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December 13, 2021

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-12-21, *State v. F.E.D.* (086187),
Appellate Division Docket No. A-2554-20

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule* 2:6-2(b), kindly accept this letter brief on behalf of *Amicus Curiae* American Civil Liberties Union of New Jersey (ACLU-NJ).

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Preliminary Statement

Amicus ACLU-NJ submits this letter brief in support of Petitioner F.E.D. While *amicus* supports the arguments ably put forth by F.E.D. in his supplemental brief, *amicus* does not repeat all of the arguments here, but focuses instead on two narrow issues that are likely to recur in other applications for compassionate release.

Acknowledging that New Jersey incarcerates too many infirm people, at great costs – both personal and financial – the Legislature passed, and the Governor signed, a compassionate release law. The law sought to ensure that prisons did not transform into nursing homes, providing around-the-clock care for the seriously ill, except where security concerns required them to do so.

The law requires, as a threshold matter, the incarcerated person to obtain a certificate of eligibility from Department of Corrections (DOC) doctors. The prison doctors provide the certificate if the person has a terminal diagnosis or, as applicable here, suffers from a permanent physical incapacity. Thereafter, the person may seek compassionate release in the Law Division. The court may grant release where the incarcerated person proves by clear and convincing evidence that that are so enfeebled "as to be permanently physically incapable of committing a crime if released." Finally, the court must be convinced that releasing the person on agreed upon parole terms would not pose a threat to public safety.

Faced with a case testing that law, the Appellate Division read several terms of the statute in a way that stripped the statute of its very purpose: compassion. (Point I). Specifically, the panel replaced the medical judgment of the DOC and determined that F.E.D. was not permanently physically incapacitated enough because there were some activities of daily living (ADLs) that he could, arguably, perform. This was error both because the DOC's medical judgment was entitled to deference and because the inability to perform several ADLs renders a person permanently physically incapacitated, under an ordinary understanding of the term. (Point I, A). And, in *dicta*, the panel provided an interpretation of the two public safety provisions of the law that would only allow for release where a court was certain that a person could not commit a crime. Insofar as such an assurance could never be given, the interpretation renders the law useless. The Legislature could not have intended such a result. (Point I, B).

To effect the law's purpose – to provide for compassionate release of people ailing in our prisons when it can be done safely – the Court must reject the limitations the Appellate Division read into the statute.

Statement of Facts and Procedural History

Amicus ACLU-NJ accepts the statement of facts and procedural history contained in Defendant F.E.D.'s supplemental brief filed before this Court.

Argument

I. The Appellate Division's cramped reading of the compassionate release statute strips the statute of its legislative purpose.

On October 19, 2020, Governor Murphy signed into law A2370, a statute that allows for compassionate release. N.J.S.A. 30:4-123.51e. The law calls on the Commissioner of the DOC to establish a process for incarcerated people to obtain medical diagnoses from two doctors to determine whether they are eligible for compassionate release. N.J.S.A. 30:4-123.51e(b). When those doctors determine that a person suffers from a permanent physical incapacity ("a medical condition that renders the inmate permanently unable to perform activities of basic daily living, results in the inmate requiring 24-hour care, and did not exist at the time of sentencing" N.J.S.A. 30:4-123.51e(l)), the DOC is commanded to issue a certificate of eligibility for compassionate release; thereafter the incarcerated person may petition a trial court for compassionate release. N.J.S.A. 30:4-123.51e(d)(2).

In evaluating petitions for compassionate release, trial courts look for clear and convincing evidence that the petitioner is so permanently physical incapacitated[1] "as to be permanently physically incapable of committing a crime if

[1] The statute also allows for compassionate release of those people facing terminal diagnoses – that is, a prognosis that a person has six months or less to live – but

released. . . .” N.J.S.A. 30:4-123.51e(f)(1). Additionally, the court must find, by the same standard, that releasing the petitioner under conditions of parole “would not pose a threat to public safety.” *Id.*

This procedure allows extremely sick people – those who cannot perform important activities of daily living – an opportunity to get out of prison, provided their illness has sufficiently enfeebled them and their release can be safely accomplished. Instead of applying the statute to the facts of F.E.D.’s case, the Appellate Division read into the statute additional language that creates impossible burdens for petitioners to meet.

