

**State of New Jersey**

**Council on Local Mandates**

In re Complaint Filed by The New Jersey Association of Counties

Re: N.J.S.A. 2A:162-16(b)(1) and N.J.S.A. 2A:162-22

Sections of The Criminal Justice Reform Act

COLM-0004-16

Decided: April 26, 2017

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**Syllabus**

(This syllabus was prepared for the convenience of the reader and is not part of the opinion of the Council. The Syllabus does not purport to summarize all portions of the opinions.)

Following a ballot question that was approved in the November 2014 general election, the New Jersey Constitution, article I, section 11, was amended (the Amendment) to substantially eliminate bail for defendants awaiting trial; the Amendment instead substituted a risk-based provision. Concomitant with the adoption of the Amendment, the Legislature enacted implementing legislation, the Criminal Justice Reform Act, C. 2A:162-15 to -26 (CJRA). The Claimant, the New Jersey Association of Counties (the NJAC), filed a complaint with the Council on Local Mandates (the Council) seeking a declaration that certain provisions of the CJRA, as codified, N.J.S.A. 2A:162-16(b)(1), the risk assessment timeframe, and N.J.S.A. 2A:162-22, the speedy trial timeframes, should be found to be unfunded mandates and in violation of article VIII, section II, paragraph 5 of the New Jersey Constitution, as implemented by the Local Mandates Act, N.J.S.A. 52:13H-1 to -22 (the LMA). The NJAC claimed that the CJRA is an unfunded mandate as applied to the counties as it will force counties to expend monies for which a reciprocal funding source has not been created. Thus, the NJAC asserts that because neither the CJRA nor any other legislative enactment authorizes resources to offset the additional direct expenses the

counties will incur to implement the CJRA, the expenses must be paid by property taxes; accordingly, the NJAC submits that the CJRA is an unfunded mandate and should cease to be mandatory in its effect.

The NJAC also challenged the CJRA's funding source, C.2B:1-9, captioned, the "21<sup>st</sup> Century Improvement Fund," asserting it provides no funding for the counties' anticipated expenses in implementing the Amendment and the CJRA.

The First Indemnity Insurance Company and various bail bonding agents (the bail bonding amici) support the NJAC's position.

In its complaint, the NJAC also sought preliminary injunctive relief, enjoining the State from enforcing N.J.S.A. 2A:162-16 (b)(1) and N.J.S.A. 2A:162-22 pending disposition of the complaint. By order of December 27, 2016, the Council denied that request.

The State of New Jersey filed a motion to dismiss the complaint. The primary point raised by the State is that the complaint must be dismissed because the CJRA calls into effect article VIII, section 2, paragraph 5(c)(5), a provision of the New Jersey Constitution, and N.J.S.A. 13H-3e, which preclude a law that implements a provision of the New Jersey Constitution from being considered an unfunded mandate. The New Jersey State Bar Association and the American Civil Liberties Union of New Jersey (the ACLU) support the State's position.

**HELD:** Following oral argument on February 15, 2017, the Council voted 4-3 to grant the State's motion to dismiss the complaint.

At issue here is the applicability of the exemption that removes a law that may otherwise qualify as an unfunded mandate from being considered an unfunded mandate if that law implements a provision of the New Jersey Constitution. In pertinent part, the 5(c)(5) exemption, reads as follows: "(c) Notwithstanding anything in this paragraph to the contrary, the following categories of laws . . . shall not be considered unfunded mandates:

(5) those which implement the provisions of this Constitution[.]” N.J. Const. art. VIII, §II, ¶5(c)(5). The LMA contains similar language: “3. Notwithstanding the provisions of any other law to the contrary, the following categories of laws . . . shall not be unfunded mandates: e. those which implement the provisions of the New Jersey Constitution[.]” N.J.S.A. 52:13H-3e.

The Council, having determined that the CJRA does indeed implement the provisions of the New Jersey Constitution, dismissed the complaint. The factors that informed the Council’s decision included the similarity of the language of the Amendment and the CJRA. Further, the Amendment and the CJRA have a significant temporal connection, having been moved through the legislative adoption processes nearly simultaneously. The challenged legislation could not have taken effect without enactment of the Amendment.

The Amendment changed the criteria for a defendant’s pretrial release from a resource-based system – a defendant primarily had to post money to secure his pretrial release – to a risk-based system. To effectuate this new risk-based system, the CJRA established procedures and conditions for pretrial release exclusive of bail. Without the procedures and conditions embedded in the CJRA, no process would exist to effectuate the purpose of the Amendment.

And further, the speedy trial requirements give effect to the speedy trial guarantees found in the New Jersey Constitution, Art. I, §10: “In all criminal prosecutions the accused shall have the right to a speedy . . . trial.” That New Jersey courts have previously applied a judicially fashioned test to determine if a defendant received a speedy trial does not preclude the Legislature from adopting specific time frames within which the State must bring a defendant to trial.

