

SUPREME COURT OF NEW JERSEY
DOCKET NO. 089371

M.R., : CRIMINAL ACTION
Plaintiff-Appellant, : On Certification from a Final
v. : Judgment of the Superior Court
: of New Jersey, Appellate Division.
NEW JERSEY DEPARTMENT : Sat Below:
OF CORRECTIONS, :
Defendant-Respondent. : Hon. Allison E. Accurso, P.J.A.D.
: Hon. Francis J. Vernoia, J.A.D.
: Hon. Katie A. Gummer, J.A.D.

**SUPPLEMENTAL BRIEF AND APPENDIX ON BEHALF OF
PLAINTIFF-APPELLANT**

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PRELIMINARY STATEMENT

In June 2024, M.R.¹ died from stage four brain cancer. Prior to his death, M.R. had sought release under New Jersey's compassionate release statute, designed to increase the humane release of our sickest inmates. The statute and DOC regulations provide clear procedures for people seeking release. First, an inmate must request an evaluation by two DOC physicians. The physicians must examine the individual, make a medical diagnosis, and determine eligibility for release. If found medically eligible, the inmate can petition the Superior Court for compassionate release.

But, less than one year before his death, the DOC found that M.R. was not medically eligible without ever physically examining him. Rather, the two physicians made these findings based on a review of medical records alone. Moreover, the physicians' attestations offered little to no explanation for their findings, rendering these findings essentially unreviewable on appeal.

Then, the Appellate Division misinterpreted the compassionate release statute and its regulations to not require a physical examination or complete attestations. But if M.R. were physically examined, it is possible, if not likely, that he would have been found medically eligible sooner and spent his final

¹ Initials are used because this brief discusses M.R.'s medical condition. State v. A.M., 252 N.J. 432, 447-48 (2023).

days with his loved ones. The Appellate Division's decision will cause eligible sick applicants to be passed over for release, an outcome that flies in the face of the Legislature's intent in passing the statute: to increase release and reduce the burden on our prison system. And, the Appellate Division's decision will insulate the DOC's eligibility determinations from any meaningful review on appeal. Therefore, this Court must clarify that the DOC is required to physically examine applicants and provide sufficient reasoning to substantiate its eligibility decisions.

PROCEDURAL HISTORY AND STATEMENT OF FACTS²

On March 14, 2013, plaintiff-appellant M.R. pled guilty to one count of racketeering, N.J.S.A. 2C:41-2e, d, for which he was sentenced to sixteen years in prison, with thirteen years, seven months, and four days of parole ineligibility under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2. (Pca1)³ M.R. was incarcerated at Northern State Prison for over nine years. (Pca5)

In 2021, at thirty-seven years old, M.R. was diagnosed with stage four medulloblastoma, a malignant brain cancer. (Pca6-7, 27-29) Given his deteriorating health, on or around February 9, 2023, M.R. submitted a request to the DOC health services unit for a medical examination to determine his eligibility for release pursuant to the Compassionate Release Act (“CRA”), N.J.S.A. 30:4-123.51e(1)(c). (Pca6-7)

² Due to the interrelated nature of the procedural history and statement of facts, the two sections have been combined for clarity to the reader.

³ The following abbreviations are used:

Pa – M.R.’s Appellate Division appendix

Pca – M.R.’s Appellate Division confidential appendix

Psa – M.R.’s Appellate Division supplemental appendix

Psca – M.R.’s Appellate Division supplemental confidential appendix

P2a – M.R.’s Supreme Court appendix

P2ca – M.R.’s Supreme Court confidential appendix.

That same day, DOC physician Dr. Jeffrey Pomerantz submitted an attestation, based on his review of M.R.'s medical records, finding M.R.'s condition to be terminal, "a prognosis . . . that [he] has six months or less to live." (Pca6, 8) He did not find M.R. to have a permanent physical incapacity. (Ibid.) Under the CRA, these findings would make M.R. medically eligible for release. N.J.S.A. 30:4-123.51e(d)(2). On February 16, 2023, DOC physician Dr. Ruppert Hawes also submitted an attestation, based on his review of M.R.'s medical records, finding that M.R. did not have a permanent physical incapacity or a terminal condition. (Pca7-8) He provided no explanation for these findings. (Ibid.)

