

RECORD IMPOUNDED

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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3010-20

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

A.M.,¹

Defendant-Appellant.

APPROVED FOR PUBLICATION

May 2, 2022

APPELLATE DIVISION

Argued January 26, 2022 – Decided May 2, 2022

Before Judges Fasciale, Vernoia and Firko.

On appeal from the Superior Court of New Jersey,
Law Division, Morris County, Indictment No. 11-02-
0201.

Alison Gifford, Assistant Deputy Public Defender,
argued the cause for appellant (Joseph E. Krakora,

¹ We employ initials to refer to defendant A.M. because information contained in a petition for compassionate release under N.J.S.A. 30:4-123.51e, and "comments submitted by a recipient" of the petition "in response thereto," are "confidential and shall not be disclosed to any person who is not authorized to receive or review the information or comments." N.J.S.A. 30:4-123.51e(e)(4); see also State v. F.E.D., 469 N.J. Super. 45, 48 n.1 (App. Div. 2021); Administrative Directive #04-21, "Criminal — Procedures for Compassionate Release Pursuant to N.J.S.A. 30:4-123.51e" (Feb. 1, 2021) ("The petition, responses, and information related to the petition . . . shall be confidential pursuant to N.J.S.A. 30:4-123.51e(e)(4).").

Public Defender, attorney; Alison Gifford, of counsel and on the brief).

John McNamara, Jr., Chief Assistant Prosecutor, argued the cause for respondent (Robert J. Carroll, Morris County Prosecutor, attorney; John McNamara, Jr., on the brief).

The opinion of the court was delivered by

VERNOIA, J.A.D.

A.M. suffers from end-stage multiple sclerosis, a progressive condition that renders her physically incapable of conducting any activities of daily life and requires twenty-four-hour daily medical care. After serving eight years of her forty-year sentence for the murder of her husband, she petitioned for release on parole to a medical facility pursuant to the Compassionate Release Act (CRA), N.J.S.A. 30:4-123.51e.

Subsection (f)(1) of the CRA authorizes a court to grant a petition for release on parole where there is clear and convincing evidence the inmate suffers from a "permanent physical incapacity" rendering the inmate "permanently physically incapable of committing a crime if released" and the conditions "under which the inmate would be released would not pose a threat to public safety." N.J.S.A. 30:4-123.51e(f)(1). Here, the court conducted hearings, determined A.M. satisfied the permanent physical incapacity and

public safety requirements, but denied her petition based on its conclusion N.J.S.A. 30:4-123.51e(f)(1) vested it with discretion to do so.

A.M. appeals from the denial of her petition. She argues N.J.S.A. 30:4-123.51e(f)(1) does not vest a court with any discretion and the statute mandates that a court grant a petition for release on parole under the CRA if it finds, as the court did here, there is clear and convincing evidence an inmate suffers from a qualifying permanent physical incapacity and does not pose a threat to public safety. We agree and reverse the court's order denying A.M.'s petition.

I.

The CRA

To place the issues presented by A.M.'s petition for release on parole under the CRA in context, we first summarize the history and requirements of the statute, which became effective on February 1, 2021. L. 2020, c. 106, § 1 (codified at N.J.S.A. 30:4-123.51e). Prior to the CRA's enactment, the Parole Act of 1979 (the Parole Act), N.J.S.A. 30:4-123.45 to -123.76, vested the State Parole Board with the authority to grant what was characterized as "medical parole," see N.J.S.A. 30:4-123.51c (repealed by L. 2020, c. 106, § 3). Under N.J.S.A. 30:4-123.51c, the State Parole Board was authorized to grant medical parole to prison inmates diagnosed with "a terminal condition, disease or

syndrome or a permanent physical incapacity" that caused an inmate to be "so debilitated or incapacitated . . . as to be physically incapable of committing a crime if released on parole and, in the case of a permanent physical incapacity, the conditions under which the inmate would be released would not pose a threat to public safety."² N.J.S.A. 30:4-123.51c(a)(2) (repealed 2020).

The medical parole statute detailed procedures for submission of a request for medical parole and for the State Parole Board's consideration of the request. See N.J.S.A. 30:4-123.51c(a)(2), (a)(3) and (b)-(d) (repealed 2020). The statute excluded certain inmates from eligibility for medical parole; those serving sentences for certain offenses, including murder under N.J.S.A. 2C:11-3, were not eligible for medical parole. N.J.S.A. 30:4-123.51c(a)(3) (repealed 2020).³

² Prior to an amendment to N.J.S.A. 30:4-123.51c that became effective April 1, 2018, L. 2017, c. 235, § 1, medical parole was available only to inmates suffering from a terminal condition, disease, or syndrome. Under the amendment, inmates suffering from qualifying permanent physical incapacities became eligible for medical parole.

³ The statute also prohibited medical parole for

inmates serving any sentence for a violation of . . . [N.J.S.A.] 2C:11-4; [N.J.S.A.] 2C:13-1; subsection a. of [N.J.S.A.] 2C:14-2; [N.J.S.A.] 2C:15-1 in which the inmate, while in the course of committing the theft, attempted to kill another, or purposely inflicted or attempted to inflict serious

In a 2019 report, the New Jersey Criminal Sentencing & Disposition Commission (the Sentencing Commission) recommended replacing medical parole under N.J.S.A. 30:4-123.51c with a new "release mechanism," which the Sentencing Commission "called [c]ompassionate [r]elease," providing for the "prompt release" of prison inmates "suffering from a terminal condition or permanent physical incapacity." New Jersey Criminal Sentencing & Disposition Commission, Annual Report: November 2019 30 (2019). The Sentencing Commission found the medical parole statute was rarely used in part because "by the time an inmate qualifies for release, he or she is too ill to take the necessary steps to complete the process." Id. at 32.

