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THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CAPE MAY COUNTY
LAW DIVISION, CRIMINAL PART
INDICTMENT NO. 17-10-0737

STATE OF NEW JERSEY,

Plaintiff,

v.

HANEEF MOLLEY,

Defendant.

APPROVED FOR PUBLICATION

November 24, 2021

COMMITTEE ON OPINIONS

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Decided: May 27, 2020

Saverio M. Carroccia, Chief Assistant Prosecutor, for plaintiff (Jeffrey H. Sutherland, Cape May County Prosecutor, attorney).

Jesse E. Deane, Assistant Deputy Public Defender, for defendant (Joseph E. Krakora, Public Defender, attorney).

LEVIN, J.S.C.

This matter comes before the court by way of defendant Haneef Molley's Motion for Release Due to Illness or Infirmity under Rule 3:21-10(b)(2) and a Motion for a Judicial Furlough under State v. Boone, 262 N.J. Super. 220 (Law Div. 1992). Based upon the court's extensive review of the submissions, the arguments of counsel, and the law, the court finds that defendant's motions for Release and Judicial Furlough are denied.

I. PROCEDURAL HISTORY AND STATEMENT OF FACTS

A. COVID-19 and Executive Order 124[1]

In 2020, the World, the United States, and New Jersey were faced with a novel coronavirus, COVID-19, a contagious and sometimes fatal respiratory disease caused by the SARS-CoV-2 virus, which, due to its spread, evolved into a pandemic and "public health emergency of international concern." Exec. Order No. 103 (March 9, 2020), 52 N.J.R. 549(a) (April 6, 2020). COVID-19 is a respiratory illness, caused by a coronavirus, primarily transmitted by contact with infectious materials, such as droplets, or with surfaces contaminated by the virus. Persons infected with COVID-19 can be asymptomatic or have symptoms such as fever, cough, shortness of breath, and more. In severe cases, COVID-19 can progress to pneumonia and respiratory failure, leading to death.

In response, Governor Phillip D. Murphy invoked his powers under the Civilian Defense and Disaster Control Act, N.J.S.A. App. A:9-30 to -63 and the Emergency Health Powers Act, N.J.S.A. 26:13-1 to -31, and issued a series of Executive Orders to provide for the health and well-being of the residents of New Jersey. Those Orders included the following: On February 3, 2020, Governor

[1] This information in this section was derived from the court's review of the Executive Orders issued by Governor Phillip D. Murphy and the Consent Order issued by the New Jersey Supreme Court on March 22, 2020, In re Request to Commute or Suspend County Jail Sentences, 241 N.J. 404 (2020).

Murphy issued Executive Order 102, establishing a "Coronavirus Task Force." Exec. Order No. 102 (Feb. 3, 2020), 52 N.J.R. 366(b) (March 2, 2020). On March 9, 2020, Governor Murphy issued Executive Order 103, declaring a "state of emergency" and "public health emergency." Exec. Order No. 103 (March 9, 2020), 52 N.J.R. 549(a) (April 6, 2020). On March 16, 2020, Governor Murphy issued Executive Order 104, establishing aggressive social distancing measures to mitigate further spread of COVID-19 in New Jersey. Exec. Order No. 104 (March 16, 2020), 52 N.J.R. 550(a) (April 6, 2020). On April 7, 2020 and May 6, 2020, Governor Murphy renewed the declarations of a "state of emergency" and a "public health emergency" in Executive Orders 119 and 138, respectively. Exec. Order No. 119 (April 7, 2020), 52 N.J.R. 956(a) (May 4, 2020); Exec. Order No. 138 (May 6, 2020), 52 N.J.R. 1107(b) (June 1, 2020).

In addition to Governor Murphy's Executive Orders, on March 22, 2020, the Supreme Court of New Jersey issued a Consent Order, In re Request to Commute or Suspend County Jail Sentences, 241 N.J. 404 (2020). In the Consent Order, the New Jersey Supreme Court provided for the release of certain inmates that were incarcerated at the county jails, as the parties to the Consent Order all agreed that reduction in the county jail populations was "in the public interest to mitigate [the] risks imposed by COVID-19." Ibid. Indeed, all of the parties that signed the Consent Order—namely, New Jersey Attorney General Gurbir S. Grewal on behalf

of the Attorney General's Office, New Jersey Public Defender Joseph E. Krakora on behalf of the Public Defender's Office, Mercer County Prosecutor Angelo J. Onofri on behalf of the New Jersey County Prosecutor's Association, and Senior Supervising Attorney Alexander Shalom on behalf of the New Jersey Chapter of the American Civil Liberties Union—recognized that there was a "profound risk posed to people in correctional facilities arising from the spread of COVID-19." Ibid.

