most likely to be willing to assist.” Id. at 960. Under these various circumstances, the Third Circuit ultimately affirmed the district court’s decision to grant injunctive relief against transfer of pretrial detainees. Id. at 962.

As it relates to the Crowe factors, the Court finds that Plaintiffs have satisfied all four prongs. Regarding the first prong—irreparable harm—the Court finds that, if Plaintiffs’ allegations are accepted as true, Plaintiffs have demonstrated that their right to effective assistance of counsel will be violated if the existing Agreement is executed. At this juncture, the Court need not address such substantive questions of fact raised by Plaintiffs, including early-morning wakeups or the intrusive strip-searches conducted prior to attorney-client consultation. Rather, Mercer has conceded that the appropriate video technology for remote attorney-client consultation and consultation friends and family, is not in place.¹ While it appears that HCCC has made five (5) videoconference booths available to Mercer detainees for friends and family conversations, and four (4) attorney conference rooms available exclusively for Mercer detainees,² there is no counterpart facility ready anywhere in Mercer County. Accordingly, the Court finds that the lack of appropriate video technology for remote consultations, strains the

¹ At oral argument, on December 19, 2019, it was uncontested that there is absolutely no current plan in place to facilitate videoconferencing in Mercer, for OPD clients, private attorney clients, or friends and family of detainees.

² See Edwards Cert., at pp. 3-4.

Joseph E. Krakora, et al. v. County of Mercer, et al.
MRS-L-2489-19

detainees' Sixth Amendment right to effective assistance of counsel such that preliminary restraints are warranted, at least until such accommodations have been provided.

Regarding the related second and third Crowe factors—reasonable likelihood of success on the merits, and upon well-settled principles of law—the court in Cobb determined that very similar circumstances justified injunctive relief on the transfer of pretrial detainees, including, inter alia, the lack of contact between friends and family as well as the long distances that attorneys were required to travel for in-person consultations. See Cobb, 643 F.2d at 950-951, 962.

With regard to the final prong of the Crowe test, balance of hardships, the Court finds that Mercer and Hudson seek to either save funds or earn revenue. These reasons do not outweigh the greater harm associated with the potential violation of three-hundred and thirty-six (336) detainees' constitutional rights. Accordingly, the Court finds that Plaintiffs have established all four prongs of the Crowe test, respecting the alleged violation of their Sixth Amendment right to effective assistance of counsel, and that preliminary restraints are justified.

b. The PBA

To demonstrate that they are entitled to preliminary restraints, the PBA must establish that the Crowe factors, as outlined in Section III of this Statement of Reasons, weigh in their favor. Regarding the first prong, irreparable harm, the PBA has satisfied its burden. To date, the Court has not been apprised with any plan that ensures the safety of corrections officers tasked with either: (1) initially transporting all three-hundred and thirty-six (336) detainees from MCCC to HCCC; or (2) the daily transport of detainees from Hudson to Mercer and back to Hudson. See PBA Verified Compl. ¶ 23, 28. The process for transporting detainees is necessarily meticulous

Joseph E. Krakora, et al. v. County of Mercer, et al.
MRS-L-2489-19

and lengthy to protect the officers' safety while the detainees are in transit. Id. ¶ 43. After detainees are awoken in their respective "pods," they are escorted to a common holding cell, and then are taken, two at a time, are strip-searched for contraband and then shackled. Id. ¶ 43-45. The only operational document produced by MCCC, according to the PBA, is a September 19, 2019 "Staffing Plan." Id. ¶ 24, Ex. 2. Exhibit 2 of the PBA's submission is a document reflecting various posts and daily shifts for corrections officers, although it does not provide any specific procedures for the transportation of detainees. See PBA's Verified Compl., Ex. 2. The PBA alleges that, "if Exhibit 2 is to be credited there are only 6 or possibly 8 transport officer posts to handle the transportation of up to 90 detainees from HCCC to Mercer, meaning that officers will not be able to safely secure and guard the massive amount of detainees being transported over 60 miles." Id. ¶ 51. Under these circumstances, without a more detailed plan to ensure the officers' well-being in executing the safe transport of detainees, the Court finds that permitting the Agreement to go into effect, as is, may represent a serious risk of irreparable harm.