On February 22, 2023, Dr. Herbert Kaldany, DOC Director of Psychiatry, concluded that M.R. was ineligible for compassionate release. (Pca8) Dr. Kaldany did not address -- or even acknowledge -- the conflicting findings of the two attesting physicians; nor did he explain the basis for his conclusion that M.R.'s stage four brain cancer was not a terminal condition. On February 27, 2023, DOC Director of Classification Lisa Palmiere issued a corresponding final agency decision finding M.R. ineligible. (Pca9)

M.R. appealed this decision, arguing that that the DOC was required to physically examine him and that the attestations were insufficient to substantiate the DOC's decision and to provide an opportunity for meaningful

appellate review. (Pca10-13) On August 8, 2023, the DOC acknowledged the conflicting attestations and moved to remand the matter “for the purpose of having two doctors re-evaluate M.R. to determine” his medical eligibility. (Psa3) M.R. agreed to the remand and the Appellate Division granted the DOC’s motion while retaining jurisdiction. (Psa12-13; Psca3)

On remand, Drs. Pomerantz and Hawes again submitted attestations based on their review of M.R.’s medical records. (Psca4-5) This time, both physicians found that M.R. did not have a permanent physical incapacity or a terminal condition but provided no explanation for their conclusions; nor did Dr. Pomerantz acknowledge that he had previously found M.R. to be terminal. (Ibid.) Accordingly, Dr. Kaldany found M.R. ineligible for compassionate release and, on August 24, 2023, Director Palmiere issued a corresponding final agency decision. (Psca8-9) On September 19, 2023, M.R. amended the Notice of Appeal to include this new decision. (Psca10-13)

Back on appeal, M.R. again argued that the DOC was required to physically examine him and that the attestations were missing necessary information. The Appellate Division disagreed in a published opinion affirming the DOC’s decision. M.R. v. Dep’t of Corr., 478 N.J. Super. 377 (App. Div.

2024).⁴ The court reasoned that the CRA and its regulations do not explicitly mention a physical examination requirement. Id. at 388-90. The court also remarked that “[r]equiring inmates to undergo physical examinations before the designated physicians render their medical diagnoses would have the effect of delaying and complicating the process, not streamlining it.” Id. at 390.

Moreover, the court found that the barebones attestations were sufficient. Ibid.

On May 15, 2024, M.R. petitioned this Court for certification. (P2a1-9) While the petition was pending, M.R. requested a third evaluation to determine his medical eligibility for compassionate release. This time, the DOC found that M.R. was medically eligible. (P2ca1) On June 17, 2024, before filing a petition for release in the Superior Court, M.R. died from brain cancer. (P2ca2)

On July 26, 2024, this Court granted M.R.’s petition for certification. (P2a10)

⁴ Judge Accurso did not participate in oral argument but joined the opinion with the parties’ consent. M.R., 478 N.J. Super. at 378 n.1.

LEGAL ARGUMENT

SUPPLEMENTAL POINT I

THE COMPASSIONATE RELEASE ACT AND ITS REGULATIONS REQUIRE THE DEPARTMENT OF CORRECTIONS TO PHYSICALLY EXAMINE APPLICANTS AND PROVIDE DETAILED REVIEWABLE INFORMATION TO EXPLAIN ELIGIBILITY DECISIONS. (Psc8-9)

The CRA and relevant DOC regulations require two DOC physicians to physically examine an applicant to determine his medical eligibility for release and provide specific information in their attestations. But the Appellate Division incorrectly held that the DOC was not required to physically examine M.R. or any applicant for release. Moreover, the Appellate Division rubber stamped the physicians' barebones evaluations that failed to include the required information to substantiate their decision.

Without physical examinations, people who would be eligible for compassionate release will instead be passed over and the CRA will fail to achieve its intended purpose of increasing the number of sick inmates released, decreasing the prison population, and decreasing DOC expenses. Moreover, permitting barebones evaluations will leave people with no basis to challenge their ineligibility or opportunity for meaningful appellate review. The Appellate Division's incorrect interpretation precludes otherwise eligible individuals from qualifying for compassionate release, undermining the CRA's purpose. Therefore, this Court must

clarify that the CRA requires the physicians to physically examine applicants for compassionate release and provide sufficient attestations.