Given these factors, the State has met its burden and has established that the CJRA implements provisions of the New Jersey Constitution. Accordingly, summary judgment is granted dismissing the complaint.

The dissent would deny the motion to dismiss and permit the Claimant to offer proofs at a full fact-finding hearing. The dissenters have not formed a conclusion as to the substantive issues, but believe the motion to dismiss is premature. The dissenters seek additional information. In particular, the dissent questions whether the speedy trial provisions constitute legislative overreach. Without additional information, the dissenters are unable to determine how the risk assessment timeframe, which requires eligible defendants to be detained no longer than 48 hours after the defendant's commitment to jail during preparation of risk assessment prior to trial, implements the Amendment. The same question applies to the speedy trial time frames, which impose limitations on detention for 90 days prior to indictment, 180 days following return or unsealing of the indictment, and two years if the defendant does not go to trial. N.J.S.A. 2A:162-22. Based on the present record, the dissenters question whether the challenged statutes in fact implement the Amendment, as they bear a tenuous connection to conditions that may be necessary for release of a defendant without bail.

A majority of members of the Council joined in an addendum to the decision. In the addendum, the members emphasized the limited scope of the decision to the facts of this application, cautioning that the 5(c)(5) exemption should not be considered an open invitation to the Legislature to impose unfunded mandates upon counties, municipalities or boards of education by enacting amendments or supplements to the "Criminal Justice Reform Act."

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Angelo J. Genova argued the cause for the Claimant, New Jersey Association of Counties (Genova Burns, attorneys; Mr. Genova, Anthony M. Anastasio and Celia S. Bosco on the briefs).

Joseph C. Fanaroff, Assistant Attorney General, argued the cause for the Respondent, State of New Jersey and Administrative Office of the Courts; Mr. Fanaroff on the briefs.

Alexander Shalom argued the cause for amicus curiae, American Civil Liberties Union of New Jersey; (Mr. Shalom, Edward Barocas and Jeanne LoCicero on the brief).

Thomas H. Prol argued the cause for amicus curiae New Jersey State Bar Association; Mr. Prol on the brief.

Douglas E. Motzenbecker argued the cause for amici First Indemnity of America Insurance Company and various bail bonding agents (Gordon & Rees, attorneys; Mr. Motzenbecker and Samuel M. Silver on the briefs).

Council members Michael Kelly, Christopher Pianese, Victor R. McDonald, III, and Robert R. Salman, Esq. join in the opinion; members Robert R. Pacicco, Jack Tarditi and Edward P. Zimmerman dissent; members Michael Kelly, Victor R. McDonald, III, Robert R. Pacicco, Christopher Pianese, Jack Tarditi and Edward P. Zimmerman join in the addendum. Council member John K. Rafferty and Council Chair Hon. John A. Sweeney did not participate in the decision.

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In re Complaint Filed by The New Jersey Association of Counties

Re: N.J.S.A. 2A:162-16(b)(1) and N.J.S.A. 2A:162-22

Sections of The Criminal Justice Reform Act

COLM-0004-15

Decided: April 26, 2017

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Angelo J. Genova argued the cause for the Claimant, New Jersey Association of Counties (Genova Burns, attorneys; Mr. Genova, Anthony M. Anastasio and Celia S. Bosco on the briefs).

Joseph C. Fanaroff, Assistant Attorney General, argued the cause for the Respondent, State of New Jersey and Administrative Office of the Courts; Mr. Fanaroff on the briefs.

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Introduction

Following a ballot question that was approved in the November 2014 general election, the New Jersey Constitution was amended (the Amendment) to substantially eliminate bail for defendants awaiting trial; the Amendment instead substituted a risk-based provision. The Amendment, which became effective on January 1, 2017, reads:

All persons shall, before conviction be eligible for pretrial release. Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combinations of monetary bail and non-monetary conditions would reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community, or

prevent the person from obstructing or attempting to obstruct the criminal justice process. It shall be lawful for the Legislature to establish by law procedures, terms, and conditions applicable to pretrial release and the denial thereof authorized under this provision.

[N.J. Const. art. I, §11.]