The Sentencing Commission recommended the Legislature establish standards for compassionate release similar to those under the medical parole statute but with different procedural mechanisms intended to accelerate the decision-making process. Ibid. The Sentencing Commission "believe[d]" its recommendation, if adopted, "would likely increase the number of ill patients

bodily injury, or was armed with or used or threatened the immediate use of a deadly weapon; subsection a. of [N.J.S.A.] 2C:17-1; or [N.J.S.A.] 2C:24-4 or an attempt to commit any of these offenses

[N.J.S.A. 30:4-123.51c(a)(3) (repealed 2020).]

released from custody, and would result in significant cost savings for" the New Jersey Department of Corrections. Id. at 33.

The Legislature accepted the Sentencing Commission's recommendation and enacted the CRA, which, as noted, became effective on February 1, 2021. L. 2020, c. 106, § 1. The CRA eliminated the State Parole Board's authority to grant medical parole, and "empowered courts to grant qualifying inmates 'compassionate release' regardless of their parole-eligibility date." F.E.D., 469 N.J. Super. at 50. The CRA generally "retains the medical-parole statute's criteria for release, but it adopts procedures to hasten decision-making." Ibid. The CRA also eliminates the medical parole statute's disqualification of inmates based on the crimes for which they are serving sentences. Ibid. Thus, inmates serving sentences for any crime in our Criminal Code, including murder, are eligible for release under the CRA. See N.J.S.A. 30:4-123.51e.

The CRA details the process required for the submission of, and consideration of, a request for compassionate release. See State v. Chavies, 247 N.J. 245, 261 (2021) (noting the CRA "addresses . . . the process for petitioning for compassionate release after a qualifying diagnosis"). The CRA further defines the duties, responsibilities, and roles of the Department of Corrections, the State Parole Board, and the courts in the process. N.J.S.A. 30:4-123.51e.

Under the CRA, the Commissioner of the Department of Corrections is required to "establish and maintain a process by which an inmate may obtain a medical diagnosis to determine whether [he or she] is eligible for compassionate release." N.J.S.A. 30:4-123.51e(b). The diagnosis must be "made by two licensed physicians designated by the [C]ommissioner" of the Department of Corrections, N.J.S.A. 30:4-123.51e(b), and it must "include . . . a description of the" inmate's "terminal condition, disease or syndrome, or permanent physical incapacity," "a prognosis concerning the likelihood of recovery," "a description of the inmate's physical incapacity, if appropriate," "and a description of the type of ongoing treatment that would be required if" release is granted. N.J.S.A. 30:4-123.51e(b)(1)-(4).

Where "a medical diagnosis determines that an inmate is suffering from a grave medical condition as defined in" the CRA, the Department of Corrections is required to "promptly notify the inmate's attorney or, if the inmate does not have an attorney, the [Office of] the Public Defender, to initiate the process of petitioning for compassionate release." N.J.S.A. 30:4-123.51e(d)(1). A "[g]rave medical condition" is defined as a

prognosis by the licensed physicians designated by the [Department] of Corrections . . . that an inmate has more than six months but not more than [twelve] months to live or has a medical condition that did not exist at the time of sentencing and for at least three months has rendered the inmate unable to perform the

activities of daily living, resulting in the inmate requiring [twenty-four]-hour care.

[N.J.S.A. 30:4-123.51e(1).]

An initial medical diagnosis of a grave medical condition does not render an inmate eligible to file a petition for compassionate release. A petition cannot "be filed until a subsequent medical diagnosis determines that the inmate is suffering from a terminal condition, disease or syndrome, or a permanent physical disability as defined in" the CRA "and the Department of Corrections issues to the inmate a Certificate of Eligibility for Compassionate Release." N.J.S.A. 30:4-123.51e(d)(1).

The CRA defines a "[t]erminal condition, disease[,] or syndrome" as a "prognosis by the licensed physicians designated by the Commissioner . . . that an inmate has six months or less to live." N.J.S.A. 30:4-123.51e(1). A "[p]ermanent physical incapacity" is defined as "a prognosis by the licensed physicians designated by the Commissioner . . . that an inmate has a medical condition that renders the inmate permanently unable to perform activities of basic daily living, results in the inmate requiring [twenty-four]-hour care, and did not exist at the time of sentencing." Ibid.

An inmate to whom a Certificate of Eligibility for Compassionate Release is issued "may petition the court for compassionate release," N.J.S.A. 30:4-123.51e(d)(2); see also N.J.S.A. 30:4-123.51e(f)(2) (stating "[n]o petition

for compassionate release may be submitted unless it is accompanied by a Certificate of Eligibility for Compassionate Release"), and a "request [for] representation from the Office of the Public Defender" for that purpose, N.J.S.A. 30:4-123e(d)(3). The Commissioner of the Department of Corrections must ensure that any inmate who applies for compassionate release is also provided an opportunity to apply for Medicaid benefits and assistance when completing the application. N.J.S.A. 30:4-123.51e(h).

An inmate opting to petition for compassionate release must serve a copy of the petition on the agency — either the county prosecutor or the Attorney General's Office — that prosecuted the case for which the inmate is serving his or her sentence. N.J.S.A. 30:4-123.51e(e)(1). The CRA requires the prosecuting agency to notify the "victim or member of the family of a victim entitled to notice relating to a parole or the consideration of . . . a parole" that they have an "opportunity to present a statement at the hearing . . . or to testify to the court concerning any harm suffered by the victim or family member at the time of the hearing." N.J.S.A. 30:4-123.51e(e)(2).