To be released under the CRA, an inmate must first obtain a “Certificate of Eligibility” from the DOC. N.J.S.A. 30:4-123.51e (d)(2). The Certificate is based on a decision by two DOC physicians that the inmate has a qualifying medical diagnosis, i.e., that he is “terminal” or “permanently physically incapacitated.” N.J.S.A. 30:4-123.51e(b), (d)(2), (l). The CRA defines “terminal” as having less than six months to live, and “permanently physically incapacitated” as being unable to perform “activities of basic daily living” (ADLs), thus requiring 24-hour care. N.J.S.A. 30:4-123.51e(l); see also State v. F.E.D., 251 N.J. 505, 529-31 (2022) (defining activities of basic daily living as “eating, mobility, bathing, dressing, using a toilet, and transfers” and holding that an inmate is permanently physically incapacitated if he is “unable to perform two or more” activities of basic daily living, resulting in the need for 24-hour care). If the physicians does not find that the inmate has a qualifying medical diagnosis but does find that he has “a grave medical condition,” meaning he has between six and twelve months left to live, the CRA requires that the individual is assigned an attorney in anticipation of further deterioration in his condition and possible future eligibility. N.J.S.A. 30:4-123.51e(d), (l).

If an inmate obtains a Certificate of Eligibility, only then can he petition the Superior Court for compassionate release. N.J.S.A. 30:4-123.51e(d)(2). The court may order compassionate release “if [it] finds by clear and convincing evidence that [1] 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, [2] in the case of a permanent physical incapacity, the conditions established in accordance with [N.J.S.A. 30:4-123.51e(h)] 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). If the two DOC physicians are not required to physically examine inmates, however, otherwise eligible inmates will be barred from even petitioning for release.

A. The DOC must conduct the requisite physical examinations when determining an applicant’s medical eligibility.

Both the plain language of the CRA and the DOC regulations implementing the CRA require a physical examination to determine a person’s medical eligibility for compassionate release. Moreover, the primary purpose of “statutory interpretation is to determine and ‘effectuate the Legislature’s intent.’” State v. Rivastineo, 447 N.J. Super. 526, 529 (App. Div. 2016) (quoting State v. Shelley, 205 N.J. 320, 323 (2011)), and when the Legislature’s intent “is revealed by a statute’s plain language -- ascribing to the words used ‘their ordinary meaning and significance,’” our courts “need look no further.” Wilson ex rel. Manzano v. City of

Jersey City, 209 N.J. 558, 572 (2012) (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)).

A statute’s language “should not be read in isolation, but in relation to other constituent parts so that a sensible meaning may be given to the whole of the legislative scheme.” Ibid. Courts should be guided by “the legislative objectives sought to be achieved by enacting the statute.” Ibid. Humanitarian statutes, in particular, “should be liberally construed to achieve their beneficent purposes.” T.H. v. Div. of Developmental Disabilities, 189 N.J. 478, 480 (2007). Applying these tenants of statutory interpretation, the CRA and related DOC regulations require the DOC to physically examine applicants.

1. The CRA requires two DOC physicians to physically examine applicants.

The CRA lays out requirements for the DOC to satisfy when an inmate applies to obtain a Certificate of Eligibility:

The Commissioner of Corrections shall establish and maintain a process by which an inmate may obtain a medical diagnosis to determine whether the inmate is eligible for compassionate release. The medical diagnosis shall be made by two licensed physicians designated by the commissioner. The diagnosis shall include, but not be limited to:

- (1) a description of the terminal condition, disease or syndrome, or permanent physical incapacity;

(2) a prognosis concerning the likelihood of recovery from the terminal condition, disease or syndrome, or permanent physical incapacity;

(3) a description of the inmate's physical incapacity, if appropriate; and

(4) a description of the type of ongoing treatment that would be required if the inmate is granted compassionate release.

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

The plain language of this section demonstrates that the two DOC physicians must physically examine the inmate. In finding that no physical examination was required, the Appellate Division concluded that “the statute says nothing about a physical examination.” M.R., 478 N.J. Super. at 388. But this overly rigid interpretation ignores how a physical examination is fundamental to an accurate medical diagnosis and a prerequisite to making the CRA's required findings.

“[T]o ascertain the ordinary meaning of words used in a statute, courts typically look to a dictionary.” State v. N.G., 381 N.J. Super. 352, 360 (App. Div. 2005). Cambridge Dictionary defines “diagnosis” as “the making of a judgment about the exact character of a disease or other problem, esp. after an examination, or such a judgment” (emphasis added).⁵ Here, the dictionary definition demonstrates

⁵ Definition of “diagnosis,” available at <https://dictionary.cambridge.org/us/dictionary/english/diagnosis>.

that the plain language of the CRA -- requiring the physicians to make a medical diagnosis -- also requires the physicians to examine the applicant.