The Claimant, New Jersey Association of Counties (the NJAC), filed a complaint with the Council on Local Mandates (the Council) seeking a declaration by the Council that the requirements set forth in N.J.S.A. 2A:162-16(b)(1), the risk assessment timeframe, and N.J.S.A. 2A:162-22, the speedy trial timeframes, sections of the Criminal Justice Reform Act (the CJRA), should be found to be unfunded mandates and in violation of article VIII, section II, paragraph 5 of the New Jersey Constitution, as implemented by the Local Mandates Act, N.J.S.A. 52:13H-1 to -22 (the LMA). The NJAC claims that the CJRA is an unfunded mandate as applied to the counties as it will force counties to expend monies for which a reciprocal funding source has not been created. Put another way, the NJAC asserts that because neither the CJRA nor any other legislative enactment authorizes resources to offset the additional direct expenses the counties will incur to implement the CJRA, the expenses must be paid by property taxes; accordingly, the NJAC submits that the CJRA is an unfunded mandate and should cease to be mandatory in its effect. The First Indemnity Insurance Company and various bail bonding agents (the bail bonding amici) support the NJAC's position.

In its complaint, the NJAC also sought preliminary injunctive relief, enjoining the State from enforcing the risk assessment timeframe requirement of N.J.S.A. 2A:162-16(b)(1) and the speedy trial requirements of N.J.S.A. 2A:162-22 pending disposition of the complaint. By order of December 27, 2016, the Council denied that request.

The State filed a motion to dismiss the complaint. The primary point raised by the State is that the complaint must be dismissed because the CJRA calls into effect article VIII, section 2, paragraph 5(c)(5), a provision of the New Jersey Constitution, and N.J.S.A.

13H-3e, which preclude a law that implements a provision of the New Jersey Constitution from being considered an unfunded mandate. The New Jersey State Bar Association and the American Civil Liberties Union of New Jersey (the ACLU) support the State's position. Following oral argument on February 15, 2017, the Council voted 4-3 to grant the State's motion to dismiss the complaint. This written decision is issued in accordance with N.J.S.A. 52:13H-15, requiring rulings by the Council to be in writing and to set forth the reasons for its determinations.

### The Council's Authority

In addressing the parties' arguments, the Council is guided by the constitutional amendment that governs its decisions concerning allegations of unfunded mandates, article VIII, section II, paragraph 5 of the New Jersey Constitution, which states:

any provision of law enacted on or after July 1, 1996, and with respect to any rule or regulation issued pursuant to law originally adopted after July 1, 1996, except as otherwise provided herein, any provision of such law, or of such rule or regulation issued pursuant to a law, which is determined in accordance with this paragraph to be an unfunded mandate upon . . . counties . . . because it does not authorize resources, other than the property tax, to offset the direct expenditures required for the implementation of the law or rule or regulation, shall, upon such determination cease to be mandatory in its effect and expire.

This constitutional provision was codified in N.J.S.A. 52:13H-1 to -22. Specifically, N.J.S.A. 52:13H-2 states that "any provision of a law enacted after January 17, 1996, that is determined to be an unfunded mandate upon . . . counties . . . because it does not authorize resources to offset the additional direct expenditures required for the implementation of the law . . . shall cease to be mandatory in its effect and shall expire."

A determination that a regulation is an unfunded mandate under the provisions of Article VIII, §2, ¶5 of the New Jersey Constitution requires that the claimant prove 1) a mandate on the government unit; 2) direct expenditures are required for implementation of the mandate; and 3) the regulation does not authorize resources to offset the required direct



expenditures. In re Complaint filed by Ocean Township (Monmouth County) and Frankford Township, Aug. 2, 2002 at 5.

Nonetheless, even assuming that a claimant could establish these criteria, both the New Jersey Constitution and the LMA create exemptions to the law being classified as an unfunded mandate. At issue here is the exemption that removes a law that may otherwise qualify as an unfunded mandate from being considered an unfunded mandate if that law implements a provision of the New Jersey Constitution. In pertinent part, the exemption, which the Council will refer to as the 5(c)(5) exemption, reads as follows: “(c) Notwithstanding anything in this paragraph to the contrary, the following categories of laws . . . shall not be considered unfunded mandates: (5) those which implement the provisions of this Constitution[.]” N.J. Const. art. VIII, §II, ¶5(c)(5). The LMA contains similar language: “3. Notwithstanding the provisions of any other law to the contrary, the following categories of laws . . . shall not be unfunded mandates: e. those which implement the provisions of the New Jersey Constitution[.]” N.J.S.A. 52:13H-3e.

Thus, the principal issue addressed by the parties and the Council is whether under this exemption the CJRA implements provisions of the New Jersey Constitution. The Council, having determined that the CJRA does indeed implement the provisions of the New Jersey Constitution, dismissed the complaint.