On April 10, 2020, Governor Murphy issued Executive Order 124 (EO 124), which related to inmates incarcerated in the New Jersey State Prison System. Exec. Order No. 124 (Apr. 10, 2020), 52 N.J.R. 963(a) (May 4, 2020). EO 124 recognized that inmates, "by virtue of their age and/or underlying medical conditions," might "face a heightened risk of death or serious injury if they [were to] contract COVID-19[.]" Ibid. EO 124 further recognized that the New Jersey State Prison System had "finite capacity within its facilities to provide medical care to inmates who contract COVID-19[.]" Ibid. Due to these concerns, "in order to protect these particularly vulnerable individuals from a heightened risk of death and serious injury, it [might] be necessary to take certain emergency steps in order to temporarily remove these individuals from congregate custody[.]" Ibid. Thus, in EO 124, Governor Murphy ordered and directed the Department of Corrections (DOC) to generate lists, called "Emergency Medical Referral Lists," of inmates that might be appropriate for release. Ibid.

Under Paragraph 1e of EO 124, the DOC was directed to generate a list that included "any additional inmates that DOC subsequently concludes face a heightened risk of death or serious injury from COVID-19 based on their age and/or underlying medical conditions." Ibid. Under Paragraph 3, once the "Emergency Medical Referral List" was generated, the list was to be produced to the Director of the Division of Criminal Justice and to the County Prosecutors' Offices for their input and objections. Ibid. Under Paragraph 5, EO 124 established an Emergency Medical Review Committee, chaired jointly by a designee of the DOC and a designee of the Chairman of the State Parole Board, to make a recommendation regarding each inmate on the list(s) as to "whether the Commissioner should authorize a period of emergency medical temporary home confinement pursuant to N.J.S.A. 30:4-91.3." Ibid. Under Paragraph 8, the Commissioner then "shall decide whether to grant an emergency medical home confinement pursuant to his authority under N.J.S.A. 30:4-91.3." Ibid.

Importantly, EO 124 expressly provides that "it would only be appropriate to grant an inmate such emergency medical home confinement where such inmate does not present a threat to public safety . . . especially at a time when law enforcement agencies across the State are dedicating time and resources to addressing the public health emergency[.]" Ibid. In those instances in which an inmate is denied release,

EO 124, Paragraph 10, directed the DOC to "take all appropriate actions to mitigate inmates' health risks while remaining in DOC's custody." Ibid.

EO 124 does not appear to provide for any inmates on the list to participate by notice, through counsel, or at a hearing. Rather, the process appears to be confidential to those outside of the state actors set forth in the order, and inmates do not necessarily know if they have been considered and/or denied the emergent medical home confinement. This seemingly sets the process apart from traditional administrative proceedings.

B. Defendant's Arguments and the State's Response

Due to the COVID-19 pandemic, defendant has filed the within Motion for Release Due to Illness or Infirmity under Rule 3:21-10(b)(2) and a Motion for a Judicial Furlough under State v. Boone, 262 N.J. Super. 220 (Law Div. 1992). Defendant has placed reliance on the fact that he is an "insulin dependent diabetic requiring two injections daily." This information was contained in defendant's presentence investigation report and was not disputed by the State. In essence, defendant has asserted that his diabetic condition, coupled with his being housed in the prison, has placed him at a very high risk of contracting COVID-19 and suffering extremely serious health consequences, including death. Therefore, as stated, defendant has sought his release under Rule 3:21-10(b)(2) or judicial furlough.

In support of defendant's Motion for Release or Furlough, defendant has submitted the following exhibits:

- Exhibit A – Defendant's Signed Waiver of Appearance at the Hearing;
- Exhibit B – The Consent Order executed by the Supreme Court of New Jersey, In re Request to Commute or County Jail Sentences, 241 N.J. 404 (2020);
- Exhibit C – Executive Order 124 issued by Governor Phillip D. Murphy on April 10, 2020;
- Exhibit D – Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of Those in Custody (March 2020);
- Exhibit E – The Declaration of Dr. Chris Beyrer, a Professor of Epidemiology, International Health and Medicine and Director for the Center for Public Health and Human Rights at Johns Hopkins Bloomberg School of Public Health, in which Dr. Beyrer provided valuable information about the high risk of persons, including inmates and workers, in detention facilities;
- Exhibit F – The Declaration of Dr. Jonathan Louis Golob, an assistant professor at the University of Michigan School of Medicine, specializing in infectious disease with a concentration in those diseases affecting immunocompromised patients, who concluded that persons with various diseases, including diabetes, are at grave risk of severe illness and death from COVID-19;