The victim or the victim's family is permitted to submit comments to the court and advise the court of an intention to testify at the hearing. N.J.S.A.

30:4-123.51e(e)(3). The prosecutor may also respond to the petition. N.J.S.A. 30:4-123.51e(e)(6).

If the prosecutor objects to the petition or the court is notified the victim or a family member intends to testify at the hearing, the court must conduct "a hearing on the petition on an expedited basis." N.J.S.A. 30:4-123.51e(e)(7). If the court does not receive a timely objection from the prosecutor and is not notified the victim or victim's family member intends to testify, "the court may make a determination on the petition without holding a hearing." N.J.S.A. 30:4-123.51e(e)(7).

With or without a hearing, the CRA defines the issues presented for the court's decision. More particularly, the CRA states:

[n]otwithstanding the provisions of subsection [(a)] of [N.J.S.A. 30:4-123.53]⁴, the court may order the compassionate release of an inmate . . . if the court finds by clear and convincing evidence that the inmate is so debilitated or incapacitated by the terminal condition, disease or syndrome, or permanent physical incapacity as to be permanently physically incapable of committing a crime if released and, in the case of a permanent physical incapacity, the conditions established [by the Parole Board] under which the

⁴ N.J.S.A. 30:4-123.53 generally provides for the determination of the date of release of an inmate on parole.

inmate would be released would not pose a threat to public safety.⁵

[N.J.S.A. 30:4-123.51e(f)(1) (emphasis added).]

Thus, the CRA requires that the court make two determinations in its consideration of a petition for compassionate release. The court must first decide whether there is clear and convincing evidence "the inmate is so debilitated or incapacitated by the terminal condition, disease or syndrome, or permanent physical incapacity as to be permanently physically incapable of committing a crime if released." Ibid. The CRA provides a court must make a second determination for inmates who have proven they suffer from a qualifying permanent physical incapacity; the court must also decide whether there is clear and convincing evidence "the conditions established [by the Parole Board] under which the inmate would be released would not pose a threat to public safety." Ibid. The CRA does not expressly identify any other determinations a court is required to make in its consideration of a petition for compassionate release. The court must also "provide . . . written notice of its decision setting forth the reasons for granting or denying compassionate release." N.J.S.A. 30:4-123.51e(f)(3).

⁵ The "conditions established [by the Parole Board]" referred to in the statute are those included in the "inmate's release plan" as defined by N.J.S.A. 30:4-123.51e(h)(1)-(3).

The CRA also defines the role of the State Parole Board in the process of determining whether a petition for compassionate release may be granted. As a condition precedent to an order for release under the CRA, the State Parole Board must "ensure that the inmate's release plan" satisfies three conditions. N.J.S.A. 30:4-123.51e(h). The conditions include "identification of a community sponsor," "availability of appropriate medical services sufficient to meet treatment requirements," and "housing . . . suitable to the inmate's medical condition, disease or syndrome, or permanent physical incapacity." N.J.S.A. 30:4-123.51e(h)(1)-(3).

The CRA allows the State Parole Board to impose the conditions authorized under N.J.S.A. 30:4-123.59 on an inmate granted compassionate release, N.J.S.A. 30:4-123.51e(i), and the State Parole Board also is charged with informing the prosecuting agency that obtained the inmate's conviction if an inmate "granted compassionate release is no longer so debilitated or incapacitated by a terminal condition, disease or syndrome, or by a permanent physical incapacity as to be physically incapable of committing a crime or, in the case of a permanent physical incapacity, the parolee poses a threat to public safety," N.J.S.A. 30:4-123.51e(j).

These provisions of the CRA provide the statutory framework for our analysis of the court's denial of A.M.'s petition for compassionate release.

Prior to addressing her petition and the court's decision, however, we summarize the events leading to her conviction and sentence.

A.M.'s Conviction, Sentence, and Incarceration

A grand jury charged A.M. in an indictment with first-degree knowing and purposeful murder of her husband, N.J.S.A. 2C:11-3(a)(1) and (2), and second-degree possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4(a). The trial evidence showed A.M. and her husband were embroiled in marital difficulties in the months prior to May 2010. In March 2010, A.M. discussed with her husband his "desire" to divorce A.M., and, by April, A.M. had retained an attorney who drafted a complaint for divorce.

During those months, A.M. contacted a friend several times looking for a gun, and she asked if the friend knew where she could obtain a gun illegally. When those efforts failed, A.M. had a locksmith open a safe in her husband's closet. A.M. took a handgun from the safe that she later used to shoot her husband.

A.M. later explained that during the early morning hours of a day in May 2010, she argued with her husband about money, and she told her husband she intended to report what she believed to be his inappropriate actions with one of their daughters. According to A.M., her husband became furious, and she shot him multiple times as he moved towards her.

One of the couple's three children entered the room and saw her father lying on the floor with A.M. standing next to him. A.M. told the child her father was drunk and had fallen. Five hours later, A.M. called her sister and said she thought she shot her husband. A.M. then called 911. When the police arrived and found A.M.'s deceased husband, they arrested A.M., who reported she shot her husband, using every round in the gun.

A jury convicted A.M. of knowing and purposeful murder and possession of a handgun for an unlawful purpose. The record presented at A.M.'s 2013 sentencing reflected she was diagnosed with multiple sclerosis in 2005, took numerous medications, and was interviewed by the probation department for its presentence investigation report while located in the infirmary of the county jail. The court imposed an aggregate forty-year prison term with the requirement A.M. serve eighty-five percent of the term, or thirty-four years, without parole eligibility as required under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2.

Since A.M.'s March 2013 sentencing, she has been incarcerated at the Edna Mahan Correctional Facility for Women. During that entire time, she has been confined to the infirmary.