The medical community similarly recognizes that a physical examination is fundamental to an accurate medical diagnosis. For example, the Committee on Diagnostic Error in Healthcare identified four key information-gathering activities as part of the diagnostic process: clinical history, diagnostic testing, outside consultations, and the physical examination. 154 Committee on Diagnostic Error in Health Care, Board on Health Care Services, Institute of Medicine, The National Academies of Sciences, Engineering, and Medicine, Improving Diagnosis in Health Care, National Academies Press (US) (2015). Moreover, for patients entering long-term care, it is the American Medical Association's policy "for the attending physician to perform a physical examination of his patient and provide the facility with an admitting diagnosis." American Medical Association, H-280.999 Physician Involvement in Long-Term Care (2015). A physical examination is fundamental to a medical diagnosis, and must be fundamental to the CRA's "medical diagnosis" requirement.

A physical examination is also required under the CRA because the eligibility decision is all about timing and a person's medical condition is not static. The CRA requires the physicians to determine whether the applicant is medically eligible at the time of the application, not at the time of his last doctor's visit or test.

N.J.S.A. 30:4-123.51e(b). While medical records are an instructive and an essential part of the evaluation, they do not fully represent the applicant's condition at the time of his application. This is particularly critical in terminal cases, where the physicians must identify specifically when the person has crossed that threshold from being very sick to having less than six months to live. Based on medical records alone, an individual with less than six months to live could be found ineligible, contrary to the CRA, because he had more than six months to live at the time of his most recent medical records. Similarly, an individual with six to twelve months to live could not be assigned an attorney, also contrary to the CRA, because he had more than twelve months to live at the time of his most recent medical records. Only a physical examination will accurately reveal whether and when the person has crossed this threshold based on their current condition, symptoms, and experience with the illness. This decision cannot be based on months old medical reports. The only way to accomplish this requirement is for the physicians to perform a physical examination of the applicant.

Moreover, very sick individuals seeking compassionate release, and possibly suffering from a terminal condition or permanent physical incapacity, are likely to experience sudden and substantial declines in health. For example, M.R. was found not medically eligible in August 2023 but was found medically eligible nine months later in May 2024, and he ultimately died two weeks later before he could petition

for release. Making a diagnosis as current as possible, based on the applicant's current condition and not just months-old records, is crucial to ensure that people are found eligible as early as possible and to meet the CRA's goals. See also N.J.S.A. 30:4-123.51e(e)(7), (j) (providing for expedited hearings on compassionate release petitions because of applicants' volatile health).

Under the Appellate Division's interpretation, however, an ineligibility finding could be based on medical records that are days, weeks, or months old. For example, Dr. Pomerantz's findings for the August 2023 decision about M.R.'s gait, speech, and dexterity -- abilities which directly relate to the medical diagnosis -- quote four-month-old notes. (Psc14) This finding, essential to M.R.'s eligibility, was not actually based on M.R.'s ability to walk, talk, or use his hands at the time of his application. Without a physical examination, applicants are completely dependent on the thoroughness and recency of their medical records. And, even more concerning, there will be no common baseline to ground all eligibility decisions; some decisions may be based on days-old records while others are based on months-old records. See Midlantic Nat'l Bank v. Peerless Ins. Co., 253 N.J. Super. 137, 142 (App. Div.1992) (noting that statutes should be read in a commonsense manner).

Relying solely on medical records not only means relying on stale information, but also relying on information that was not gathered for the purpose

of making the requisite statutory findings. Even the most thorough and recent medical records will not include all the required information for the medical diagnosis. For example, the CRA requires the physicians to include a description of the terminal condition or permanent physical incapacity, conditions defined by and tailored to the CRA's unique purpose. While definitions of a terminal condition may vary, the CRA defines a terminal condition as a diagnosis of specifically six months or less to live. N.J.S.A. 30:4-123.51e(b), (l); Cf. NCI Dictionary of Cancer Terms, Nat'l Cancer Inst. (last visited August 20, 2014), <https://www.cancer.gov/publications/dictionaries/cancer-terms/def/terminal-cancer> (defining terminal cancer as cancer "that cannot be cured or controlled with treatment and leads to death."). The definition of a permanent physical incapacity was defined by the CRA and then, after being misinterpreted by the both Appellate Division and the DOC, clarified by this Court as meaning permanently unable to perform two or more activities of basic daily living and, as a result, requiring 24-hour care. F.E.D., 251 N.J. at 527-31. Thus, these findings are unique to the CRA; physicians examining an individual for unrelated purposes would likely not investigate and record all the relevant information needed for these findings. Consequently, these findings must be investigated as part of a physical examination geared toward the CRA and its unique needs.