- Exhibit G – The Declaration of Robert G. Greifinger, M.D., a physician who has managed the health care of inmates in the New York State Prison System for more than 30 years, who concluded that those in detention facilities, like jails and prisons, are at a much higher risk of having health issues from COVID-19 due to, amongst other things, the inability to socially distance from one another;
- Exhibit H – The Declaration of Marc Stern, M.D., a physician specializing in internal medicine and correctional health care, who advised that there is an increased risk of serious, adverse health consequences from COVID-19 for persons from diseases, such as diabetes, and for persons that are incarcerated;
- Exhibit I – The Declaration of Dr. Jaimie Meyer, an assistant professor of Medicine at the Yale School of Medicine and an Assistant Clinical Professor of Nursing at Yale School of Nursing, who also is Board Certified in Infectious Disease and Internal Medicine and who concluded that inmates, especially those that have underlying health conditions like diabetes, are at an increased risk of contracting the virus and suffering serious health consequences, including death;
- Exhibit J – The DOC COVID-19 Updates Page, dated May 11, 2020, indicating that there have been more than forty inmate deaths due to COVID-19;

- Exhibit K – A Map of Mid-State Correctional Facility;
- Exhibit L – A news article from CorrectionsOne.com, dated March 3, 2020 and entitled, "Study: NJ Prisons have highest COVID-19 death rate in U.S.";
- Exhibit M – Online information from the Center for Disease Control and Prevention, indicating that persons with diabetes are at a greater risk for contracting COVID-19 and becoming severely ill from the disease;
- Attached Undesignated Exhibit – Letter dated April 25, 2020 from defendant's sister, Hakeema Vaughan;
- Attached Undesignated Exhibit – Letter dated May 1, 2020 from defendant's mother, Elise Molley;
- Attached Undesignated Exhibit – Medical Records from AtlantiCare Regional Medical Center, confirming that defendant has type-1 diabetes;
- Attached Undesignated Exhibit – Defendant's Judgment of Conviction;
- Attached Undesignated Exhibit – Defendant's Certification; and,
- Attached Undesignated Exhibit – Letter dated April 25, 2020, from defendant requesting to be released from the New Jersey State Prison System to have a fighting chance.

The State has responded by arguing that defendant's motions are premature and should be denied, because defendant failed to exhaust his administrative remedy of furlough by the Commissioner under EO 124 and N.J.S.A. 30:4-91.3. The State

also has maintained that defendant should not be released under Rule 3:21-10(b)(2) and State v. Priester, 99 N.J. 123, 135 (1985), because defendant is not at a higher risk of exposure in prison; because defendant can obtain necessary medical treatment in prison; and, because defendant's circumstances have not changed in that he has not contracted COVID-19. The State lastly has contended that the court should deny a judicial furlough under Boone because the present case is legally and factually distinguishable.

On May 19, 2020, the court entertained oral argument in the matter. This decision now follows.

II. LEGAL ANALYSIS

A. Exhaustion of Administrative Remedies

The State, through the Cape May County Prosecutor's Office, has argued that this court should not even address defendant's Motion for Release Due to Illness or Infirmity under Rule 3:21-10(b)(2) and defendant's Motion for a Judicial Furlough under Boone because EO 124 sets out an administrative process to which defendant must adhere and through which defendant must exhaust his administrative remedies under Rule 2:2-3(a)(2). Rule 2:2-3(a)(2) reads:

> [A]ppeals may be taken to the Appellate Division as of right . . . to review final decisions or actions by an administrative agency or officer . . . except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any

> administrative agency or officers, unless the interests of justice requires otherwise.

The Cape May County Prosecutor's Office has buttressed its argument by submitting unpublished cases in which the Appellate Division has denied applications for permission to file emergent motions by defendants, where the trial courts have dismissed such defendants' Motions for Release under Rule 3:21-10(b)(2) and Boone for failure to exhaust administrative remedies. It should be noted that cases also exist in which the trial courts and subsequently the Appellate Division addressed such emergent motions on the merits.

Defendant has responded that EO 124 cannot truly be categorized as an administrative remedy, as the defendants file neither an application nor participate and the defendants cannot apply for consideration. Moreover, the defendants have no notice, no information (e.g., discovery) as to what is being considered, no opportunity to be heard, no counsel, and no hearing. Furthermore, EO 124 has no means by which to seek appellate review. Simply put, the defendants have no procedural or substantive due process rights under EO 124. Lastly, defendant has noted that EO 124 does not contain any language suspending all other remedies and doing so would be inconsistent with its intent, protecting inmates during a global pandemic. As such, defendant has maintained that EO 124, Rule 3:21-10(b)(2), and Boone are "parallel track[s]," which can occur simultaneously.