A.M.'s Petition For Release On Parole Under The CRA

In December 2020, two physicians submitted reports supporting A.M.'s release under the CRA. In a December 17, 2020 report, Dr. Edith Senyumba, diagnosed A.M. with progressive end-stage multiple sclerosis, hypothyroidism, and urinary incontinence-chronic catheterization. Dr. Senyumba determined A.M.'s prognosis is "poor[,] " and A.M. requires "nursing home level care" because it is necessary to turn her frequently to prevent decubitus, change her after bowel movements, feed her, and use a lift to facilitate getting her out of bed and for daily hygiene. The doctor observed A.M. "is completely dependent on nursing care for [activities of daily living] and is bedridden."

Dr. Sandra Braimbridge reported on December 31, 2020, that A.M.'s diagnosis includes progressive end-stage multiple sclerosis, hypothyroidism, and urinary incontinence-chronic catheterization. She determined A.M.'s prognosis is "poor and progressive" and A.M.'s "most recent brain MRI done [in] January 2020 showed multiple new brain lesions compared to [an] MRI done in March 2016." The doctor noted A.M. requires twenty-four-hour care, and A.M. "is not able to do anything for herself."

Dr. Hesham Soliman, a managing physician employed by the Department of Corrections, reviewed Dr. Braimbridge's and Dr. Senyumba's reports, as well as A.M.'s "medical record in the entirety." Dr. Soliman noted A.M. is diagnosed with progressive end-stage multiple sclerosis, her prognosis

is poor and progressive, and she is completely dependent on nursing care for all activities of daily living. He determined A.M. suffered from the medical conditions permitting release under the CRA, finding her condition will "be fatal in the near future or [constitutes a] permanent physical disability."

The Commissioner of the Department of Corrections issued a Certificate of Eligibility for Compassionate Release to A.M., who then filed a petition for release under the CRA. A.M. also submitted letters from family members and friends in support of her request.⁶ A.M. sought compassionate release, claiming she suffered from a qualifying permanent physical incapacity under the CRA.⁷ See N.J.S.A. 30:4-123.51e(1). The State opposed the petition, and the victim's and A.M.'s children advised the court they intended to oppose the petition and testify at the hearing.

During the first day of the hearing, the court considered only whether A.M.'s then-current diagnosis of progressive end-stage multiple sclerosis existed at the time of sentencing. The court considered the issue because, as

⁶ Defendant filed a pro se petition for release under the CRA on March 4, 2021, and later filed a March 15, 2021 petition after the assignment of counsel. The first petition was dismissed by the court. We address only the March 15, 2021 petition.

⁷ A.M.'s petition for release under the CRA is not based on a claim she suffers from a terminal condition, disease or syndrome as defined in N.J.S.A. 30:4-123.51e(1).

noted, to obtain compassionate release under the CRA based on a permanent physical incapacity, an inmate must demonstrate by clear and convincing evidence the "medical condition that renders [him or her] permanently unable to perform activities of basic daily living . . . did not exist at the time of sentencing." N.J.S.A. 30:4-123.51e(1). A.M. presented a single witness, Dr. Javier Taboada, her treating neurologist, who testified about the changes in A.M.'s condition since her 2013 sentencing.

In an opinion from the bench, the court noted the State did not dispute A.M. suffered from a permanent physical incapacity that rendered her unable to perform the activities of basic daily living as required under N.J.S.A. 30:4-123.51e(1) to qualify for compassionate release. Instead, the State argued A.M. did not qualify for release on parole under N.J.S.A. 30:4-123.51e(1) because she suffered from the condition — multiple sclerosis — at the time of sentencing.

The court rejected the State's argument and found credible A.M.'s treating physician's testimony that the progression of A.M.'s disease rendered it "materially different" than it was eight years earlier when she was sentenced. The court concluded A.M. established by clear and convincing evidence she suffered from a permanent physical incapacity that did not exist at sentencing and which rendered her unable to perform any activities of basic daily living.

Consistent with its oral opinion, the court's May 17, 2021 order states the medical condition A.M. claimed required her release under the CRA — progressive end-stage multiple sclerosis — did not exist at the time of her 2013 sentencing. The court's order further memorialized its determination A.M. suffers from a "permanent physical incapacity" that qualifies her for release under the CRA, N.J.S.A. 30:4-123.51e(1).⁸

On the second and final day of the hearing, the court considered the arguments of the parties, and the testimony of the victim's and A.M.'s children, each of whom opposed A.M.'s petition. The court also heard testimony from the victim's mother who explained her opposition to A.M.'s petition. The court reserved decision.

In its written decision, the court identified the record presented, detailed the parties' contentions, and summarized the testimony from the victim's children and mother. The court first determined that, as a matter of law, A.M. is eligible for release under the CRA even though she has not completed service of her mandatory period of parole ineligibility under NERA.⁹

⁸ The State did not cross-appeal from the court's May 17, 2021 order.

⁹ The State does not seek review of that determination by the court. We therefore do not address it.