Both the terminal condition and permanent physical incapacity diagnoses require information that physicians cannot accurately investigate without a physical examination. For example, performance status, or the ability to perform physical tasks, is “well known as a prognostic indicator in cancer patients” of how the cancer is progressing and whether and how long patients will survive. Declan Walsh, Lisa Rybicki, Kristine Nelson, and Sinead Donnelly, Symptoms and prognosis in advanced cancer, *Supportive Care in Cancer* 10.5, 385-388 (2002). This information is therefore directly relevant to whether an applicant has six, twelve, or more months to live. Similarly, the DOC will find a permanent physical incapacity when the applicant’s medical condition renders him “permanently unable to perform activities of basic daily living” (ADLs), like “eating, mobility, bathing, dressing, using a toilet, and transfers.” F.E.D., 251 N.J. at 510, 529 (citing N.J.S.A. 30:4-123.51e(1)(b)). All of these indicators can only be observed through a physical examination.

Although fundamental to the terminal condition and permanent physical incapacity diagnoses, the DOC physicians never observed M.R.’s physical performance status or ability to perform ADLs at the time of his application. Nor could this information be gleaned from medical records alone, if at all. Accordingly, any information from these indicators at the time of application was not a part of the requisite diagnoses. The effect that not having this information had on M.R.’s

diagnoses is unknown. But without a physical examination, there is a greater possibility that applicants will be wrongly passed over. To accurately make the requisite diagnoses, physicians must observe the applicant and their physical ability themselves. See Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 195 (2007) (citation omitted) (“If the plain language leads to a clear and unambiguous result, then our interpretive process is over”). Under the plain language of the CRA, therefore, a physical examination is required.

Beyond the subsection at issue, the CRA as a whole requires a physical examination when physicians are making medical diagnoses. “[E]ach part or section [of a statute] should be construed in connection with every other part or section so as to produce a harmonious whole” and “it is not proper to confine interpretation to the one section to be construed.” In re Passaic County Utils. Auth., 164 N.J. 270, 300 (2000) (internal quotations omitted); see also United States v. Gregory, 345 F.3d 225, 229 n.2 (3d Cir. 2003) (applying the presumption that a word used in one section of a statute is intended to have the same meaning when used in another section of the same statute). N.J.S.A. 30:4-123.51e(i), another subsection of the CRA, allows the State Parole Board to require released inmates “to submit to periodic medical diagnoses by a licensed physician.” (emphasis added). Compassionate release can be revoked if, on review of the medical diagnosis, the Parole Board finds the released inmate “no longer” medically eligible. N.J.S.A.

30:4-123.51e(j). In these subsections, the phrase “medical diagnosis” obviously requires a physical examination; to determine whether a released inmate is “no longer eligible,” after having previously been found eligible, the released individual must be physically examined in his current state. This diagnosis cannot be made based on medical records alone, and instead requires a physical examination. The phrase “medical diagnosis” in other subsections of the CRA must be interpreted in the same way. Accordingly, the medical diagnosis required to determine eligibility must include a physical examination.

Furthermore, the Appellate Division’s interpretation undermines the Legislature’s express intent in passing the CRA: to increase the number of sick people released from prison. A.M., 252 N.J. at 438, 458; see also (Pa47) (upon the CRA’s passage, the bill’s legislative sponsors stated that “[b]y expanding upon what already exists we can show true compassion to those with profound medical needs and those suffering terminal illness”). The physical examination requirement helps to facilitate increased release. To the extent that there may be any ambiguity in the plain language, the legislative history further supports the physical examination requirement. Wilson ex rel. Manzano, 209 N.J. at 572 (Statutory interpretation should be guided by “the legislative objectives sought to be achieved by enacting the statute.”). Specifically, the “structure and history of” the

statute “reveal that the Legislature intended to expand the use of compassionate release.” Id. at 458, 460.

The Legislature passed the CRA in 2020 based on a recommendation of the Sentencing Commission, which found that under the prior statute providing for early medical release, fewer than five people were released between 2015 and 2019. Id. at 438, 457; (Pa35). The prior medical release statute was particularly rigid and inmates were often too ill to petition for release by the time they qualified. (Pa35) Accordingly, the CRA streamlines the process for applying for release and allows anyone to apply, regardless of their crime of conviction. Id. at 438, 458.