Interestingly, the State, through the Attorney General's Office, has argued that EO 124 does not bar defendant-inmates from accessing the courts and filing motions under Rule 3:21-10(b)(2). The Attorney General's Office requested that the New Jersey Supreme Court address the misconception that EO 124 bars defendant-inmates from filing Rule 3:21-10(b)(2) applications. In so doing, the Attorney General characterized EO 124 as establishing an administrative classification process to determine whether an inmate can serve his sentence at home with no mechanism for defendant-inmates to seek appeal of denials and no remedy to exhaust precluding review under Rule 3:21-10(b)(2).

"Exhaustion of administrative remedies before resort to the courts is a firmly embedded judicial principle." Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 558-59 (1979) (citing Central R.R. Co. v. Neeld, 26 N.J. 172, 178 (1958)). This requires exhausting available procedures by "pursuing them to their appropriate conclusion and, correlatively . . . awaiting their final outcome before seeking judicial intervention." Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 767 (1947). In practice, this means that a party must conclude the administrative action before seeking review in the Appellate Division, "unless the interest of justice requires otherwise." Ibid.; R. 2:2-3(a)(2).

In determining whether defendant needs to exhaust his administrative remedies here, this court notes that the plain meaning of the term "exhaust" is to

"consume entirely."[2] In this case, as argued by defendant, and supported by the Attorney General, under EO 124, the defendant-inmates have no role and do not participate. They also are not entitled to appellate review, should their release be denied. Thus, it would appear that the defendant-inmates are not actively engaging, or exhausting their remedies, in the process at all.

As a corollary, the defendant-inmates appear to have no due process rights in the review set out under EO 124. The defendant-inmates have no notice and no opportunity to be heard. The defendant-inmates have no counsel and no hearing. Again, the defendant-inmates have no means by which to appeal. The New Jersey Supreme Court has held and declared that it is well-recognized that "parolees, probationers, and even prisoners have liberty interests that implicate the commands of due process." Jamgochian v. N.J. State Parole Bd., 196 N.J. 222, 240 (2007) (citing Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (parolees); Gagnon v. Scarpelli, 411 U.S. 778, 781-82, n. 3 (1973) (probationers); Wolff v. McDonnell, 418 U.S. 539, 555-56, 572 n. 19 (1974) (noting that prisoners have due process rights in any "action which would tend to affect [his] release or parole date or have a major change in the condition of confinement")). Thus, under the circumstances before this court, the court finds the exhaustion of administrative remedies doctrine

[2] Exhaust, Merriam-Webster.com, http://merriam-webster.com/dictionary/exhaust (last visited May 27, 2020).

inapplicable and further finds that applying the doctrine to temporarily preclude defendant from filing an application in court during the COVID-19 pandemic would be inimical to the interests of justice.

Even if the court were to find the exhaustion doctrine applicable to the case at bar, the exhaustion doctrine is not absolute. Garrow, 79 N.J. at 558-59 (citing Nolan v. Fitzpatrick, 9 N.J. 477, 487 (1952)). One such exception is when irreparable harm might result. Ibid. (citing Roadway Express, Inc. v. Kingsley, 37 N.J. 136, 142 (1962)). Another exception, contained in Rule 2:2-3(a)(2) itself, is when the "interests of justice require." Therefore, the court holds, in the alternative, that it must address defendant's motions on the merits to potentially prevent irreparable harm to the defendant and to further the interests of justice.

B. Medical Release Pursuant to Rule 3:21-10(b)(2)

Rule 3:21-10(b)(2) provides, in pertinent part, that a "motion may be filed and an Order may be entered at any time . . . (2) amending a custodial sentence to permit the release of a defendant because of illness or infirmity of the defendant[.]" In Priester, 99 N.J. at 123, the New Jersey Supreme Court squarely addressed the issue of release and the factors that a court should consider when reviewing a defendant's application for release due to illness or infirmity under Rule 3:21-10(b)(2).[3]

[3] Both the State and defendant agree that the court has no authority to reduce or change defendant's sentence under Rule 3:21-10(b)(2), but rather the court only may consider releasing defendant under the rule. This is consistent with the New Jersey

In Priester, 99 N.J. at 129-30, the defendant pleaded guilty to first-degree aggravated sexual assault and was sentenced to ten years incarceration in the New Jersey State Prison with a five-year period of parole ineligibility.[4] At the time of sentencing, in accepting the plea agreement and imposing the sentence, the trial court considered the defendant's medical condition, which the defendant suffered as a result of an attempted escape and which included serious spinal injuries, weakness in the lower extremities, diminished use of his legs, and impairment of his bladder, bowel, and sexual functions. Ibid.

Approximately one year later, based upon the aforementioned medical issues, the defendant moved for "reconsideration" of his sentence pursuant to Rule 3:21-10(b)(2). The trial court denied the motion. The Appellate Division, however, reversed and amended the defendant's sentence "by excising the parole ineligibility term, to the end that the Parole Board may freely exercise the discretion entrusted to it by statute to determine when and under what circumstances an inmate may be

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Supreme Court's second holding in Priester, 99 N.J. at 141, in which it directly declared that Rule 3:21-10(b)(2) "may be applied only to release a prisoner from prison but not to reduce or change his sentence."