The court further noted that in its May 17, 2021 order it determined A.M. established by clear and convincing evidence she has a "permanent physical incapacity" as defined in N.J.S.A. 30:4-123.51e(1). The court also found A.M. satisfied her burden of presenting clear and convincing evidence she satisfied the two requirements for release under N.J.S.A. 30:4-123.51e(f)(1). That is, the court found A.M. proved she is "so debilitated or incapacitated by the . . . permanent physical incapacity as to be permanently physically incapable of committing a crime if released," and "the conditions established in accordance with subsection (h) of [the CRA] under which the inmate would be released would not pose a threat to public safety." N.J.S.A. 30:4-123.51e(f)(1).¹⁰

Although it determined defendant satisfied her burden of proving she suffered from a permanent physical incapacity and she would not pose a threat to public safety if released, the court reasoned that satisfaction of those eligibility requirements under N.J.S.A. 30:4-123.51e(f)(1) did not require A.M.'s release under the CRA. The court found that despite its determination there was clear and convincing evidence defendant satisfied the permanent

¹⁰ As noted, subsection (h) of the CRA requires that, as a condition precedent to compassionate release, the Parole Board is required to ensure the inmate's release plan satisfies certain statutory requirements. N.J.S.A. 30:4-123.51e(h)(1)-(3).

physical incapacity and public safety requirements of N.J.S.A. 30:4-123.51e(f)(1), it had discretion to deny the petition because the statute provides that a court "may" grant compassionate release to eligible inmates satisfying those requirements.

The court then observed the statute did not include any criteria for the exercise of what it found to be its discretion in deciding a petition for release under the CRA. The court therefore reasoned it should rely on the factors the Court outlined in State v. Priester, 99 N.J. 123 (1985), for determining a motion for a modification of sentence due to illness or infirmity under Rule 3:21-10(b)(2).¹¹

The court considered A.M.'s petition and gave great weight to three factors — the nature and severity of defendant's crime, the severity of her sentence, and the opposition of the victim's family and adverse impact release would have on them — and concluded those factors "strongly and substantially

¹¹ In Priester, the Court outlined factors a court must balance when considering a motion under Rule 3:21-10(b)(2), which allows an amendment of "a custodial sentence to permit the release of a defendant because of illness or infirmity of the defendant." 99 N.J. at 128. The factors include: "the nature of the defendant's illness and the deleterious effect of incarceration on the defendant's health"; "the availability of medical services in prison"; whether there is a change in circumstances since the original sentence; the "severity of the crime"; "the severity of the sentence"; the defendant's criminal record; "the defendant's role in bringing about his [or her] current state of health"; and the risk defendant poses to the public if released. Id. at 135-37.

outweigh the factors" the court found favored release — defendant's current condition, her lack of a threat to public safety if released, the availability of medical services if she is released, and her lack of a prior criminal history at sentencing.

The court entered an order denying A.M.'s petition for release under the CRA. This appeal followed. A.M. presents the following arguments for our consideration:

POINT I

THE LAW DIVISION ERRED IN DENYING [DEFENDANT]'S PETITION FOR COMPASSIONATE RELEASE BECAUSE THE COURT ERRONEOUSLY CONCLUDED THAT IT HAD DISCRETION TO DENY [DEFENDANT]'S PETITION AFTER FINDING THAT ALL THE STATUTORY CRITERIA HAD BEEN MET.

A. The Court Properly Concluded That [Defendant] Meets The Statutory Criteria For Compassionate Release.

B. The Word "May" In The Portion Of The Compassionate Release Statute That Authorizes The Court To Grant The Release Of A Statutorily Eligible Petitioner Must Be Given Mandatory Significance To Effectuate The Intent Of The Legislature.

C. In Determining Whether A Petitioner Is Statutorily Eligible For Release, The Court Should Consider New Jersey's

Parole Factors Insofar As They Relate To
The Petitioner's Future Risk.

POINT II

ALTERNATIVELY, EVEN IF THE COURT HAD DISCRETION TO DENY [DEFENDANT]'S PETITION, REVERSAL IS STILL REQUIRED BECAUSE THE COURT RELIED ON IMPROPER FACTORS IN DENYING [DEFENDANT]'S COMPASSIONATE RELEASE.

II.

A.M. argues the court erred by denying her petition under the CRA. She contends that once the court found she proved by clear and convincing evidence she "is so debilitated or incapacitated by [her] . . . permanent physical incapacity as to be physically incapable of committing a crime if released" and "the conditions . . . under which [she] would be released would not pose a threat to public safety," N.J.S.A. 30:4-123.51e(f)(1), the court was required to grant her petition. She claims that although N.J.S.A. 30:4-123.51e(f)(1) provides that a court "may order compassionate release of an inmate" if the stated qualifications for release are proven by clear and convincing evidence, the statute should be interpreted to require release to give effect to the Legislature's intent and purpose.

"Questions related to statutory interpretations are legal ones" that we review de novo. State v. S.B., 230 N.J. 62, 67 (2017). "The goal of all

statutory interpretation is 'to determine and give effect to the Legislature's intent.'" State v. Lopez-Carrera, 245 N.J. 596, 612 (2021) (quoting In re Registrant H.D., 241 N.J. 412, 418 (2020)).

We are guided in our interpretation of the CRA by "the well-settled rules of statutory construction 'to determine and give effect to the Legislature's intent.'" H.D., 241 N.J. at 418 (quoting DYFS v. A.L., 213 N.J. 1, 20 (2013)). "[T]he best indicator of that intent is the plain language chosen by the Legislature[.]" State v. Frye, 217 N.J. 566, 575 (2014) (quoting State v. Gandhi, 201 N.J. 161, 176 (2010)), but "a statute's words and phrases should also 'be read and construed with their context,'" Lopez-Carrera, 245 N.J. at 613 (quoting State v. McCray, 243 N.J. 196, 208 (2020)). We therefore do not read a statute's words "in isolation; we instead consider 'them in context with related provisions so as to give sense to the legislation as a whole.'" Ibid. (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)).

A court should not consider "'extrinsic interpretative aids' when 'the statutory language is clear and unambiguous, and susceptible to only one interpretation[.]'" DiProspero, 183 N.J. at 492 (quoting Lozano v. Frank DeLuca Constr., 178 N.J. 513, 522 (2004)). However, a court may properly consider "extrinsic evidence if a plain reading of the statute leads to an absurd

result or if the overall statutory scheme is at odds with the plain language." Id. at 493.