#### The Motion Standard

The issue comes before the Council on the State’s motion to dismiss. While the Council has not promulgated a rule regarding motions to dismiss, the Council has generally been guided by the New Jersey Rules of Court and New Jersey Court decisions. In re Complaints Filed by the Highland Park Board of Education and the Borough of Highland Park (Highland Park I), Aug. 5, 1999 at 12-13. The State’s motion, made prior to a testimonial hearing, essentially calls for summary disposition. Summary disposition is warranted when there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. R.4:46-2; Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540

(1995); N.J.A.C. 1:1-12.5 (b) (substantially same standard in Administrative Law proceedings). New Jersey Court Rules also allow for disposition based solely on the allegations in the complaint when there is a failure to state a claim upon which relief can be granted. R.4:6-2e. Under that rule, however, the motion is treated as a motion for summary judgment when matters outside the pleadings are presented with or in opposition to the motion. Ibid. Such is the case here, where the record contains multiple affidavits of county officials attesting to the anticipated costs the counties will incur by the implementation of the CJRA.

Once a moving party presents sufficient evidence in support of the motion, the opposition must show by competent evidence that a genuine issue of fact exists. Globe Motor Co. v. Igdaley, 225 N.J. 469, 479-80 (2016); the motion court must draw all legitimate inference in favor of the non-moving party. R.4:46-2(c). In other words, the court, or in this case the Council, must accept as true all of the evidence that supports the position of the party defending against the motion. Brill, supra, 142 N.J. at 535.

In Highland Park I, while recognizing the need for a mechanism such as a motion to dismiss to eliminate “needless delay and expense” that occur in awaiting and conducting a trial, the Council also recognized that because its rulings are not subject to judicial review, see N.J. Const. art. VIII, §II, ¶5(b); N.J.S.A. 52:13H-18, the Council must use great caution in deciding to dismiss a complaint on a pre-hearing motion. Highland Park I, at 12-13. Here, because no material facts are in dispute on the narrow question of whether the CJRA implements a provision of the New Jersey Constitution, summary disposition is warranted.

### The CJRA

The pertinent provisions of the CJRA are as follows, beginning with the purposes of the enactment.

C.2A: 162-15 Liberal construction.

1. The provisions of sections 1 through 11 of [the CJRA] shall be liberally construed to effectuate the purpose of primarily relying

upon pretrial release by non-monetary means to reasonably assure an eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, . . . and that the . . . defendant will comply with all conditions of release, while authorizing the court, upon motion of a prosecutor, to order pretrial detention . . . [under certain circumstances]. Monetary bail may be set . . . only when it is determined that no other conditions of release will reasonably assure the . . . defendant's appearance in court when required.

The laws that the NJAC challenge as unfunded mandates, N.J.S.A. 2A:162-16(b)(1), the risk assessment timeframe, and N.J.S.A. 2A:162-22, the speedy trial timeframes, concern the preparation of pretrial release risk assessments and the time frames within which certain actions concerning a defendant's release must be taken. Those provisions are as follows:

C.2A:162-16 Detaining eligible defendant during preparation of risk assessment prior to trial.

2.a. An eligible defendant . . . shall be temporarily detained to allow the Pretrial Services Program to prepare a risk assessment with recommendations on conditions for release . . .

b. (1) Except as otherwise provided . . . the court shall make a pretrial release decision for the eligible defendant without unnecessary delay, but in no case later than 48 hours after the eligible defendant's commitment to jail. The court shall consider the Pretrial Services Program's risk assessment and recommendations on conditions of release before making a pretrial release decision . . .

C. 2A:162-22 Eligible defendant subject to pretrial detention, release; conditions.

8. a. (1) (a) The . . . defendant shall not remain detained in jail for more than 90 days, not counting excludible time for reasonable delays as set forth [in other sections of this enactment] prior to return of an indictment.

(2) (a) An eligible defendant who has been indicted shall not remain detained in jail for more than 180 days on that charge following the

return or unsealing of the indictment, whichever is later, not counting excludible time for reasonable delays . . . before commencement of the trial. . . . Notwithstanding any other provision of this section, an eligible defendant shall be released from jail . . . after a release hearing if, two years after the court’s issuance of the pretrial detention order for the eligible defendant, excluding delays attributable to the . . . defendant, the prosecutor is not ready to proceed [to trial.]

The NJAC also challenges the CJRA’s funding source. That provision reads, in part, as follows:

C.2B:1-9 “21<sup>st</sup> Century Improvement Fund.”

14. a. There is established in the General Fund a dedicated, non-lapsing fund to be known as the “21<sup>st</sup> Century Improvement Fund,” which shall be [funded in a sum derived from filing fees.] Monies credited to the fund shall be appropriated annually and used exclusively for the purposes of funding:

- (1) the . . . Statewide Pretrial Services Program;
- (2) a . . . Statewide digital e-court information system;
- (3) [providing] the poor [with] legal assistance in civil matters by Legal Services of New Jersey . . .

b. Any amount remaining in the fund after the appropriation of funds . . . shall be retained by the Judiciary for . . . the Pretrial Services Program or for court information technology. The monies . . . shall not be used for any purpose other than those purposes set forth [in this and other provisions of this enactment].