[4] Aggravated sexual assault constitutes a violent crime under N.J.S.A. 2C:43-7.2 (the "No Early Release Act"), requiring defendants to serve a mandatory period of parole ineligibility of 85% of their sentences prior to becoming parole eligible. However, the No Early Release Act was not enacted into law until 1997, which is the reason that it was not applicable to the defendant in Priester.

paroled." Id. at 131. The State petitioned for Certification to the New Jersey Supreme Court, which was granted. Id. at 132.

The New Jersey Supreme Court began its analysis by reviewing the history of Rule 3:21-10(b)(2). Id. at 132-35.[5] Thereafter, the New Jersey Supreme Court set forth factors that the trial courts must consider when analyzing an application under Rule 3:21-10(b)(2). Those factors included the following:

Firstly, the defendant-prisoner must provide proof of "[t]he serious nature of the defendant's illness and the deleterious effect of incarceration on the prisoner's health." Priester, 99 N.J. at 135. With respect to this factor, "the court should consider the availability of medical services in prison . . . [and] in order to prevail, the prisoner must show that the medical services unavailable at the prison would be not only beneficial . . . but [also] are essential to prevent further deterioration to his health." Id. at 135-36 (citing State v. Tumminello, 70 N.J. 187, 193 (1976)).

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[5] The New Jersey Supreme Court in Priester, 99 N.J. at 132-35, specifically cited, reviewed, and compared three cases: In State v. Tumminello, 70 N.J. 187 (1976), the New Jersey Supreme Court granted release under the Rule to a defendant suffering from diabetes mellitus requiring hospitalization, the amputation of several toes, and the possible amputation of his legs. In State v. Sanducci, 167 N.J. Super. 503 (App. Div. 1979), the Appellate Division affirmed the denial of release to a defendant that had suffered a heart attack and had a long-standing chronic pulmonary condition and diabetes, primarily due to the seriousness of the crime of which the defendant had been convicted and the availability of treatment at the prison. And, in State v. Meighan, 173 N.J. Super. 440 (App. Div. 1980), the Appellate Division again affirmed the trial court's denial of the defendant's motion for release, because the court knew of the defendant's sickle-cell anemia at the time of sentencing.

Secondly, the defendant-prisoner "also must show that changed circumstances in his health have occurred since the time of the original sentence." Id. at 136. "The change of circumstances most likely to have occurred between sentencing and the hearing is the severe deterioration of the prisoner's health." Ibid. However, it also might include "information about the defendant's health previously unknown to the sentencing court." Id. at 137 (citing Tumminello, 70 N.J. at 193).

Lastly, the court must consider "the nature and severity of the crime, the severity of the sentence, the criminal record of the defendant, the risk to the public if the defendant is released, and the defendant's role in bringing about his current state of health." Ibid.

In applying the enunciated factors in Priester, 99 N.J. at 137, the New Jersey Supreme Court held that the trial court had properly balanced the relevant factors and did not abuse its discretion in denying the defendant's release under Rule 3:21-10(b)(2). There was no dispute as to the severity of the defendant's injuries and the hardships that he faced due to such injuries. Ibid. There also was no dispute that there had been no change in circumstances to the defendant's medical condition since the time of the sentencing, and there were proper medical services available to the defendant in the prison system.[6] Ibid. The trial court also properly had balanced

[6] The New Jersey Supreme Court also held that, "when there exists reasonable dispute as to the availability of proper medical services in prison, the State should submit evidence to the court that medical services are available, for it is the prison

the defendant's medical condition against the heinous crime committed, an aggravated sexual assault on a juvenile. As such, the New Jersey Supreme Court reversed the judgment of the Appellate Division in reducing the defendant's sentence by excising his period of parole ineligibility and concluded that the trial court properly denied the application for release. Ibid.

The Supreme Court noted that Rule 3:21-10(b)(2) "offers extraordinary relief to a prisoner" and that "there is no greater benefit one can bestow on a prisoner than release from prison." Id. at 135. As such, the Supreme Court made clear that "the Rule must be applied prudently, sparingly, and cautiously" and its application "is committed to the sound discretion of the court." Ibid.

This court must analyze the three factors set forth by the Supreme Court in Priester in ruling on defendant's Motion for Release Due to Illness or Infirmity under Rule 3:21-10(b)(2).