The State contends that because N.J.S.A. 30:4-123.51e(f)(1) provides a court "may" release an inmate who has presented clear and convincing evidence he or she suffers from a qualifying permanent physical incapacity such that he or she is physically incapable of committing a crime and the conditions of release would not pose a threat to public safety, a court has discretion to deny such a petition. The State further asserts that because the court has discretion, it is free to consider factors not set forth in the CRA in determining whether to grant or deny a petition for compassionate release parole.

The State relies on the principle of statutory construction that "use of the word 'may' generally conveys that an action is permissive, not mandatory." State v. C.W., 449 N.J. Super. 231, 256 (App. Div. 2017) (quoting Myers v. Ocean City Zoning Bd., 439 N.J. Super. 96, 101 (App. Div. 2015)). The State also relies on dicta from our decision in F.E.D., stating that because N.J.S.A. 30:4-123.51e(f)(1) provides that a court "may order . . . compassionate

release," the CRA "grants the trial court discretion to deny it."¹² 469 N.J. Super. at 51 (alteration in original).

Although "[t]he word 'may' is ordinarily permissive or directory, and the words 'must' and 'shall' are generally mandatory[,] [s]uch terms . . . have been held to be interchangeable whenever necessary to execute the clear intent of the Legislature. The problem is primarily one of ascertaining the intent of the Legislature." Harvey v. Essex Cnty. Bd. of Freeholders, 30 N.J. 381, 391-92 (1959); see also Bell v. W. Emp.'s Ins. Co., 173 N.J. Super. 60, 65 (App. Div. 1980) (stating "shall" and "may" are to "be deemed interchangeable when necessary to execute the clear intent of the Legislature"); 1A Norman J. Singer, Sutherland Statutes and Statutory Construction § 25:4 (6th ed. 2000) ("Whether a statute should be given mandatory . . . effect is . . . a question of statutory construction to which all of the rules and principles of construction are applicable . . . [however,] [u]nless the context otherwise indicates, use of the word 'shall' (except in future tense) indicates a mandatory intent.").

"[T]he rule that the use of the word 'may' ordinarily reflects an intent to confer discretionary authority is merely an aid in determining probable

¹² We note that in F.E.D. we were not required to address, as we must here, whether a trial court has discretion to deny a petition for compassionate release after finding by clear and convincing evidence that an inmate satisfies the conditions for release under N.J.S.A. 30:4-123.51e(f)(1).

legislative intent." State v. Ercolano, 335 N.J. Super. 236, 244 (App. Div. 2000). Thus, contrary to the State's contention, the term "may" in N.J.S.A. 30:4-123.51e(f)(1) does not necessarily require a finding a trial court has discretion to deny a request for compassionate release where the court finds, as it did here, clear and convincing evidence an inmate satisfies the only substantive criteria for release delineated in the CRA. We must interpret "may" in a manner consistent with the Legislature's intent. See Harvey, 30 N.J. at 391-92; see also DiProspero, 183 N.J. at 492 (explaining "[t]he Legislature's intent is the paramount goal when interpreting a statute").

The CRA modifies the Parole Act in a significant respect pertinent here. Through its repeal of the medical parole statute, N.J.S.A. 30:4-123.51c, and enactment of the CRA, N.J.S.A. 30:4-123.51e, the Legislature transferred the decision-making authority for releasing inmates with terminal conditions, syndromes, diseases, and permanent physical incapacities from the State Parole Board to the courts, while, at the same time, providing that all other parole decisions remain within the exclusive authority of the State Parole Board. The CRA therefore constitutes an exception within the Parole Act; it vests the courts, and not the State Parole Board, with the authority to grant compassionate release parole.

To achieve that result, the CRA uses "may" twice to describe the authority of the courts to decide a petition for compassionate release parole. First, subsection (a) of N.J.S.A. 30:4-123.51e broadly provides that "[n]otwithstanding any provision of [the Parole Act] to the contrary, the court may release an inmate who qualifies under [the CRA] for compassionate release at any time during the term of incarceration." N.J.S.A. 30:4-123.51e(a) (emphasis added). Subsection (f)(1) more specifically provides that "[n]otwithstanding the provisions of subsection [(a)] of" N.J.S.A. 30:4-123.53, "the court may order compassionate release" if it finds clear and convincing evidence the inmate satisfies the statute's permanent physical incapacity and public safety requirements. N.J.S.A. 30:4-123.51e(f)(1) (emphasis added).

We consider the CRA's use of the word "may" in both subsections in context. See N.J.S.A. 1:1-1 (requiring in part that the "[w]ords and phrases" of a statute "shall be read and construed [in] context"). We therefore must give effect to the prefatory "[n]otwithstanding" clauses in both subsections of the statute to provide meaning to the term "may" that follows each. When considered in context, the "[n]otwithstanding" phrases prefacing the term "may" in subsections (a) and (f)(1) of the CRA denote that compassionate release is a different form of parole that is subject to the requirements,

procedures, and standards of the CRA. That is, "notwithstanding" the other provisions of the Parole Act, release on compassionate release parole is governed by the CRA.

More particularly, subsection (a) provides that "[n]otwithstanding" the provisions of the Parole Act vesting the State Parole Board with the exclusive authority to make parole release decisions, the courts are authorized to — that is, "may" — make compassionate release parole decisions under the CRA. N.J.S.A. 30:4-123.51e(a). Thus, by declaring that notwithstanding the other provisions of the Parole Act a court may release an inmate who qualifies under the CRA, N.J.S.A. 30:4-123.51e(a), the Legislature plainly stated the courts and not the State Parole Board are vested with the authority to make a parole release decision — compassionate release parole — under the CRA. Similarly, in subsection (f)(1), the Legislature provided that under the CRA the courts are authorized to — "may" — release inmates on compassionate release parole on a date different than the one otherwise applicable under N.J.S.A. 30:4-123.53(a) to the State Parole Board's parole release decisions under the Parole Act.