The final provision of the CJRA that is relevant to the NJAC’s challenge is the CJRA’s effective date, which is related to the passage of the Amendment. That provision reads:

21. a. Sections 1 through 11 and section 20 of this act shall take effect on the same day that a constitutional amendment to Article 1, paragraph 11 of the New Jersey constitution authorizing the courts to deny pretrial release of certain defendants takes effect; [other sections not at issue here] shall take effect immediately.

The Arguments

The NJAC filed its complaint on December 6, 2016. It alleged that specific provisions of the CJRA, specifically N.J.S.A. 2A:162-16(b)(1), the 48-hour risk assessment period, and N.J.S.A. 162-22, the mandatory trial and release provisions, would “force counties to expend monies [for] which a reciprocal funding source is not provided in the Act.” Accordingly, it claimed that the above stated sections of the CJRA constitute an unfunded mandate as they fail to “authorize resources, other than the property tax, to offset the additional direct expenditures required for their implementation.”

In its complaint and accompanying brief, the NJAC asserts that compliance with the CJRA will result in millions of dollars in unfunded mandates to New Jersey’s counties. Those mandates include the Pretrial Services Program (the PSP), N.J.S.A. 2A:162-25, which calls for a risk assessment on each defendant. Further, under the CJRA, a defendant must remain in jail while the assessment is being conducted; and unless the prosecutor files a motion for pretrial detention, the CJRA requires the court to consider the risk assessment, recommendations, and other information, and make a pretrial release decision without unnecessary delay, but no later than 48 hours after a defendant is jailed. The CJRA further limits the duration of time prior to disposition that a defendant may remain in jail prior to trial: not more than 90 days prior to return of an indictment, N.J.S.A. 162-22(a); and not more than 180 days following return or unsealing of the indictment, whichever is later, subject to reasonable delays, N.J.S.A. 162-22(b). And a defendant must be released if the prosecutor is not ready to proceed to trial in two years, subject to delays attributable to the defendant. N.J.S.A. 162-22(c).

The NJAC claims that these procedures will force county facilities to open on weekends, resulting in additional ongoing costs for security at those facilities; and will require county sheriffs to hire additional officers and pay officers overtime. In addition, to accommodate staff for the PSP, counties will have to improve existing facilities.

It is further asserted that due to the timeframes requiring county prosecutors to be ready to go to trial within two years and the other “speedy trial” requirements under the

CJRA, the county prosecutors must hire additional assistant prosecutors, investigators, and staff, and hiring the additional staff will further burden the counties, necessitating expensive improvements to county facilities. According to the NJAC, the projected costs for compliance with the CJRA by county prosecutors will be \$1,279,876; by county sheriffs, \$873,547; and for county jail facilities, \$919,160. The NJAC argues that these are direct expenditures that are required for the implementation of the CJRA, which can be offset only with property taxes.

Compounding the counties' financial situation, and notwithstanding the additional anticipated costs the counties will incur to allow the prosecutors and sheriffs to perform their statutory and constitutional obligations, the NJAC points out that state law limits its request for annual funding, currently to two percent. See, inter alia, N.J.S.A. 40A:4-45.45b.

The NJAC also asserts that the CJRA will result in "potential hidden costs" that are not immediately quantifiable. For example, it is submitted that in many municipalities, municipal police departments temporally detain arrestees at the police station to provide them with an opportunity to post bail on complaint-warrants before being transferred to county jails. Because this alternative is no longer available, the NJAC submits this could potentially increase the number of inmates processed at county jails, increasing costs. And too, the NJAC points to the State Attorney Generals Criminal Justice Reform Study, which found it "not possible in this report to project monetary amounts relating to costs or savings associated with implementing" the CJRA.

The NJAC further argues that the Legislature has not created a funding source for the operating and capital improvement costs the counties will incur for compliance with the CJRA. The argument is that while the 21<sup>st</sup> Century Improvement Fund may authorize resources for the Judiciary to comply with the CJRA, it does not authorize the resources the counties will need as a result of the direct expenditures required for implementation of the PSP and the speedy trial provisions of the CJRA.

Finally, the NJAC argues that the ballot question for approval of the Amendment, and its interpretive statement, addressed only the elimination of the right to bail, and, consequently, the Amendment does not authorize a process which imposes on county governments the costs associated with an accelerated release or trial process for detained defendants.

According to the NJAC, all of the above stated issues require a plenary hearing before the Council acts on the State's motion.

The State, in its brief in support of its motion to dismiss, and in its reply to the NJAC's brief in support of its complaint, makes a number of arguments, but focuses on the 5(c)(5) exemption of the Amendment. The State argues that, as a matter of law, the CJRA falls within this exception. The State submits that even though the Legislature did not explicitly label the CJRA as a law that implements the provisions of the New Jersey Constitution, the CJRA clearly does so for a number of reasons. For example, the bill that resulted in the Amendment, and the concomitant CJRA, were moved through the Legislature contemporaneously; and, significantly, the CJRA expressly states that it would take effect only upon passage of the Amendment.