Therefore, the CRA “reflect[s] the Legislature’s intent to show compassion to people with serious medical needs, decrease the prison population, and reduce healthcare costs for correctional facilities.” Id. at 438; see also id. at 458 (noting that the CRA’s sponsors wanted to “show true compassion to those with profound medical needs,” and to “reduce prison capacity, and alleviate financial strains” on an “already overcrowded prison system” “while getting medically vulnerable residents the care they need outside of prison” (quoting Gov. Phil Murphy, Press Release, Governor Murphy Signs Sentencing Reform Legislation (Oct. 19, 2020) (joint statement of Assemblypersons Gary Schaer and Verlina Reynolds-Jackson))). The CRA

should be liberally -- not strictly -- construed to achieve that goal. T.H. v. Div. of Developmental Disabilities, 189 N.J. 478, 480 (2007) (acknowledging that humanitarian statutes “should be liberally construed to achieve their beneficent purposes”). Likewise, the CRA’s medical diagnosis requirement must be liberally interpreted given this humanitarian purpose. By requiring physical examinations and making the requisite medical diagnoses as accurate as possible, the CRA will increase the number of individuals found medically eligible and ultimately released.

While the Appellate Division remarked that a physical examination requirement would somehow “delay[] and complicat[e]” the process for medically eligible applicants, this concern is unfounded. M.R., 478 N.J. Super. at 390. In the rare case that an individual’s medical eligibility is obvious on the face of their medical records, the DOC certainly may find them eligible without a physical examination. But for sick applicants whose eligibility is not obvious on the face of their medical records, the physical examination requirement exists to ensure that the DOC meets the CRA’s goals and does not wrongly deny applications.

Moreover, there is no evidence to suggest that requiring physical examinations would be unnecessarily burdensome for the DOC. From the CRA’s passage in 2020 to May 2023, only 132 people across all New Jersey prisons had applied for compassionate release, with just 18 receiving a Certificate of Eligibility. (P2a11) The burden of requiring the DOC to perform about 44 physical

examinations per year is nominal; the requirement is a reasonable way to facilitate the CRA.

The Appellate Division’s misinterpretation of the CRA forces applicants, like M.R., to wait until they are even sicker to start the process. And, like M.R., these applicants will be less likely to live long enough to obtain relief. Surely, this is not what the Legislature intended in passing a compassionate release statute designed to increase the number of inmates released from overcrowded prisons and get them the care they need outside of prison. A.M. 472 N.J. Super. at 458. Indeed, this is exactly what the Sentencing Commission sought to correct when recommending an overhaul of the old medical parole statute. (Pa35) The Appellate Division’s incorrect and overly rigid interpretation cannot be squared with the Legislature’s intent and the CRA must be interpreted to require a physical examination to avoid this “absurd result.” Wilson ex rel. Manzano, 209 N.J. at 572.

Critically, the CRA has struggled to achieve its purpose of “increasing the use of compassionate release.” A.M., 252 N.J. at 461. From the law’s passage in 2020 to July 2024, just six people have ever received release under the CRA. (P2a13) Of the individuals who received a Certificate of Eligibility, over 27% died before the Superior Court could issue a decision on their petitions. (P2a11) Thus, the CRA is not serving its intended purpose of increasing the use of compassionate release. Nor is the CRA meaningfully

achieving its other goals of reducing our prison population or alleviating financial burdens on the DOC. See A.M. 472 N.J. Super. at 458. The CRA is only further stifled by the Appellate Division’s holdings; if applicants are not physically examined, the number of sick inmates released will continue to be suppressed, and the CRA will continue to fall short of its purpose.

Therefore, this Court must find that the CRA’s plain language and the Legislature’s intent reveal that the DOC’s is required to physically examine applicants for compassionate release.

2. The DOC regulations require two DOC physicians to physically examine applicants.

In accordance with the plain language and intent of the CRA, the DOC regulations also require a physical examination. The regulations provide:

The two designated physicians will complete the required examinations and forward their attestations, and all related medical records, to the health services unit medical director for review. Following review of the medical records, the medical director shall make a medical determination of eligibility or ineligibility and issue a memo to the Commissioner of the Department of Corrections detailing the same.

[N.J.A.C. 10A:16-8.6(a).]

By its plain language, the regulations require the two physicians to examine the inmate. Cambridge Dictionary defines “examination” as “the act or process of carefully looking at someone or something to learn about its condition or to

discover facts.”⁶ See N.G., 381 N.J. Super. at 360 (“To ascertain the ordinary meaning of words used in a statute, courts typically look to a dictionary.”) Thus, the plain language of the DOC regulations requires the two DOC physicians to carefully look at the inmates, via a physical examination, to learn about their condition.

Moreover, the DOC regulations provide that, “[a] medical diagnosis to determine an inmate’s eligibility for compassionate release may be initiated by . . . the inmate . . . by submitting the Compassionate Release Request Form.” N.J.A.C. 10A:16-8.5(a). The DOC’s Compassionate Release Request Form states: “I, [name of person making request] am hereby requesting that [inmate] be medically examined for consideration to be released under the ‘Compassionate Release’ law.” (Pa52 (emphasis added)). Plainly, the statutorily-required medical diagnosis to determine eligibility is initiated by a request for a physical examination of the inmate.

Furthermore, the language of the DOC regulations as a whole supports this interpretation. The regulations provide that the medical director conducts a “review of the medical records” and attestations. N.J.A.C. 10A:16-8.6(a). In contrast, the physicians must conduct “the required examinations.” Ibid. The

⁶ Definition of “examination” in American English, available at <https://dictionary.cambridge.org/dictionary/english/examination>.

Appellate Division ignored this distinction, asserting that “‘examination’ is a reference to a medical-record examination and not a requirement for a physical examination.” M.R., 478 N.J. Super. at 389. But the DOC chose to distinguish a “review of the medical records” from “the required examinations” for a reason; the required examinations of applicants entails more than just a review of medical records. See Cashin v. Bello, 223 N.J. 328, 340 (2015) (“[Where] [the Legislature] includes particular language in one section of the statute but omits it in another section of the same Act, it is generally presumed that [the Legislature] acts intentionally and purposely in the disparate inclusion or exclusion” (alteration in original) (citation and internal quotation marks omitted)); Delanoy v. Twp. of Ocean, 245 N.J. 384, 401 (2021) (“Traditional principles of statutory construction require courts to give meaning to all words used in a statute . . . to avoid treating the Legislature’s language as mere surplusage”).

The plain meaning of the CRA and the DOC regulations is that two DOC physicians must physically examine inmates and then make medical diagnoses to determine medical eligibility for release. DOC cannot disregard its own duly enacted regulations by not physically examining applicants. Cnty. of Hudson v. Dep’t of Corr., 152 N.J. 60, 71 (1997) (Dougherty v. Dep’t of Human Servs., 91 N.J. 1, 8 (1982)). If this Court allows the DOC to ignore the CRA and its own regulations and deny release without ever examining the inmate, as it did for

M.R., eligible applicants will be overlooked and unable to petition for release, contrary to the statute, regulations, and Legislature's intent. Therefore, this Court must find that the DOC's own regulations require it to physically examine applicants for compassionate release.

B. The CRA requires the DOC to provide detailed information about the applicant's condition to explain the eligibility decision.

The DOC must also explain its medical eligibility decisions, especially when finding an applicant ineligible for release. Here, the two DOC physicians provided virtually no explanation for their findings that M.R. did not have a terminal condition or permanent physical incapacity. (Psc4-5) On appeal, the Appellate Division merely rubber stamped the barebones attestations. But complete attestations are an essential part of the compassionate release process and appellate review. Otherwise, eligible sick applicants will have no meaningful opportunity to correct a wrongful denial and will be forced to continuously reapply until, if ever, they are found eligible before succumbing to their illness.

As discussed above, the CRA explicitly requires that the physicians' attestations include, at least:

- (1) a description of the terminal condition, disease or syndrome, or permanent physical incapacity;

(2) a prognosis concerning the likelihood of recovery from the terminal condition, disease or syndrome, or permanent physical incapacity;

(3) a description of the inmate's physical incapacity, if appropriate; and

(4) a description of the type of ongoing treatment that would be required if the inmate is granted compassionate release.

[N.J.S.A. 30:4-123.51e(b); see also N.J.A.C. 10A:16-8.5(a).]

This information is required to understand the eligibility decision and for meaningful appellate review of the same. If this information was only required for applicants who are found to be eligible, then the physicians would not need to provide any information for applicants who are found ineligible. Such a result would be absurd. Wilson ex rel. Manzano, 209 N.J. at 572.

Moreover, this Court “will not perfunctorily review and rubber stamp the [DOC’s] decision.” Blackwell v. Dep’t of Corr., 348 N.J. Super. 117, 123 (App. Div. 2002) (citing Williams v. Dep’t of Corr., 330 N.J. Super. 197, 204 (App. Div. 2000)). Rather, it is well-established that the DOC must “disclose its reasons for any decision, even those based upon expertise, so that a proper, searching, and careful review by this court may be undertaken.” Balagun v. Dep’t of Corr., 361 N.J. Super. 199, 203 (App. Div. 2003) (emphasis added).

Accordingly, the DOC must provide sufficient reasoning for every eligibility decision.

However, the Appellate Division rubber stamped the DOC's denial of compassionate release in M.R., despite the lack of explanation. M.R. 478 N.J. Super. at 390. The physicians offered no explanation whatsoever for their findings that M.R. did not have a terminal condition or permanent physical incapacity -- two of the four prongs required by the CRA. Dr. Pomerantz simply noted "no documented grave illness" and Dr. Hawes noted "N/A." (Psc4-5) While the physicians included uncited information from M.R.'s medical records in the "Diagnosis" section of the attestation form, there is no way to determine what information supports which finding and why. For example, Dr. Hawes noted, "no evidence of recurrence" but also "moderate-severe dysarthria . . . irregular/slow rate of speech . . . moderate cognitive-linguistic impairment" as well as "cranial [] palsy" and "lack of coordination." (Psc5) However, he does not explain the significance of any these findings or relate them to the CRA's required findings. Moreover, the attestations are silent as to how M.R.'s difficulty speaking and walking, cognitive impairment, and lack of coordination affected his ability to perform ADLs or why the physicians did not find that these disabilities amounted to a permanent physical incapacity.

By holding that these barebones attestations are acceptable, the Appellate Division's decision makes meaningful review of ineligibility decisions virtually impossible. If M.R. was eligible but overlooked, he could not have substantively challenged the eligibility decision. M.R. could not point to support for the DOC's findings and argue that it was incorrect or actually weighed in favor of his release because the DOC offered no support for its findings.

These barebones attestations also encourage inefficiency as to reapplying for release. M.R., who was experiencing problems walking, communicating, and using his hands due to stage four brain cancer, could not rely on the attestations to determine what changes in his condition might make him eligible in the future. A compliant attestation should offer reasoning that M.R., his family, his treating physicians, and his attorney could have used to determine if and when to reapply. But M.R. was forced to blindly reapply until the DOC finally found him eligible, weeks before his death. Under the current precedent, other sick people will be similarly encouraged to blindly reapply in the hopes of eventually being found eligible before they die.

The Legislature set forth clear criteria for the physicians to include because it did not intend for the DOC to have unquestionable authority to determine applicants' eligibility. But the Appellate Division's decision gives the DOC just

that. Unquestionable authority to deny sick applicant's release without explanation will undoubtably limit release and further undermine the intent of the CRA.

Therefore, this Court must reverse the Appellate Division's decision and clarify that the DOC must provide sufficient reasoning to comply with the CRA, allow for meaningful appellate review, and ensure that eligible sick applicants are not erroneously denied the opportunity to petition for release. See also T.H., 189 N.J. at 480 (acknowledging that humanitarian statutes "should be liberally construed to achieve their beneficent purposes").

CONCLUSION

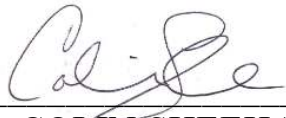
The CRA provides sick inmates with a process to be physically examined to determine their medical eligibility at the time of their applications. Moreover, the CRA requires the examining physicians to provide certain information in their attestations to ensure meaningful review. These requirements -- made clear by the plain language of the CRA, the regulations, and the Legislature's intent -- serve to ensure that our sickest inmates are not arbitrarily passed over for release because of insufficient examinations without meaningful recourse. In turn, these requirements facilitate the CRA's goals of increasing release, reducing the prison population and DOC expenses, and showing compassion to our sickest inmates.

But the Appellate Division's decision, as it stands, allows the DOC to find applicants medically ineligible without ever looking at their physical condition, without having to explain their decision-making, and without opportunity for meaningful appellate review. Under this precedent, countless sick inmates who might qualify for compassionate release will be arbitrarily passed over and forced to continuously reapply until, like M.R., their sickness is so obvious on the face of their medical records that they are found eligible -- at which point it may be too late. Moreover, the Appellate Division allowed the DOC to offer barebones evaluations without explanation, inhibiting sick inmates from getting meaningful review of their denial. To prevent this absurd result, this Court must clarify that the

CRA does, in fact, require physical examinations of applicants and sufficient attestations.

Respectfully submitted,

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