A. The Appellate Division’s narrow reading of “permanent physical incapacity” would render virtually no one eligible for release.

The Appellate Division’s hinged its resolution of the case on a “threshold question: whether F.E.D. suffers from a permanent physical incapacity.” *State v. F.E.D.*, 469 N.J. Super. 45, 57 (App. Div. 2021).[2] The panel acknowledged that it owed some deference to the DOC’s interpretation of the statute, as it was the agency charged with apply the law. *Id.* at 59. Still, the court held that the certificate of eligibility issued by the DOC was invalid because the physicians did not find

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that provision is not at issue in this case. N.J.S.A. 30:4-123.51e(f)(1); N.J.S.A. 30:4-123.51e (l).

[2] P. Cert refers to the Petition for Certification;
SBr refers to the State’s Appellate Division brief;
DSuppBr refers to F.E.D.’s Supplemental brief filed with this Court.

that F.E.D. was "unable to perform activities of basic daily living[,]" as required by law. *Id.* at 64.

The Legislature made explicit delegations in the statute: the DOC is tasked with making the medical determinations and the courts are required to review them for arbitrariness and then independently make public safety determinations. Rather than engaging in deferential review, the trial court and Appellate Division conducted independent medical analysis to determine that F.E.D. was not permanently physically disabled. The independent assessment employed the wrong standard and reached the wrong conclusions.

The Appellate Division took issue with two components of the certificate: First, that the treating physicians did not make explicit findings about F.E.D.'s ability to engage in ADLs, though the medical director did. *Id*. at 65. Second, that the DOC found that F.E.D. was unable to perform some – rather than all – ADLs. *Id.* at 64-65. *Amicus* focuses here on the second rationale since the first, if correction were necessary, presumably, could be remedied by a remand in which the designated doctors were more explicit.[3]

All parties and the Appellate Division seem to agree (*Id.* at 59, P. Cert. at 5,

[3] It is unnecessary here to determine whether the Court should hold F.E.D. responsible for the DOC's failure to abide by the exact dictates of the statute. But fairness likely precludes rejecting (with prejudice) an incarcerated person's petition because of the DOC's error. *See also* DSuppBr at 39-40 (explaining why DOC's process in this case satisfies statutory requirements).

SBr at 25) that the ADLs at issue are the activities of *basic* daily living – like bathing, dressing, toileting, locomotion, transfers, eating, and mobility – rather than activities like shopping, house cleaning, food preparation, and laundry. The question, then, is how many basic ADLs a person must be unable to perform to qualify as permanently physically incapacitated. The Appellate Division interpreted the statute to require a person to be unable to perform *all* ADLs. Such a reading limits the reach of the statute in ways the Legislature could not have intended.

Because it could not determine the exact line the Legislature drew, the Appellate Division determined that "[b]y stating that a person is 'unable to perform activities of basic daily living,' the Legislature meant 'unable to perform any activity of basic daily living.'" Slip. Op. at 62. It reasoned that "If the Legislature intended to refer to less than all activities, it could have done so." *Id.* (citing N.J.S.A. 17:30B-2 (setting the number at two) and N.J.A.C. 12:15-1.1A (setting the number at three)). But the converse is also true: had the Legislature intended to refer to *all* activities, it could have done so. It would have been just as simple for the Legislature to add the word "any" or "all" as it would have been for them to designate a number of ADLs. In interpreting statutes, courts "must be careful not to 'rewrite a statute or add language that the Legislature omitted.'" *State v. Twiggs*, 233 N.J. 513, 533 (2018) (quoting *State v. Munafo*, 222 N.J. 480, 488 (2015)). The

Appellate Division not only added language, but it also did so in a way that undermined the very purpose of the statute.[4]

There would exist no need for courts to perform the public safety analyses required by statute if only people who could perform no ADLs were even eligible for consideration under the statute. After all, if certificates of eligibility required a showing that a person could not bathe, dress, toilet, locomote, eat, move, *and* transfer without assistance, it is hard to imagine how that person could nonetheless pose a risk to public safety. The Legislature would not have set a procedure to allow courts to consider public safety if virtually no one would even qualify for consideration.

But even if either reading were plausible, the Court must defer to the DOC's interpretation: an appellate court must accord an administrative agency deference in its exercise of statutorily delegated responsibility. *In re Atty Gen. Law Enforcement Directives Nos. 2020-5 and 2020-6*, 246 N.J. 462, 489 (2021) (citations omitted). The compassionate release statute assigns the DOC responsibility to determine whether an incarcerated person meets the medical prerequisites to proceed with a petition. N.J.S.A. 30:4-123.51e(b), (d)(2), (l). As a result, the DOC's medical determination – that F.E.D. qualifies as permanently

[4] *Amicus* adopts F.E.D.'s persuasive explanation of why the Governor's press release, including quotes from the sponsors, serves as a persuasive source of legislative intent. DSuppBr at 23-24, n. 10.

physically incapacitated – is entitled to deference; absent a showing of arbitrariness or capriciousness, courts should not disturb the DOC's determination of eligibility.

B. The panel's erroneous interpretation of the public safety provision of the law would limit its application to almost no one.

The Appellate Division's holding was limited to eligibility; once the panel determined that F.E.D.'s certificate should not have issued, it did not need to go any further. *F.E.D.*, 469 N.J. Super. at 66. Acknowledging that any further analysis would amount to dicta, the court nonetheless offered some "limited observations." *Id.* None of those observations resolved the "knotty issues" that statute raised. *Id.* at 68. Still, the court's discussion of one issue raises serious concerns.

After determining that a person is physically incapable of committing a new crime the court must determine whether release on parole conditions "would . . . pose a threat to public safety." N.J.S.A. 30:4-123.51e(f)(1). The trial court held, and the Appellate Division observed, that the statute does not ask whether there is a "reasonable" likelihood of a threat to public safety. *Id.* In contrast, the parole law asks whether there exists "a reasonable expectation" that someone will violate parole (N.J.S.A. 30:4-123.53(a)) and the Criminal Justice Reform Act requires release where conditions will "reasonably assure" public safety. N.J.S.A. 2A:162-19. Because the statute did not include the word "reasonable," the trial court interpreted it strictly.

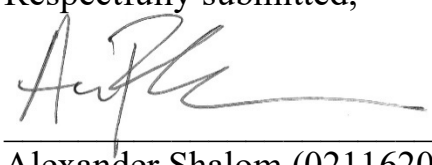
The absence of the word "reasonable" does not provide license for the courts to make unreasonable determinations. No court could *ever* hold that a threat to public safety is an absolute impossibility. Nowhere else in our system do we demand a complete assurance that no risk exists. *See*, *e.g.*, *State v. Lopez-Carrera*, 245 N.J. 596, 614 (2021) (explaining that the CJRA "is painstakingly designed to measure and manage the level of risk each defendant presents" not eliminate the risk altogether). Nor could we. Risk can never be eliminated in its entirety, so a law that demanded total assurance that no risk existed could not be effectuated.

In determining whether a person "would . . . pose a threat to public safety" (N.J.S.A. 30:4-123.51e(f)(1)) if released, courts should do what they always do in making that determination – decide whether the risk posed can be tolerated. This is not to say that courts must have the same risk tolerance is all contexts: a person jailed pretrial presumably has different liberty interests than a person seeking parole (or compassionate release) or a person seeking to avoid civil commitment under the SVPA (N.J.S.A. 30:4–27.24 to 27.38), which yields varied risk tolerance. But the absence of the word reasonable does not require courts to deny petitions whenever there exists *any* risk of recidivism. The Legislature would not pass a law with an intended reach of no people.

Conclusion

Releasing people from prison early – even those people who are so debilitated as to need around-the-clock care – requires thoughtful consideration. These questions are complex and judges hearing Petitions for release must engage in fact-sensitive analyses. But, recognizing this reality, the Court should not interpret the compassionate release statute in a way that precludes meaningful consideration of petitions. The Court should reverse the Appellate Division's eligibility holding and remand for appropriate consideration of the public safety factors.

Respectfully submitted,



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