The Bar Association joins in the State's position. The Bar Association points to the plain language embodied in article I, paragraph 11 of the Amendment, which expressly gives the Legislature the authority to provide implementing legislation: "It shall be lawful for the Legislature to establish by law procedures, terms, and conditions applicable to pretrial release and the denial thereof authorized under this provision." N.J. Const., art. I, §11. And further, the Bar Association argues that the effective date language of the CJRA, which states: "Sections 1 through 11 and section 20 of this act shall take effect on the same day that a constitutional amendment to Article 1, paragraph 11 of the New Jersey constitution authorizing the courts to deny pretrial release of certain defendants takes effect," L. 2014, c. 31, s. 21, creates a direct connection between the Amendment and the challenged statutes.

Finally, the Bar Association takes the position that the Legislature did, in fact, create a funding source for the implementation of the CJRA, pointing to the 21<sup>st</sup> Century Improvement Fund; and that the adequacy of the fund is an issue for the courts, not the Council.

The ACLU also sides with the State, making similar arguments. It submits that the “question is . . . whether the challenged statute implements a constitutional provision.”; and the answer to that question is yes. The ACLU also asserts that the costs projected by the NJAC are speculative and should be rejected.

The NJAC rejects the argument that the CJRA implements the New Jersey Constitution. It claims that exemption 5(c)(5), under the circumstances here, would undermine the public policy that underpins the reason for the unfunded mandate amendment and its statutory counterpart; that policy being to prevent state government “from forcing local governments and boards of education to implement many new or expanded programs, unless those programs are accompanied by the means to pay for them.” In re Highland Park Board of Education, Aug. 5, 1999 (citing Senate Committee Substitute for Senate Concurrent Resolution No. 87, May 15, 1995). According to the NJAC, the 5(c)(5) exemption is so “broadly-worded” that it has the potential to “swallow the entire rule against unfunded mandates.” The NJAC claims that the Council has narrowly applied the 5(c)(5) exemption in the past, citing to In re Monmouth-Ocean Educational Services Comm’n, Aug. 20, 2004, and other prior Council decisions. The NJAC asserts that when construing the exemption in light of the public policy of eliminating unfunded mandates, the language of the Amendment must be balanced against all other provisions of the New Jersey Constitution that address the same or similar subject matter. And when doing so, the exemption should not apply to the risk assessment and speedy trial provisions of the challenged statutes, as such a construction would be contrary to the underlying public policy of precluding unfunded mandates.



The bail bonding amici join in the position of the NJAC for substantially the same reasons. They further assert that the public question and its interpretive statement were “wholly inadequate and materially misleading and did not encompass the pretrial risk assessments or the speedy trial provisions.” The challenged provisions, according to the bail bonding amici, present no more than a tenuous constitutional nexus and do not fall within the bounds of the 5(c)(5) exemption.

### Decision

The State moves to dismiss the complaint on summary disposition. The Council will treat this as a motion for summary judgment because matters outside the pleadings, multiple affidavits asserting anticipated costs to implement the Amendment, have been presented in opposition to the motion. As noted previously, under the summary judgment rules, once a moving party presents evidence in support of the motion, the opposition must show by competent evidence that a genuine issue of material fact exists. Globe Motor Co., *supra*, 225 N.J. at 479-80. In deciding such a motion, the motion court, or in this case the Council, must draw all legitimate inferences in favor of the non-moving party. R.4:46-2(c).

Applying these criteria here, it is not necessary for the Council to decide the accuracy of the anticipated costs the counties claim are required for implementation of the challenge statutes. That is because the pivotal issue raised in this case, whether the CJRA implements the New Jersey Constitution, is a question of law, not a question of fact. Even if the NJRA would otherwise qualify as an unfunded mandate, if the law implements a provision of the New Jersey Constitution, it may not under any circumstance be considered an unfunded mandate. N.J. Const. art. VIII, §II, ¶5. Accordingly, because no material facts regarding this issue are in dispute, no plenary hearing to determine the accuracy of the proposed expenditures imposed upon the counties, or any other material fact, is warranted.

That said, the current record demonstrates that, as a matter of law, the challenged statutory provisions fall within the 5(c)(5) exemption: the challenged statutes “implement

the provisions of [the New Jersey] Constitution,” N.J. Const. art. VIII, §II, ¶5. As such, the exemption deprives the Council of the authority to nullify the challenged statutes - N.J.S.A. 2A:162-16(b)(1), the risk assessment timeframe, and N.J.S.A. 2A:162-22, the speedy trial timeframes, even if they were otherwise to constitute unfunded mandates. See In re Township of Medford, June 1, 2009, at 8.

A number of factors inform the Council’s decision.

First, it looks to the similarity of the language of the Amendment and the CJRA. The CJRA is to be liberally construed to “effectuate the purpose of primarily relying upon pretrial release by non-monetary means to reasonably assure an eligible defendant’s appearance in court when required, the protection of the safety of any other person or the community . . . and that the . . . defendant will comply with all conditions of release, while authorizing the court, upon motion of a prosecutor, to order pretrial detention . . . [under certain circumstances]. Monetary bail may be set . . . only when it is determined that no other conditions of release will reasonably assure the . . . defendant’s appearance in court when required.”

[N.J.S.A. 2A: 162-15.]

The language of the Amendment is strikingly similar. The Amendment, states, in part, that “[a]ll persons shall, before conviction be eligible for pretrial release. Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combinations of monetary bail and non-monetary conditions would reasonably assure the person’s appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process.” N.J. Const., art. I, §11. Comparing the wording of the two enactments, the similarity of the language and purposes of the Amendment and the CJRA demonstrate a substantial nexus between them.

Further, the Amendment and the CJRA have a significant temporal connection, having been moved through the legislative adoption processes nearly simultaneously. Indeed, the challenged legislation could not have taken effect without enactment of the Amendment. As previously noted, section 21.a. of the CJRA specifically states that “sections . . . of this act shall take effect on the same day that a constitutional amendment to Article 1, paragraph 11 of the New Jersey constitution authorizing the courts to deny pretrial release of certain defendants takes effect.” Put simply, the CJRA would not be law but for passage of the Amendment.

The Amendment changed the criteria for a defendant’s pretrial release from a resource-based system – a defendant primarily had to post money to secure his pretrial release – to a risk-based system. To effectuate this new risk-based system, the CJRA undeniably established procedures and conditions for pretrial release exclusive of bail. Those provisions were consistent with the Amendment’s express authority to the Legislature to provide implementing legislation for the Amendment. N.J. Const. art. I, §11. Without the procedures and conditions embedded in the CJRA, no process would exist to effectuate the purpose of the Amendment.

Given the similarity of language of the Amendment and the CJRA; the temporal connection between the two; the Amendment’s authorization to the Legislature to enact procedures, terms and conditions to effectuate the purposes of the Amendment; and that the CJRA would simply not have become law without the adoption of the Amendment; the State has met its burden and has established that the CJRA implements provisions of the New Jersey Constitution.

Both the risk assessment procedures and timeframe, and the speedy trial timeframes bear upon pretrial release. The Amendment allows for pretrial release without bail being posted. Inherent in this new right is the need for management of the risk posed by the potential release. That is what is substantially addressed by requirements and procedures rooted in N.J.S.A. 2A:162-16(b)(1), the risk assessment timeframes.

And too, the speedy trial requirements give effect to the speedy trial guarantees found in the New Jersey Constitution, Art. I, §10: “In all criminal prosecutions the accused shall have the right to a speedy . . . trial.” That New Jersey courts have previously applied a judicially fashioned test to determine if a defendant received a speedy trial, State v. Szima, 70 N.J. 196, 200-01 (1976), does not preclude the Legislature from adopting specific time frames within which the State must bring a defendant to trial.

A simple dictionary definition of “implement” reinforces the applicability of the 5(c)(5) exemption. “Implement” is defined: “to give practical effect to and ensure the actual fulfillment by concrete measures.” Webster’s Ninth New Collegiate Dictionary 604 (1987). That is what the challenged statutes do, they to give practical effect to the Amendment, and to Article I, §10 of the New Jersey Constitution, and attempt to ensure that the purposes of the Amendment, and Article I, §10 of the New Jersey Constitution, are fulfilled. When the Amendment gave the Legislature the authority “to establish by law procedures, terms, and conditions applicable to pretrial release and the denial thereof authorized under this provision,” N.J. Const. Art I, §11, it gave the Legislature the authority to implement the Amendment. N.J.S.A. 2A:162-16(b)(1) and N.J.S.A. 162-22 are part and parcel of the Amendment’s implementation.

In arriving at this decision, the Council follows settled judicial practice of construing a statute to avoid creating a constitutional problem, unless a contrary position is persuasively required. In Re: Ocean Township (Monmouth County) and Frankford Township, Aug. 2, 2002 at 11; (citing State v. Muhammad, 145 N.J. 23, 41 (1996)). Construing a statute, we look to its legislative purpose and give the words a common-sense meaning within the context of that purpose.” In re T.S., 364 N.J. Super 1, 6 (App. Div. 2003). The first step in deriving legislative intent is to consider the statute’s plain meaning, Mody v. Brooks, 339 N.J. Super 392, 395 (App. Div. 2001), in the context of the entire legislative scheme. Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 129 (1987).