We therefore interpret "may" in N.J.S.A. 30:4-123.51e(a) and (f)(1) as a part of a plainly stated declaration of a grant of authority to the courts to make a parole release decision — for compassionate release parole under the CRA

on a date untethered to those applicable to inmates who are ineligible for release under the CRA — that had previously been vested in the State Parole Board under the Parole Act and would otherwise fall within the State Parole Board's exclusive authority. When considered in that context, use of the word "may" is clearly intended only as an expression of the Legislature's intent to vest the courts with authority to make compassionate release parole decisions. That interpretation is consistent with the CRA's plain language; it is supported by the context in which the word "may" is used; and it gives effect to the legislative intent to transfer the decision-making authority to the courts. See F.E.D., 469 N.J. Super. at 50 (explaining the CRA "empowered" courts to release inmates on parole, a decision formerly vested in the Parole Board under the medical parole statute, N.J.S.A. 30:4-123.51c (repealed 2020)).

We also find no support in the plain language of either subsection (a) or (f)(1) for a determination that "may" is intended to define the manner in which the courts are required to exercise that authority. The purpose of the CRA is to establish a procedure that expedites the decision-making process for parole requests made by inmates suffering from either a terminal condition, disease, or syndrome, and those who suffer from permanent physical disabilities, who, are physically incapable of committing a crime if released and who may be released on conditions such that they will not pose a threat to public safety.

F.E.D., 469 N.J. Super. at 63 (explaining the Sentencing Commission's recommendation, which the Legislature adopted in the CRA, was "to increase the number of releases not by relaxing the medical-parole standards, but by streamlining procedure and tightening timeframes" for the release decision). The statute is also intended to achieve financial savings by eliminating the costs associated with providing medical care to inmates who either suffer from a terminal condition, disease, or syndrome, or a permanent physical disability, and who pose no threat to public safety if released on parole to a less costly setting. See id. at 63 n.17 ("The [Sentencing] Commission and the Legislature intended to reduce the Corrections Department's costs of caring for terminally ill and permanently incapacitated inmates.").

Although not reflected in the Sentencing Commission's report, or expressly reflected in its legislative history, the CRA is also clearly intended as an exercise in compassion for terminally ill and permanently disabled inmates, including those serving sentences for crimes as serious as the purposeful and knowing murder for which defendant was convicted. The statute's plain language embodies a legislative intent to allow parole — in the form of compassionate release — for inmates simply because, in the first instance, they suffer from a qualifying terminal condition, disease, or syndrome, or permanent physical disability.

Consistent with that intention, the CRA eliminated the provision, formerly set forth in the medical parole statute, N.J.S.A. 30:4-123.51c (repealed 2020), disqualifying inmates from release who are serving sentences for certain specified offenses, including murder. In other words, in its enactment of the CRA, the Legislature extended compassionate release eligibility to all inmates who suffer from a qualifying condition and do not pose a threat to public safety, regardless of the crime or crimes for which they are serving their sentence.

With those purposes in mind, the Legislature precisely defined in N.J.S.A. 30:4-123.51e(f)(1) the issues for the court's consideration under the CRA. For an inmate like A.M., whose petition claims she suffers from a permanent physical disability, subsection (f)(1) sets forth only two substantive issues the court must address and decide in determining whether the petition should be granted. See N.J.S.A. 30:4-123.51e(f)(1). First, the court must determine whether there is clear and convincing evidence the inmate is "so debilitated or incapacitated by the . . . permanent physical incapacity as to be permanently physically incapable of committing a crime if released." Ibid. The court is also required to determine if there is clear and convincing evidence, "the conditions . . . under which the inmate would be released would not pose a threat to public safety." Ibid. The Legislature did not identify any

other standard, factor, or criteria for the court to consider, and no other substantive issues for the court to address, when making the decision whether to grant compassionate release parole to an inmate whose petition is supported by a Certificate of Eligibility for Compassionate Release pursuant to N.J.S.A. 30:4-123.51e(d)(2).

The CRA sets forth the complete procedural and substantive paradigm for compassionate release parole and vests the authority for making the release determination exclusively in the courts. Yet, the CRA is bereft of any language requiring or authorizing a court to consider factors other than those set forth in subsection (f)(1) in the decision-making calculus on a petition for compassionate release. See generally N.J.S.A. 30:4-123.51e. It is illogical to conclude, as the State suggests we should, that the Legislature adopted the comprehensive statutory procedural and substantive framework for compassionate release parole set forth in the CRA and, at the same time, intended that the courts develop ad hoc criteria untethered to any authorization in the statute. Subsection (f)(1) therefore must be read as an expression of legislative intent that a court is authorized and required to consider only the factors specified, and the Legislature did not intend that a court consider any

unspecified factors in deciding whether to grant or deny a petition.¹³ See Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 112 (2004) ("The canon of statutory construction, expressio unius est exclusio alterius — expression of one thing suggests the exclusion of another left unmentioned — sheds some light on the interpretative analysis.").

The State suggests an interpretation of the statute that would require a court to consider factors the Legislature clearly chose not to include in subsection (f)(1). The State argues that although the Legislature identified only two issues a court must determine in deciding whether to grant or deny a petition under subsection (f)(1), we should interpret the CRA to require consideration of other factors that are not included in the statute and for which there is no evidence the Legislature intended a court utilize in deciding a petition for compassionate release.