Regarding the second and third Crowe factors—a reasonable likelihood of success on the merits, based upon well-settled principles of law—the Court is not aware of any instances in New Jersey in which a labor union successfully sought a permanent injunction for ill-conceived plans regarding workplace safety procedure. N.J.S.A. § 34:6A-3, however, provides:

Every employer shall furnish a place of employment which shall be reasonably safe and healthful for employees. Every employer shall install, maintain and use such employee protective devices and safeguards including methods of sanitation and hygiene and where a substantial risk of physical injury is inherent in the nature of a specific work operation shall also with respect to such work operation establish and enforce such work methods, as are reasonably necessary to protect the life, health and safety of employees, with due regard for the nature of the work required.

Joseph E. Krakora, et al. v. County of Mercer, et al.
MRS-L-2489-19

Furthermore, N.J.S.A § 34:6A-44 provides that the Superior Court is authorized, upon application of the Attorney General, to “restrain any conditions or practices in any workplace ... [that] could reasonably be expected to cause death or serious physical harm.” While the Court acknowledges that the law on this matter is less clear than that of Plaintiffs’ argument for preliminary restraints, preserving the status quo justifies a “less rigid view” of the Crowe factors. Waste Management of New Jersey, Inc., 399 N.J. Super. at 520. In this matter, Mercer and Hudson’s lack of plan to ensure the officers’ safety of this mass transport permits a more flexible approach to the standard for issuing preliminary restraints. Moreover, as with the Plaintiffs’ argument, the fourth Crowe factor—balance of hardships—weighs heavily in the PBA’s favor. The Court is unable to conclude that preserving the status quo—maintaining MCCC’s standard operations—will cause any harm to Mercer, beyond the financial burden of its operation pending the outcome of this litigation. In contrast, if the Court allowed the Agreement to go into effect on January 1, 2020, the lack of an operational plan for the transportation of detainees presents a significant risk to the transporting officers’ personal, physical safety. Accordingly, the PBA has demonstrated that the application of the Crowe factors, viewed as a whole, and in consideration of preserving the status quo, justify preliminary restraints.

V. Conclusion

For the foregoing reasons, Plaintiffs’ Order to Show Cause, with preliminary restraints is **granted**. In addition, the PBA’s Order to Show Cause, with preliminary restraints, is also **granted**. Pending the outcome of this litigation, Mercer and Hudson are preliminarily enjoined from transferring detainees from MCCC to HCCC in accordance with the Agreement. A conforming Order, containing a discovery schedule, accompanies this Statement of Reasons.

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Attorney for Defendants County of Mercer and Mercer County Board of Chosen Freeholders

JOSEPH E. KRAKORA, as Public Defender
for the State of New Jersey, et al.,

SUPERIOR COURT OF NEW JERSEY
MORRIS COUNTY-LAW DIVISION

Plaintiffs,

Docket No. MRS-L-2489-19

V.

Civil Action

COUNTY OF MERCER, et al.,

CERTIFICATION OF WARDEN
CHARLES ELLIS

Defendants.

I, Charles Ellis, being of full age, certify as follows:

1. I currently serve as the Warden for the Mercer County Correctional Center (“MCCC”), a position I have held for over ten (10) years. As such, I am fully familiar with the present matter.

2. This Certification is submitted in support of the opposition of Defendants County of Mercer and Mercer County Board of Chosen Freeholders to the petition of Plaintiffs Joseph E. Krakora, The New Jersey Office of the Public Defender, Issiaha Bivens and Tyleeb Reese (“Plaintiffs”) seeking certain temporary restraints and injunctive relief under N.J.S.A. 10:6-2 and 42 U.S.C. §1983.

A. Background

3. Mercer County has entered into a two (2) year contractual arrangement with Hudson County for the transfer of a minimum of 300 inmates from the MCCC to the Hudson County

Correctional Center (HCCC). It is expected that the transfer of inmates will commence on or about January 15, 2020.

4. Upon completion of the transfer of 300 inmates, MCCC will have reduced its current daily population (approx. 330 inmates), with a concomitant reduction in staff (corrections officers, administrative, medical and educational).

5. During the two-year contract, MCCC will still be open, maintained and operational for receiving and processing those arrested for suspected criminal activity. Bail hearings will be conducted at MCCC. At their conclusion, if an individual is to be held over and not released, the individual would be transported to, and housed, at HCCC. As discussed in more detail, *infra*, inmates will be housed at MCCC during the pendency of their trial.

6. A layoff plan concerning MCCC staff has been vetted and approved by the State of New Jersey Civil Service Commission.

7. In anticipation of the commencement of the transfer of inmates, Hudson County and Mercer County have been addressing the potential for displaced MCCC Corrections Officers to transfer to HCCC, via an intergovernmental transfer or other similar process.

B. The Court and the defense bar

8. Over the past year, representatives of Mercer County's administrative staff, together with the MCCC's Deputy Administrator and myself, have met with the supervisory staff of the Office of the Public Defender's Mercer Trial Region, the private defense bar and Mercer County Superior Court personnel, including the Hon. Mary C. Jacobson, A.J..S.C. and the Hon. Peter E. Warshaw, Jr., P.J.Cr.

9. Mercer County is in constant communication with Superior Court personnel in addressing questions, reviewing and revising procedures and protocols as required by that branch of government, with respect to the timely production of inmates for Court appearances.

10. Currently, public defenders and private defense counsel are able to meet with their

clients at MCCC during day and evening hours, 7 days a week. Upon arrival at MCCC, after processing through the necessary security checks and protocols, defense counsel is taken to an area where private consultations with their clients can ensue. Counsel simply provides the names of the inmates he/she wishes to meet with, and MCCC staff brings the inmate to the consultation area.

11. Defense counsel are permitted to bring computers, lap tops, I-Pads, flash drives and other forms of technology to review discovery, whether such discovery is scanned documents, lab reports, photographs or videos. MCCC attempts to make the necessary electronic and technological resources available to inmates and their counsel to ensure that inmates have access to their counsel, access to the resources to defend their criminal charges, and access of counsel to their clients. This policy will continue.

12. During and upon completion of the transfer of inmates to HCCC, it is MCCC's intention and commitment to provide all defense counsel access to any and all inmates **at MCCC** with notice. To accomplish this, I have set in motion the following procedure: no later than 5:00 pm, defense counsel (public or private) may provide the MCCC with the name(s) of any inmate/client that they wish to confer with during the next day, or any future date selected by counsel. MCCC officials will coordinate this request with HCCC officials so that the individual(s) will be prepared to be picked up by the MCCC transport team. Requested inmates will be brought to MCCC on the requested day, and will be available to their attorneys. The inmates will be returned to HCCC by the MCCC transport team at the end of the day. This process and policy will provide attorneys with the same access to their clients as is currently available at MCCC. A working draft of the notice is attached hereto. **Exhibit A.**

13. It is my understanding that HCCC will be providing expanded videoconferencing access, facilities and hours of availability to defense counsel should there be a need to conference with a Mercer inmate on an emergent basis by video or Skype. HCCC will provide dedicated videoconferencing booths for Mercer inmates. To assist in this endeavor, Mercer County is

committed to paying for videoconference connections and hardware/software to be installed at the Mercer County Public Defender's office.

14. Any inmate standing trial in Mercer County Superior Court will be housed at MCCC for the duration of his/her trial. Thus, defense counsel will have the same opportunities for after-hours consultations at MCCC that they currently enjoy. Additionally, this policy of keeping the inmate at MCCC during a trial addresses concerns that an inmate's appearance, concentration, and participation potentially being adversely affected by travel, etc.

15. New arrestees will not be transferred to HCCC until the conclusion of his/her bail proceedings. Additionally, short-term commitments serving, for instance, a two- or three-day Drug Court penalty, will not be transferred to HCCC; that penalty would be served at MCCC.

16. I have been in contact, and met, with the command staff of the New Jersey State Police regarding the transport of Mercer inmates on the New Jersey Turnpike, to/from MCCC and HCCC. There will be an open line of communication between MCCC and the NJSP, and the NJSP has provided assurances that they will assist Mercer County as needed in this undertaking, *i.e.*, emergency and alternate routes as needed due to traffic conditions, MVAs, etc.

17. It is my opinion that the procedures and protocols that will be operational for the Mercer inmates being housed in HCCC will ensure that the current attorney – client relationship for inmates is maintained. In addition, I believe there will be no negative impact on an inmate's right to effective assistance of counsel, or of an inmate's right to access to counsel, due to the Hudson-Mercer agreement.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Charles Ellis
Warden Charles Ellis
Mercer County Correctional Center

Dated: December 9, 2019

Pursuant to Local Rule 5.1, I hereby attest that I have on file all holograph signatures for any signatures indicated by a “conformed” signature (/s/) within this e-filed document.

/s/ John K. Maloney
John K. Maloney
Assistant County Counsel

Dated: December 9, 2019

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JOSEPH KARKORA, as Public
Defender for the State of New Jersey,
THE NEW JERSEY OFFICE OF THE
PUBLIC DEFENDER, ISSIAHA BIVENS
and TYLEEB REESE,

Plaintiffs,

v.

COUNTY OF MERCER AND ITS
BOARD OF CHOSEN FREEHOLDERS
AND COUNTY OF HUDSON AND ITS
BOARD OF CHOSEN FREEHOLDERS.

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MORRIS COUNTY
DOCKET NO. MRS-L-2489-19

Civil Action

**CERTIFICATION
OF RONALD EDWARDS**

Ronald Edwards certifies that:

1. I am the Director of the Hudson County Department of Corrections and Rehabilitation and manage the Hudson County Correctional Center, 30 Hackensack Avenue, Kearny, New Jersey ("HCCC").

2. I make this Certification to support of the opposition of the County of Hudson ("Hudson") and Hudson Board of Chosen Freeholders to the request of Joseph Krakora, the New Jersey Office of the Public Defender, Issiaha Bivens and Tyleeb Reese ("Plaintiffs") for injunctive relief.

3. Primarily because of the Bail Reform Act, the number of pretrial detainees housed in county jails has dropped dramatically. Attached to this Certification is the most recent chart published by the Administrative Office of the Courts documenting a state total reduction of 34.1% between July 2015 and July 2017.

4. Since 2015, Hudson has housed several Mercer inmates transferred because they were disciplinary problems in Mercer:

a. J.W.¹

Indictment # 18-01-00142-I
February 14, 2019-September 11, 2019; October 25, 2019-present.
Represented by private counsel.

b. D.W.

Indictment # 19-02-00072-I
February 14, 2019-June 24, 2019
Represented by private counsel

c. S.B.

Indictment # 14-07-00876-I
January 15, 2016-October 31, 2017
Represented by private counsel

d. R.W.

Indictment # 19-02-00072-I
September 3, 2015-July 6, 2016
Represented by OPD

5. HCCC is not aware of any complaints from inmates or counsel about access to counsel, friends, family or witnesses, or transport to court.

6. To prepare to accept Mercer inmates in Hudson, HCCC has created facilities, protocols and policies which address:

¹ For privacy, initials are used to identify the inmates.

Lodging of Mercer Inmates

The Mercer jail is not closing. All new inmates will be housed in Mercer until a decision to detain under the Criminal Justice Reform Act is made, following which the inmate will be transferred to Hudson. Other than being temporarily transferred to Mercer for consulting with their attorney, reviewing discovery or attending judicial hearings, a Mercer inmate will remain in Hudson until discharged from custody or transferred to the New Jersey Department of Corrections.

During periods of extended personal consultation with counsel and judicial proceedings, inmates will be housed in Mercer.

Except for inmates in the infirmary or protective custody, Mercer inmates will be housed in and take their meals in their own pod and not in general population with Hudson inmates. In addition, Mercer inmates will receive drug treatment services separated from other inmates.

Attorney Visitation.

HCCC dedicated four (4) conference rooms for the exclusive use of attorneys to consult with their Mercer clients. The rooms have videoconference equipment and may be used by attorneys to personally visit with their clients or to conduct videoconferences with their clients from the OPD office. The rooms are in a pod reserved to house Mercer inmates. OPD attorneys may invite the inmate's family, friends or witnesses to communicate with the inmate using the same videoconference equipment. Reservation of the conference rooms follow standard jail notice protocol for professional visitation (one day in advance) but, in cases of emergency, when advanced request cannot be

made, or after 4:00 p.m., an attorney may contact the HCCC record room supervisor for production of the inmate. Attorneys making personal visits may bring their laptops.

Transportation of Mercer Inmates.

When an inmate is to be transported to Mercer, the inmate will be awakened at 4:00 a.m. (approximately 30 minutes earlier than a Hudson inmate scheduled for court in Jersey City), given time to shower and shave, processed, and put into transportation by 5:45 a.m. The inmate will arrive in Mercer well before Court commences at 9:00 a.m.

Legal Mail

Mercer inmates will have the identical discovery privileges they enjoy in Mercer. Under existing jail protocol, legal mail will be opened by the inmate in the presence of an officer and inspected, not for content, but only for contraband.

Hudson has twenty-five (25) computers equipped with Lexis Nexis in the law library for examining materials on thumb drives or discs. Each housing unit has a schedule for the library. In addition, each housing unit has kiosks to permit viewing of discovery material. Inmates housed in restricted or special housing units will have access to Hudson laptops for their legal needs.

If voluminous discovery (such as wiretap or surveillance recordings) must be reviewed with the inmate, a request to transfer the inmate back to Mercer will be accommodated.

Non-professional Visitation

Besides the four attorney conference rooms, Hudson will make five (5) video conference booths available to the inmate's friends, family members or witnesses for video visitation. These booths will be available six days a week, from 7:00 a.m. until

9:00 p.m. Mercer will install video conferencing equipment in the OPD. There is a charge for this service (10 minutes-\$4.00; 20 minutes-\$8.00), but Hudson is endeavoring to persuade its service provider to waive the fees.

In addition, Hudson has a family-friendly room reserved for contact visits. Visits—determined by the inmate's surname (e.g., A-L, M-Z) are available on one weekday and one weekend day from 2:00 p.m. until 8:00 p.m.

Miscellaneous


Hudson can house 1,745 inmates. Adding 300 Mercer inmates will bring its present population to 1,297 inmates.

Hudson has enough staff to facilitate counsel visits with their clients. Hudson has offered up to 100 Mercer correctional officers intergovernmental transfers and continues to hire new officers on a continuing basis. There are 27 recruits scheduled to train at the academy on December 20, 2019.

Hudson facilities include: a detoxification unit; a licensed residential drug treatment program; a newly constructed infirmary; a mental health unit; twenty-four/seven medical treatment staffed by 3 physicians, 1 full-time psychologist, 2 part-time psychiatrists; and a nurse practitioner; weekly religious services for all denominations; adult education; and participating in the LEAP (Linking Employment Activities Pre-release) program.

7. I reviewed Plaintiffs Complaint and believe that the facilities, protocols and policies recited address Plaintiffs access, right to counsel and speedy trial concerns.

I certify these statements are true. I know that if any of these statements is knowingly false, I am subject to punishment.



Ronald Edwards

Dated: December 9, 2019