Applying these rules of statutory construction here, it is beyond question that the statutes at issue implement the Amendment and Article I, §10 of the New Jersey Constitution. The Amendment is clear on its face; the words of the enactments are given their common sense meaning. The Amendment gives the Legislature the authority to enact procedural rules governing a defendant's pretrial release. The Council finds that the Legislature did just that in enacting the CJRA. By so construing the Amendment's language, the Council fosters the purposes of both the Amendment and the statutes to manage conditions for pretrial release.

The NJAC further argues that the Council must attempt to harmonize the 5(c)(5) exemption with the underlying purposes of the unfunded mandate amendment, as well as with other constitutional provisions that effect funding for legislative mandates. The Council disagrees. No reconciliation is necessary beyond looking at the plain language of the constitutional amendment regarding unfunded mandates, N.J. Const. art. VIII, §2, ¶5, and the LMA, N.J.S.A. 52:13H-1 to -22. Their meaning is clear and unambiguous: if a law implements the New Jersey Constitution, it may not be classified as an unfunded mandate, even if it otherwise meets the constitutional and statutory definition of an unfunded mandate. When a statute is clear on its face, we need not look beyond its words and phrases for its intent. State v. Churchdale Leasing, Inc., 115 N.J. 83, 101 (1989).

And too, legislation must be read to give effect to all of its provisions. Bradley v. Ramp, 132 N.J. Super 429 433 (App. Div. 1975). To accept the NJAC's argument that all other constitutional provisions that affect funding for legislative mandates must be considered along with the plain language of 5(c)(5) would effectively nullify the 5(c)(5) exemption and ignore its plain meaning.

Finally, the Council does not address whether the funding mechanism, the 21<sup>st</sup> Century Improvement Fund, was sufficient. That issue is for the courts.

In sum, for the reasons the Council has set forth, the State has met its burden and has proved that the Criminal Justice Reform Act implements provisions of the New Jersey Constitution and, accordingly, shall not be considered an unfunded mandate.

### Dissent

The dissent would deny the motion to dismiss and permit the Claimant to offer proofs at a full fact-finding hearing. The dissenters have not formed a conclusion as to the substantive issues, but believe the motion to dismiss is premature. The dissenters believe additional information is necessary.

In particular, the dissent questions whether the speedy trial provisions constitute legislative overreach. The Amendment, which led to passage of the CJRA, is silent concerning timeframes within which to take certain steps toward trial. Without additional information, the dissenters are unable to determine how N.J.S.A. 2A:162-16(b)(1), the risk assessment timeframe, which requires eligible defendants to be detained no longer than 48 hours after the defendant's commitment to jail during preparation of risk assessment prior to trial, implements the Amendment. The same question applies to the speedy trial time frames, which impose limitations on detention for 90 days prior to indictment, 180 days following return or unsealing of the indictment, and two years if the defendant does not go to trial. N.J.S.A. 2A:162-22. Based on the present record, the dissenters question whether the challenged statutes in fact implement the Amendment, as they bear a tenuous connection to conditions that may be necessary for release of a defendant without bail. The dissenters believe they need more information bearing on this issue.

As the Council has made clear in the past, its rulings are not subject to judicial review. N.J. Const. art. VIII, §2, ¶5(b); N.J.S.A. 52:13H-18. And “given that the parties will have no other forum in which to challenge mandates, we are wary of disposing of

matters in a summary manner. In re Board of Education and Borough of Highland Park, Aug. 5, 1999 at 13. Accordingly, the dissenters would deny the motion to dismiss and allow the Claimant an opportunity to explore the issues in a full plenary hearing. The dissent would seek additional information on the necessity of the proposed costs the NJAC claims are required by the CJRA, as well as additional information on the relationship between the time frames in the CJRA and the language and purpose of the Amendment.

Accordingly, we dissent.

### Addendum

Notwithstanding the Council's decision, members of the Council strongly caution that while it has found that provisions of the "Criminal Justice Reform Act" fall within the 5(c)(5) exemption: the challenged statutes "implement the provisions of [the New Jersey] Constitution," the Legislature and the Executive Branch should not interpret this decision as carte blanche to impose unfunded mandates upon counties, municipalities, or boards of education by enacting amendments or supplements to the "Criminal Justice Reform Act."

This decision should not be viewed as a bypass around the State Mandate - State Pay provisions of the New Jersey Constitution upon which future mandates may travel unchallenged. The limited scope of our decision and the fact that efforts to use it in order to circumvent State Mandate - State Pay "would be beyond the scope of the exemption and within the purview of this Council to decide, based on the proofs, whether it was an unfunded mandate" was acknowledged by the representative of the ACLU in response to questioning by the Council.