1. Proof of the Serious Nature of Defendant's Illness and the Deleterious Effect of Incarceration on the Prisoner's Health

In the case before the court, defendant has proven, and the State has acknowledged, that he is "an insulin dependent diabetic requiring two injections daily." Defendant also has demonstrated that the COVID-19 pandemic has

officials who are in the best position to introduce that evidence." Priester, 99 N.J. at 139-40. However, it is in the court's discretion to determine whether such testimony is necessary. Id. at 140.

infiltrated the New Jersey Prison System, including Mid-State Correctional Facility, where he has been serving his sentence. Defendant further has proven that persons with compromised immune systems are at higher risk of contracting COVID-19 and suffering serious health ramifications, including death. Defendant has proven these facts through the submission of the Consent Order executed by the Supreme Court of New Jersey in In re Request to Commute or Suspend County Jail Sentences, 241 N.J. at 404-09, EO 124, the Joint Statement from Elected Prosecutors on COVID-19, the Declarations of Dr. Beyrer, Dr. Golob, Dr. Greifinger, Dr. Stern, and Dr. Meyer, the DOC COVID-19 Update Page, a news article from CorrectionsOne, information from the Center for Disease Control and Prevention, medical records of defendant, the Certification of defendant, and letters from defendant's mother, sister, and defendant.

To the contrary, the State, through the Cape May County Prosecutor's Office, presented no evidence at all. Instead, the State merely asserted that defendant "does not and cannot show that he is at greater risk while housed at the State Prison as opposed to being in his own home." The State even went so far to maintain that "defendant is better protected from exposure to COVID-19 than he would be if released and permitted to visit grocery stores, gas stations, pharmacies and other businesses that remain open to the general public." As stated, the State presented no evidence to support these positions and, in fact, these positions have been directly

rebutted by the Governor's Orders, including EO 124, the Supreme Court Consent Order, the Attorney General's Office, the Center for Disease Control and Prevention, the medical experts, and even in certain respects by the DOC. The DOC page alone showed that more than forty inmates had passed away due to COVID-19. Clearly, this court rejects these arguments by the State under this factor.

Having said that, this court notes that the DOC has taken efforts to mitigate and protect against the spread of the disease and treat those affected. EO 124, Paragraph 10 even mandates that the DOC "take all appropriate actions to mitigate inmates' health risks while remaining in DOC custody." Exec. Order No. 124 (Apr. 10, 2020), 52 N.J.R. 963(a) (May 4, 2020). Throughout the crisis, it is clear that the DOC has been required to provide inmates with treatment. "[T]he court [has] consider[ed] the availability of medical services in prison . . . [and the fact that] in order to prevail, [defendant] must show that the medical services unavailable at the prison would be not only beneficial . . . but [also] are essential to prevent further deterioration to his health." Priester, 99 N.J. at 135-36 (citing Tumminello, 70 N.J. at 193). The court also recognizes that, despite the profound risks associated with being an immunocompromised inmate with diabetes, defendant did not present any evidence that the pandemic was having a "deleterious effect" on his medical condition or actual health and did not show that medical services unavailable at the prison would be essential to prevent further deterioration of his health.

From a practical standpoint, defendant's argument, that although he is not presently afflicted with the virus he should be released because he is at a higher risk of contracting COVID-19 due to his underlying health condition, could be made by a large number of healthy inmates with a plethora of medical conditions, such as weakened immune systems, hypertension, diabetes, blood, lung, kidney, heart and liver disease, and more, as set forth in the doctors' declarations. Thus, in actuality, defendant's motion is a noble attempt to secure the release of defendant and countless others, who are not currently ill or infirm due to the virus. The court has taken this into consideration and finds it relevant to its analysis.

In weighing this factor, despite the voluminous and impressive submissions on behalf of defendant, the court finds that this factor does not support defendant's Motion for Release under Rule 3:21-10(b)(2).

2. Proof of Changed Circumstances in Defendant's Health Since the Time of the Original Sentence

Defendant also has proven that there has been a change of circumstances between the time that he was sentenced and the hearing. There is no question that circumstances have changed, as New Jersey and the New Jersey Prison System now are faced with COVID-19, a contagious and sometimes fatal respiratory disease caused by the SARS-CoV-2 virus, which has evolved into a pandemic and public health emergency. The virus is a respiratory illness, caused by a coronavirus and

transmitted by contact. It can cause those affected to have symptoms such as fever, cough, shortness of breath, pneumonia, respiratory failure, and even death.

However, again, this court notes that the DOC has taken efforts to mitigate and protect against the spread of the disease. EO 124, Paragraph 10 even mandates it. The DOC also has been required to provide inmates with treatment.

In addition, this factor also takes into account that, "[t]he change of circumstances most likely to have occurred between sentencing and the hearing is the severe deterioration of the prisoner's health." Priester, 99 N.J. at 136. Here, despite the proven risks associated with being an immunocompromised inmate with diabetes, defendant did not present any evidence that the coronavirus COVID-19 was causing a "serious deterioration" in his health.

Again, from a practical or policy standpoint, defendant's argument that, although he presently has not suffered "serious deterioration" in his health, he should be released because he is at a higher risk of becoming ill from the virus due to his diabetes could be made by a large number of otherwise healthy inmates with the multitude of underlying medical conditions in order to secure their release. The court also has taken this into consideration and finds it relevant to its analysis.

In weighing this factor, the court finds that this factor does not support the defendant's Motion for Release under Rule 3:21-10(b)(2).

3. The Nature and Severity of the Crime and Sentence, the Criminal Record of Defendant, the Risk to the Public if Released, and Defendant's Role His Current State of Health

In 2017, defendant was the target of an investigation into the distribution of heroin in Cape May County. On August 17, 2017, detectives stopped defendant, searched his car, and recovered heroin and cocaine, as well as $6,672. As a result, defendant was charged with second-degree possession with the intent to distribute cocaine and heroin in a school zone in contravention of N.J.S.A. 2C:35-7, second-degree possession with the intent to distribute cocaine in contravention of N.J.S.A. 2C:35-5(b)(2), third-degree possession with the intent to distribute heroin in contravention of N.J.S.A. 2C:35-5(b)(3), and related offenses. Importantly, the possession with the intent to distribute cocaine charge was graded as a second-degree crime due to the fact that defendant possessed more than one-half ounce. Thus, there can be no question that the criminal offenses with which defendant was charged were serious.

The severity of the charge was compounded by the fact that defendant had prior criminal offenses, including a prior distribution of controlled dangerous substance conviction, making him mandatory extended term eligible. See N.J.S.A. 2C:43-6(f). As such, upon conviction, defendant was facing up to twenty years in the New Jersey State Prison with a ten-year parole disqualifier, just on the second-degree distribution of a controlled dangerous substance charge. See N.J.S.A. 2C:43-

7(a)(3). Moreover, defendant could have received consecutive sentences on the related counts. See N.J.S.A. 2C:44-5. Again, there can be no doubt that the criminal offenses were serious.

At the detention hearing, Judge Donohue specifically found, by clear and convincing evidence, that defendant was a danger to the community, because defendant had prior distribution of controlled dangerous substance convictions and was caught with over 600 bags of heroin and distribution weight of cocaine. Judge Donohue further found that defendant was a "serial drug distributor" and his distribution activity was "a serious and pervasive threat to the health, safety, and welfare of the community." This court agrees that defendant's criminal activity in distributing controlled dangerous substances made, and continues to make, him a risk to the public.

Defendant pleaded guilty to Count 6 of the Indictment, second-degree possession with the intent to distribute cocaine in violation of N.J.S.A. 2C:35-5(a)(1) and (b)(2), in exchange for a sentencing recommendation of ten years' incarceration in the New Jersey State Prison with a five-year period of parole ineligibility. At sentencing, as required by N.J.S.A. 2C:44-1(a)(6), Judge Donohue considered defendant's prior record and noted that defendant had twelve prior arrests with six prior convictions, five of which constituted indictable offenses. Those indictable offenses included not only the distribution of controlled dangerous substances, but

also the unlawful possession of a handgun and hollow point bullets. This court takes note that defendant pleaded guilty to a serious criminal offense and has a serious prior record.

In sentencing defendant in accordance with the plea agreement to ten years incarceration with a five-year period of parole ineligibility in the New Jersey State Prison, Judge Donohue found aggravating factors 3, 6, and 9 and further determined by clear and convincing evidence that the aggravating factors substantially outweighed the mitigating factors, of which there were none. See N.J.S.A. 2C:44-1(a)(3), (6), and (9). This court again agrees that defendant's conduct must be deterred, both specifically and generally, and that defendant has a significant prior criminal record with serious prior convictions.

After sentencing, defendant filed a Motion for Reconsideration or, in the alternative, a Motion for a Reduction or Change of Sentence into a Long-Term In-Patient Program pursuant to Rule 3:21-10(b)(1), even providing proof that he was drug dependent and had been admitted into a long-term in-patient program. Judge Donohue denied defendant's motion, finding that defendant's admittance into a program would be incompatible "with the welfare of society." Thus, Judge Donohue already determined that defendant's criminal activity warranted incarceration, as opposed to rehabilitation at a program, due to its serious nature. This court concurs.

When reviewing these indisputable facts, this court concludes that the severity of defendant's crime and sentence, defendant's prior record, and defendant's risk to the public if released, all strongly militate in favor of denying defendant's application. Therefore, when reviewing all of the factors set out in Priester, 99 N.J. at 135-37, this court denies defendant's Motion for Release pursuant to Rule 3:21-10(b)(2). When balancing the interests, defendant's release would not be in the public safety and welfare. This simply is not a case in which "extraordinary relief" of release from prison should be bestowed by the court. Id. at 135. In applying the rule "prudently, sparingly, and cautiously," as mandated by the New Jersey Supreme Court, it is clear that defendant's motion must be denied. Ibid.

C. Judicial Furlough Under State v. Boone

In Boone, 262 N.J. Super. at 221, the defendant was convicted of possession of a controlled dangerous substance with the intent to distribute in a school zone pursuant to N.J.S.A. 2C:35-7 and was sentenced to the New Jersey State Prison with a mandatory period of parole ineligibility of twenty months. While serving his sentence, the defendant was diagnosed with a rare and potentially fatal condition known as an aneurysmal dilation, which involved the aorta in this heart. Id. at 222. As a result, the defendant needed aortic replacement surgery, which only could be performed at Methodist Hospital in Houston, Texas. Ibid. As such, the defendant filed a motion for release before the trial court.

The trial court began its analysis by recognizing that, if the defendant's condition could be medically treated in New Jersey, then the Commissioner of the DOC would have the authority to grant the defendant a furlough under N.J.S.A. 30:4-91.3. Ibid. However, the trial court further recognized that "there [was] no statutory authority for the Commissioner to permit a furlough outside of the State of New Jersey and [the Commissioner] was unwilling to do so without authority from the court." Ibid. Although the trial court had no statutory or Rule-based authority, the trial court determined that the Rules of Court should be construed "to secure a just determination" and that any court rule "may be dispensed with or relaxed by the court in which the action is pending if adherence to it would result in injustice." Ibid. (citing R. 1:1-2). In essence, the trial court found that it had the "inherent authority to act to preserve life." Id. at 223 (citing In re Conroy, 98 N.J. 321, 349 (1985) and In re Farrell, 108 N.J. 335, 349 (1987)). In so finding, the trial court reasoned and held:

> This defendant is incarcerated in a state prison. The State has an obligation to provide for his health, safety, and well-being while incarcerated in its correctional facility. That obligation includes necessary medical and health care and is an "absolute duty." Holloway v. State, 125 N.J. 386 (1991). In the present case, that health care can only be provided by furloughing the defendant and permitting him to travel to Texas. Accordingly, I have granted a judicial furlough. In granting the furlough I have not changed the sentence in any way. If the necessary medical services were available in New Jersey, they would be promptly given. The fact that they are not available in New Jersey

> but are only available in Texas should not act to deny the defendant of medical services which are necessary to attempt to save his life. The Rules of Court should not read as to defeat this application solely by virtue of the fact that there is no express authority. Rather, the Rules should be liberally read to permit the State to protect life. Again, the sentence is not being modified in any way. The hospitalization is merely taking place in Texas, rather than New Jersey. Once he is able to do so, the defendant will return to New Jersey and resume his incarceration.
>
> [Boone, 262 N.J. Super. at 223-23 (emphasis added).]

Therefore, in granting a judicial furlough, the trial court plainly held that it had the inherent authority to do so, because the defendant could not receive life-saving treatment in New Jersey and there was no other way for the defendant to be released to receive such life-saving treatment. Ibid. The trial court concluded that its "inherent" judicial furlough power should be "sparingly utilized in the very rarest of cases . . . to assure the availability of medical treatment that is necessary to preserve [the defendant's] life." Id. at 224.

In the present matter, defendant has moved for a judicial furlough, citing Boone. However, the Boone case in inapposite, as the trial court made it abundantly clear that it only was exercising its inherent authority to grant a judicial furlough because there were no other statutes or Rules permitting the defendant to receive life-saving medical treatment. Here, there is explicit statutory authority, vested in the Commissioner and his agents, through which defendant can seek a furlough in

the State of New Jersey. More specifically, defendant can seek a furlough under N.J.S.A. 30:4-91.3, which expressly provides, in pertinent part:

> The commissioner or his duly authorized agent or agents may extend the limits of the place of confinement of a prisoner as to whom there is reasonable cause to believe he will honor his trust, by authorizing him, under prescribed conditions, to
>
> (a) Visit a specifically designated place or places for a period not to exceed 30 days and return to the same or another institution or facility. An extension beyond the 30-day limit may be granted to permit . . . the obtaining of medical services not otherwise available . . . or for any other compelling reason consistent with the public interest[.]
>
> [(Emphasis added).]

Since defendant has a statutory means by which to seek a furlough, which rests in the sole province of the Commissioner of the DOC, this court has no authority to grant a judicial furlough. Accordingly, defendant's Motion for a Judicial Furlough is denied.

CONCLUSION

Based upon the foregoing, defendant's Motion for Release Due to Illness or Infirmity under Rule 3:21-10(b)(2) and defendant's Motion for a Judicial Furlough under State v. Boone, 262 N.J. Super. 220 (Law Div. 1992), hereby are denied.