¹³ We observe that in their interpretation of Cal. Penal Code, § 1170(e)(1) and (2), which in pertinent part states an inmate who is terminally ill or suffers from a permanent physical incapacity "may" be recommended for release and also provides that a court has "discretion" to order the release if specified statutory criteria are met, the California courts have interpreted the statute to require the recommendation and release where the statutory criteria are satisfied because, to hold otherwise, is inconsistent with the statutory purpose of releasing inmates who meet the only criteria for release specified by the Legislature. See, e.g., People v. Torres, 261 Cal. Rptr. 3d 844, 846 (Cal. Ct. App. 2020); Martinez v. Bd. of Parole Hearings, 107 Cal. Rptr. 3d 439, 441-42 (Cal. Ct. App. 2010).

We decline the State's invitation to rewrite the statute to supplement it with factors the Legislature opted not to include in the CRA. It is not the court's "job to engraft requirements [on a statute] that the Legislature did not include. It is our role to enforce the legislative intent as expressed through the words used by the Legislature." Lippman v. Ethicon, Inc., 222 N.J. 362, 388 (2015).

The court considered the two issues identified in subsection (f)(1) and determined there is clear and convincing evidence defendant satisfied each of the defined criteria for compassionate release parole. The court found defendant suffers from a permanent physical disability, which renders her so debilitated and incapacitated that she is permanently physically incapable of committing a crime. The court also found defendant would not pose a threat to public safety if released on the conditions required under the CRA. Having made those findings, N.J.S.A. 30:4-123.51e(f)(1) left the court without any further issues to address or legal conclusions to draw. For that reason, it also left the court without any discretion to deny defendant's petition. The court erred by finding otherwise.

The State argues the CRA cannot be properly interpreted to limit the court's decision on a petition for compassionate release to the criteria specified in N.J.S.A. 30:4-123.51e(f)(1) because the CRA allows the victim or the

victim's family to offer opposition to the petition. The State claims the Legislature would not have made provision for victim opposition unless it intended that a court consider it in determining whether to grant or deny a petition for compassionate release parole. The State therefore contends that victim opposition is a factor the court must consider in its determination, and, although it is not listed among the criteria set forth in N.J.S.A. 30:4-123.51e(f)(1), the Legislature used the term "may" as a grant of discretion to consider victim opposition as a factor, among others, in the court's release determination.

We reject the State's argument because it again ignores the plain language of the CRA, which requires the conclusion that "may" in subsections (a) and (f)(1) constitutes only an affirmation of the court's newfound authority to grant petitions for compassionate release parole. Additionally, the Legislature knew it provided for victim opposition in the CRA, see N.J.S.A. 30:4-123.51e(e)(2) and (3), but it chose not to include victim opposition as a separate standard for which the court is required to make a distinct finding in its release determination, see N.J.S.A. 30:4-123.51e(f)(1). As noted, because the Legislature clearly opted not to include victim opposition as a separate and distinct criterion for release under the CRA, it is beyond our authority to add it as a statutory criterion. See Ethicon, 222 N.J. at 388.

That is not to say the court may disregard the valuable input a victim and victim's family members are entitled to provide in opposition to a petition for compassionate release parole. In our view, however, under the CRA's statutory framework, the relevance of victim opposition is not in establishing a separate ground for denying a petition the Legislature chose not to include in N.J.S.A. 30:4-123.51e(f)(1). If it was otherwise, the Legislature would have included victim input as a standard in N.J.S.A. 30:4-123.51e(f)(1). The most reasoned reading of the CRA is that victim opposition must be considered in the court's assessment and determination of the criteria the Legislature expressly chose to delineate in the statute. As such, a court must consider victim opposition, as the court in part did here, but only in its assessment of whether the defendant satisfies the only criteria — permanent physical incapacity and threat to public safety — set forth by the Legislature in N.J.S.A. 30:4-123.51e(f)(1).

Here, the court erred by importing the Priester factors into its analysis of A.M.'s petition based on the incorrect conclusion it had discretion to grant or deny A.M.'s petition based on factors not included in the CRA. The only criteria pertinent to a court's decision to grant or deny a petition for compassionate release parole are those set forth in N.J.S.A. 30:4-123.51e(f)(1). We do not limit the evidence — like victim opposition — that is relevant to a

determination of those criteria. However, where, as here, a court determines there is clear and convincing evidence a defendant satisfies the permanent physical incapacity and public safety requirements under N.J.S.A. 30:4-123.51e(f)(1), the court is without discretion to consider other criteria in making its release decision.

In a footnote in its merits brief, the State argues we should affirm the order denying A.M.'s petition because the court erred by finding as a matter of fact that the medical condition resulting in her permanent physical incapacity did not exist at the time of her sentencing. See N.J.S.A. 30:4-123.51e(1) (defining "permanent physical incapacity" under the CRA). The argument is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

We add only that we defer to the court's finding because it is supported by sufficient credible evidence that the sad but steady and inevitable progression of A.M.'s multiple sclerosis has resulted in a different and substantially more debilitating medical condition than existed when she was sentenced in 2013. See State v. Vincenty, 237 N.J. 122, 131-32 (2019) (explaining a reviewing court defers to a trial court's factual findings following an evidentiary hearing "so long as [they] are supported by sufficient credible

evidence in the record" (quoting State v. Hubbard, 222 N.J. 249, 262 (2015))).

The State presented no contrary evidence at the hearing.

Reversed. In accordance with N.J.S.A. 30:4-123.51e(g), our reversal of the court's order denying A.M.'s petition for compassionate release shall not become final for ten days to allow the State to petition the Supreme Court for certification or other relief.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION