

To: New Jersey Law Revision Commission
From: Samuel M. Silver, Dep. Dir.
Re: Compassionate release pursuant to N.J.S. 30:4-123.51e: (1) meaning of “activities of basic daily living” as discussed in *State v. F.E.D.*, 251 N.J. 505 (2022); (2) discretion to deny compassionate release to eligible persons as discussed in *State v. A.M.* A-56-21, (N.J. Jan. 09, 2023); and (3) confidentiality provision of N.J.S. 30:4-123.51e(e)(4) as discussed in *F.E.D.* and *A.M.*
Date: January 17, 2023

MEMORANDUM

Project Summary

Historically, the New Jersey Parole Board had the power to grant “medical parole” to prisoners who were either terminally ill or permanently incapacitated.¹ In February of 2020, a bill was introduced in the New Jersey Legislature to establish a compassionate release program for prisoners who met certain criteria, regardless of their parole-eligibility date.² The compassionate release statute was enacted on October 19, 2020; it eliminated the Parole Board’s authority to grant “medical parole” and transferred that power to the judiciary.³

In *State v. F.E.D.*, the New Jersey Supreme Court considered, in a case of first impression, several aspects of the newly enacted Compassionate Release Act (“Act” or “CRA”) that it considered to be ambiguous.⁴ As a threshold question, the Court examined whether a trial court was required to accept the eligibility determination of the Department of Corrections without scrutiny, or to determine whether the agency’s decision conformed with the law, was supported by credible evidence, and was not unreasonable.⁵ Next, the Court focused on the meaning of the undefined phrase “activities of basic living” in the context of the definition of “permanent physical incapacity.”⁶ The Court considered the quantum of *activities of basic living* that a petitioner must be *unable to perform* to be considered permanently physically incapacitated and thus eligible for compassionate release.⁷ Finally, the Court considered the Act’s requirement that the petitioner be “permanently physically incapable of committing a crime if released” and “would not pose a threat to public safety.”

Once a determination is made that a defendant is eligible for compassionate release, the statute does not state whether it “requires a judges to grant compassionate release, or leaves them discretion to deny relief, when a defendant has satisfied the Act’s medical and public safety conditions.”⁸ Along with the question of how such discretion should be exercised in the absence

¹ N.J. STAT. ANN. § 30:4-123.51c (West 2023).

² A.B. 2370, 2020 Leg., 219th Sess. (N.J. 2020); L. 2020, C. 106 § 1 (codified at N.J.S. 30:4-123.51e).

³ *Id.* Press Release, Gov. Phil Murphy, Governor Murphy Signs Sentencing Reform Legislation (Oct. 19, 2020), <https://nj.gov/governor/news/news/562020/approved/20201019d.shtml>

⁴ 251 N.J. 505, reconsideration denied, 251 N.J. 579 (2022).

⁵ *Id.* at 526.

⁶ *Id.* at 528-529.

⁷ *Id.* at 529-530.

⁸ *State v. A.M.*, A-56-21, slip op. at 20 (N.J. Jan. 09, 2023); § 30:4-123.51c(f)(1).

of an explicit statutory provision, this was the issue before the New Jersey Supreme Court in the consolidated appeals of *State v. A.M.*, and *State v. Oliver*⁹

The decision of a court to grant or deny a petition for compassionate release to an individual who is incarcerated is predicated upon the court's evaluation of the opinions of designated licensed physicians and other medical information.¹⁰ The Act explicitly requires that the contents of the petition and any responding comments by the recipient of the petition shall be confidential.¹¹ The statute does not, however, provide the judiciary with guidance regarding the disclosure of the identity of a litigant seeking relief in compassionate release proceedings.¹²

The absence of a statutory standard of review for eligibility determinations led the *F.E.D.* Court to affirm the Appellate Division's standard of review for the Department of Corrections eligibility decisions.¹³ The Court also affirmed the Appellate Division's common law definition for the phrase "activities of basic living" which is not readily apparent from a plain reading of the statute.¹⁴

The *A.M.* Court concluded that judges have the discretion to deny the compassionate release of persons who are incarcerated if they find that one or more "extraordinary aggravating factors" exists.¹⁵ To this time, the statute neither enumerates "extraordinary aggravating factors" nor provides the standard for evaluating such factors.

Finally, in both *F.E.D.* and *A.M.*, the Court "respectfully urge[d] the Legislature to provide guidance with respect to whether it envisions that our courts will depart from our general practice of disclosing to the public the identity of a litigant seeking relief in the setting of... future compassionate relief proceeding[s]."

These three issues are separately discussed in more detail below.

Statute Considered

N.J.S. 30:4-123.51e reads in relevant part:

a. Notwithstanding any provision of P.L.1979, c. 441 (C.30:4-123.45 et seq.) to the contrary, the court may release an inmate who qualifies under this section for compassionate release at any time during the term of incarceration.

...

⁹ *State v. A.M.*, A-56-21, (N.J. Jan. 09, 2023).

¹⁰ N.J. STAT. ANN. § 30:4-123.51c (West 2023).

¹¹ *Id.*

¹² *F.E.D.*, 251 N.J. at 536.

¹³ *Id.* at 529.

¹⁴ *Id.* at 531.

¹⁵ *A.M.*, slip op at 35.

d. [(2)] In the event that a medical diagnosis determines that an inmate is suffering from a terminal condition, disease or syndrome, or permanent physical incapacity as defined in subsection l. of this section, the Department of Corrections shall promptly issue to the inmate a Certificate of Eligibility for Compassionate Release.... An inmate who receives a Certificate of Eligibility for Compassionate Release may petition the court for compassionate release.

...

e. A petition for compassionate release shall be filed with the Superior Court.

...

(2) The county prosecutor or the Attorney General, as the case may be, shall provide notice of the petition to any victim or member of the family of a victim entitled to notice relating to a parole or the consideration of a parole under the provisions of P.L.1979, c. 441 (C.30:4-123.45 et seq.), and shall notify the victim or family member of the opportunity to present a statement at the hearing on the petition or to testify to the court concerning any harm suffered by the victim or family member at the time of the hearing.

(3) Upon receipt of notice of the petition, the victim or member of the family of the victim, as the case may be, may submit any comments to the court within 15 days following receipt of notice of the petition, including but not limited to advising the court of an intent to testify at the hearing.

(4) The information contained in the petition and the contents of any comments submitted by a recipient in response thereto shall be confidential and shall not be disclosed to any person who is not authorized to receive or review the information or comments.

...

(7) If the court receives from the prosecutor a response objecting to the petition or is notified that a victim or a family member intends to testify to the court at the hearing, the court shall hold a hearing on the petition on an expedited basis in accordance with the Rules of Court and procedures established by the Administrative Director of the Courts. If the court does not, within the time frames established under this subsection, receive a response from the prosecutor objecting to the petition and is not notified of an intent for a victim or family member to testify, the court may make a determination on the petition without holding a hearing.

...

f. (1) [T]he court may order the compassionate release of an inmate who has been issued a Certificate of Eligibility for Compassionate Release pursuant to paragraph (2) of subsection d. of this section 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 in accordance with subsection h. of this section under which the inmate would be released would not pose a threat to public safety.

...

l. For purposes of this section:

“Grave medical condition” means a prognosis by the licensed physicians designated by the Commissioner of Corrections pursuant to subsection b. of this section that an inmate has more than six months but not more than 12 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 activities of basic daily living, resulting in the inmate requiring 24-hour care.

“Terminal condition, disease or syndrome” means a prognosis by the licensed physicians designated by the Commissioner of Corrections pursuant to subsection b. of this section that an inmate has six months or less to live.

“Permanent physical incapacity” means a prognosis by the licensed physicians designated by the Commissioner of Corrections pursuant to subsection b. of this section 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 24-hour care, and did not exist at the time of sentencing.

A. *State v. F.E.D.*

Background

In 1982, F.E.D.¹⁶ was convicted of several murders, one committed while on parole, and sentenced to serve multiple life sentences.¹⁷ At the age of seventy-two, F.E.D. was seen by two physicians who diagnosed him with heart disease.¹⁸ Both physicians believed that that F.E.D.’s prognosis was poor.¹⁹ The physicians concurred that F.E.D. would require significant help or assistance with laundry, grocery shopping, meal preparation, and house cleaning.²⁰ Both

¹⁶ N.J. STAT. ANN. § 30:4-123.51e(e)(4) (West 2023) (providing that “[t]he information in the petition. . . shall be confidential. . .”). *F.E.D.*, 469 N.J. Super. 45 n. 1. (App. Div. 2021) (noting use of initials to protect petitioner’s identity). *State v. F.E.D.*, 251 N.J. 505, 536 reconsideration denied, 251 N.J. 579 (2022) (noting that [b]y virtue of N.J.S.A. 123.51e(e)(4), F.E.D.’s petition...[was] filed under seal....”). *See also* discussion *infra* “Confidentiality.”

¹⁷ *F.E.D.*, 251 N.J. at 512.

¹⁸ *Id.* at 513.

¹⁹ *Id.*

²⁰ *Id.*

physicians noted that F.E.D. possessed the ability to perform the activities of daily life, albeit with “diminished ability” – not an inability to perform these activities.²¹

The Commissioner of the Department Commissioner issued F.E.D.’s “certificate of eligibility for compassionate release” based upon the attestations of the two designated physicians and the department’s managing physician/psychiatrist.²²

F.E.D. petitioned for compassionate release with the Superior Court.²³ The petition included the certificate of eligibility that stated that F.E.D. was eligible and met the requirement for Compassionate Release N.J.S. 30:4-123.51e.²⁴ The matter was the subject of a plenary hearing.²⁵

At the hearing, a cardiologist who treated F.E.D. testified about F.E.D.’s heart condition.²⁶ The doctor declined to assess F.E.D.’s ability to perform activities of daily living beyond his assessment that “F.E.D. was incapable of grocery shopping.”²⁷ The Managing Physician for the Department of Corrections (“Managing Physician”) testified that F.E.D. satisfied the preconditions of compassionate and opined that a release it was possible that F.E.D. would progress into a terminal condition in the next six months.²⁸ Regarding F.E.D.’s “permanent physical incapacity,” the Managing Physician testified that F.E.D.’s condition was “not going to get better.”²⁹ In addition, he opined that it would take F.E.D. a long time to conduct the activities of daily living because of his condition.³⁰ No testimony was proffered to suggest that F.E.D.’s condition was terminal.³¹

The trial court denied F.E.D.’s petition for compassionate release.³² In doing so, the Court determined that F.E.D. failed to prove by clear and convincing evidence that he had the permanent physical incapacity required by N.J.S. 30:4-123.51e.³³ The trial court observed that because the statute did not define “activities of basic daily living” it found the Medicaid long-term-care requirements instructive.³⁴ The Court did not reach the question of whether F.E.D.’s incapacity made him “permanently physically incapable of committing a crime if released” because of his failure to prove that he had a permanent physical incapacity.³⁵ The petitioner, F.E.D., appealed the

²¹ *Id.* at 513-14.

²² *Id.* at 514.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 515.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 517.

³³ *Id.* at 516.

³⁴ *Id.* (describing the activities of basic daily living to include “bathing, dressing, toileting, locomotion, transfers, eating and mobility.”).

³⁵ *Id.* at 517

trial court’s decision.³⁶

On appeal, F.E.D. maintained that he had a “permanent physical incapacity,” not a “terminal condition, disease or syndrome” pursuant to N.J.S. 30:4-123.51e(l).³⁷ In addition, he argued that he was “permanently physically incapable of reoffending, and that he posed no threat to public safety.”³⁸

The Appellate Division affirmed the trial court’s order denying F.E.D.’s petition for compassionate relief.³⁹ In reaching its decision, the Court interpreted the Act’s requirement that the petitioner prove they are “permanently unable to perform the activities of basic daily living to mandate proof that [they are] permanently unable to perform any activity of basic daily living.”⁴⁰ The Court also determined that the Act applied “only to inmates whose medical condition render them unable to perform any of the enumerated activities of daily living, and to be inapplicable to any inmate who can conduct one or more of those enumerated activities.”⁴¹

The Appellate Division did not address whether F.E.D.’s condition rendered him physically incapable of committing a crime or whether his release posed a threat to public safety because the defendant failed to prove by clear and convincing evidence that he was afflicted with a “permanent physical incapacity.”⁴²

The New Jersey Supreme Court granted the defendant’s petition for certification.⁴³

Analysis

A prisoner may only petition for compassionate release once they have “procure[d] a certificate of eligibility from the Corrections Department.”⁴⁴ As an initial matter, the Corrections Department must determine whether a prospective petitioner is suffering from either a terminal condition⁴⁵ or a permanent physical incapacity.^{46,47} A permanent physical incapacity is one that renders the person “unable to perform *activities of basic living*....”⁴⁸ If two department-designated physicians diagnose a prisoner with a permanent physical incapacity, the Department must issue a

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 510, 519.

⁴⁰ *Id.* at 510, 518.

⁴¹ *Id.*

⁴² *Id.* at 518.

⁴³ *State v. F.E.D.*, 248 N.J. 481 (2021).

⁴⁴ N.J. STAT. ANN. § 30:4-123.51e(f)(2) (West 2023).

⁴⁵ N.J. STAT. ANN. § 30:4-123.51e(l) (West 2023) (defining a terminal condition as a prognosis by two licensed physicians designated by the Commissioner of Corrections that the person who is incarcerated has six months or less to live). This definition is not ambiguous, and a further discussion exceeds the scope of this memorandum.

⁴⁶ N.J. STAT. ANN. § 30:4-123.51e(l), (West 2023).

⁴⁷ N.J. STAT. ANN. § 30:4-123.51e(d)(2) (West 2023).

⁴⁸ N.J. STAT. ANN. § 30:4-123.51e(l), (West 2023).

Certificate of Eligibility for Compassionate Release.⁴⁹ The prisoner may then petition the Superior Court for compassionate leave.⁵⁰

- *Standard of Review*

The Act delegates the question of whether a prisoner suffers from a terminal condition, disease or syndrome, or permanent physical incapacity to the Department of Corrections.⁵¹ It does not set forth the standard that should be used by the Superior Court when reviewing such a determination.⁵² Rather, the statute instructs the court to decide – given the inmate’s permanent physical incapacity – if the inmate is physically incapable of committing a new crime, and if the inmate poses a threat to public safety.⁵³

In the absence of any statutory language regarding how to review a petitioner’s eligibility determination, the Appellate Division suggested that the issuance of a Certificate of Eligibility by the Department of Corrections upon receipt of a medical diagnosis pursuant to N.J.S. 30:4-123.51e(d)(2) was a final agency decision to be affirmed unless it was arbitrary and capricious.⁵⁴

The Supreme Court disagreed with Appellate Division’s interpretation of the statute.⁵⁵ The Court noted that the Act “makes no provision of the Department to make a final agency decision on the merits of the inmate’s application.”⁵⁶ The Court reasoned that “the trial court, not the Department of Corrections, makes the initial determination whether the inmate has met his burden of proof by clear and convincing evidence.”⁵⁷ That decision is subject to appellate review.⁵⁸

This Court’s decision, and the Act, however, did not answer whether the *refusal* of the Commissioner to issue a Certificate of Eligibility for Compassionate Release constitutes a final agency determination that is appealable; and if so, the standard of review for such a denial.

- *Activities of Basic Daily Living*

A trial court must make two findings, each by clear and convincing evidence, before granting the compassionate release of a permanently physically incapacitated prisoner. It must find that the “inmate is so debilitated or incapacitated by the permanent physical incapacity as to be permanently physically incapable of committing a crime if released” from prison.⁵⁹ In addition, the trial court must find that the release of the prisoner “would not pose a threat to public safety.”⁶⁰

⁴⁹ N.J. STAT. ANN. § 30:4-123.51e(b), (d)(2) (West 2023).

⁵⁰ N.J. STAT. ANN. § 30:4-123.51e(e) (West 2023).

⁵¹ N.J. STAT. ANN. § 30:4-123.51e(b), (d)(2) (West 2023).

⁵² N.J. STAT. ANN. § 30:4-123.51e(b), (d)(2) (West 2023).

⁵³ N.J. STAT. ANN. § 30:4-123.51e(f)(1).

⁵⁴ *F.E.D.*, 251 N.J. at 526.

⁵⁵ *Id.*

⁵⁶ *Id.* See generally § 30:4-123.51e.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ N.J. STAT. ANN. § 30:4-123.51e(f)(1).

⁶⁰ *Id.*

If these conditions precedent are met, the court *may* order the compassionate release of the prisoner.⁶¹

A prisoner is considered to have a permanent physical incapacity if they meet three criteria. First, the prisoner must have “a medical condition that renders [them] permanently unable to perform *activities of basic daily living*”⁶² Next, this condition must result in the need for twenty-four-hour care.⁶³ Finally, the prisoner’s medical condition is not one that existed at the time of sentencing.⁶⁴ While the latter two requirements may be determined based upon the plain language of the statute, the statute does not enumerate what constitutes the “activities of basic daily living.”

Neither legislative nor executive source material provides a definition for the phrase “activities of basic daily living.” The Act does not define the phrase.⁶⁵ The prior medical-parole statute,⁶⁶ its implementing regulations,⁶⁷ and the department’s proposed implementing regulation⁶⁸ also do not define it. In addition, “the legislative history is silent. . . on the term’s meaning.”⁶⁹ The Court, therefore considered the use of this phrase in the context of other New Jersey laws.⁷⁰

In the absence of a statutory definition for “activities of basic daily living,” the Court examined a similar phrase in the context of health-care statutes and regulations. The New Jersey Adult Family Care Act defines the term “activities of daily living” to mean “functions and tasks for self-care which are performed either independently or with supervision or assistance, which include, but are not limited to, mobility, transferring, walking, grooming, bathing, dressing and undressing, eating, and toileting.”⁷¹ A similar definition is found in the administrative regulation pertaining to home care services, with only a minor variations in the order these items are enumerated.⁷²

The Court determined that the Legislature’s use of the adjective “basic” in the phrase “activities of basic daily living” distinguished this phrase from the defined phrase “instrumental activities of daily living” found in the Administrative Code.⁷³

⁶¹ N.J. STAT. ANN. § 30:4-123.51e(f)(1) (emphasis added).

⁶² N.J. STAT. ANN. § 30:4-123.51e(l) (emphasis added).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *F.E.D.*, 251 N.J. at 528.

⁶⁶ N.J. STAT. ANN. § 30:4-123.51c (2001) (repealed by L. 2020, c. 106 § 3).

⁶⁷ N.J.A.C. 10A:71-3.53

⁶⁸ 53 N.J.R. 675(a) (May 3, 2021).

⁶⁹ *F.E.D.*, 469 N.J. Super. 45, 60 (App. Div. 2021).

⁷⁰ *F.E.D.*, 251 N.J. at 528.

⁷¹ *Id.* N.J. STAT. ANN. § 26:2Y-3 (2023).

⁷² *F.E.D.*, 251 N.J. at 528. N.J. ADMIN. CODE § 10:60-1.2 (defining “activities of daily living (ADL)” as those “activities related to self-care as those performed either independently or with supervision or assistance, which include, but are not limited to, dressing and undressing, bathing, eating, grooming, ambulation, transferring, toileting, and mobility. The inability to independently perform such tasks may be used as a measure to determine a person’s level of disability.”).

⁷³ N.J. ADMIN. CODE § 10:60-1.2 (defining “instrumental activities of daily living (IADL)” as those “non-hands-on personal care assistance services that are essential to the beneficiary’s health and comfort, including, but not limited

Given the Act’s requirement that a person seeking compassionate release required twenty-four-hour care,⁷⁴ the Court concluded that “activities of basic living denotes a limited number of rudimentary tasks... essential to self-care.”⁷⁵ The Act, however, did not identify the number of these rudimentary tasks that a petitioner must be unable to perform to be deemed to have a “permanent physical incapacity.”

• *Quantum of Activities*

A petitioner for compassionate release must be “permanently unable to perform activities of basic living.”⁷⁶ The statute does not set forth the number activities a petitioner must be unable to perform to be considered permanently physically incapacitated.

The Appellate Division held that a petitioner must be unable to perform all activities of basic living to be found permanently physically incapacitated.⁷⁷ The Court rejected the petitioner’s suggestion that a person who requires assistance with “several” or “nearly all” activities of daily living has satisfied the statutory requirements, finding such a standard to be too vague.⁷⁸ The Court opined that “[i]f the Legislature intended to refer to less than all activities, it could have done so.”⁷⁹ The Supreme Court disagreed.⁸⁰

The Court noted that “if the statute demanded a showing that, by virtue of the inmate’s medical condition, he is incapable of eating, walking, bathing, dressing, using a toilet, and getting in and out of bed, compassionate release would be granted rarely, if at all.”⁸¹ In addition, the Court reasoned that such a reading would render superfluous the Act’s additional requirements – that the petitioner is permanently physically incapable of committing a crime and if released would not pose a threat to public safety.⁸² Additionally, the Court interpreted the use of the plural “activities” to mean that a petitioner “whose medical conditions render them unable to perform two or more activities of basic daily living may seek compassionate relief.”⁸³

Ultimately, the Court “concur[red] with the trial court and the Appellate Division that the attesting physicians’ letters did not constitute proof by clear and convincing evidence that F.E.D.’s medical condition gave rise to a permanent physical incapacity” with the meaning of the Act, and

to, housekeeping, food preparation, doing laundry, and shopping.”). *See also* N.J. ADMIN. CODE § 12:15-1.1A (defining “instrumental activities of daily living” for purposes of certain insurance benefits to include “cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.”).

⁷⁴ N.J. STAT. ANN. § 30:4-123.51e(1)

⁷⁵ *F.E.D.*, 251 N.J. at 529.

⁷⁶ N.J. STAT. ANN. § 30:4-123.51e(f)(1), (l).

⁷⁷ *F.E.D.*, 469 N.J. Super. at 61.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *F.E.D.*, 251 N.J. at 530.

⁸¹ *Id.*

⁸² *Id.* N.J. STAT. ANN. § 30:4-123.51e(h), (f)(l).

⁸³ *F.E.D.*, 251 N.J. at 530.

affirmed the judgment of the Appellate Division as modified.⁸⁴

B. *State v. A.M. and State v. Oliver*⁸⁵

Background

The defendants in *A.M.* and *Oliver* were both convicted of murder.⁸⁶ Both defendant's have "serious medical conditions; they are permanently bedridden, unable to perform the basic activities of daily life, and require round-the-clock care."⁸⁷ Neither "poses a realistic threat to public safety if released."⁸⁸

Although both petitioners are similarly situated medically, the path of their appeals differed yet converged at the Supreme Court on a common issue. In *A.M.*, the Appellate Division reversed the decision of the trial court and ordered the defendant's release.⁸⁹ The New Jersey Supreme Court granted the State's petition for certification.⁹⁰ In *State v. Oliver*, the trial court denied the defendant's motion for compassionate release.⁹¹ The Court made a finding that "the defendant suffered from a permanent physical incapacity and would not pose a threat to public safety if released."⁹² The Court opined, however, that subsection (a) of the Act "affords judges discretion to deny relief even when an applicant meets the law's medical and safety factors."⁹³ The defendant appealed, and the New Jersey Supreme Court granted the State's motion for direct certification.⁹⁴

Both defendants asked the Supreme Court "whether the CRA requires judges to grant compassionate release, or leaves them the discretion to deny relief, when a defendant as satisfied the Act's medical and public safety conditions."⁹⁵

⁸⁴ *Id.* at 534, 537. The Court did not formally reach the question whether the petitioner's permanent physical incapacity rendered him incapable of committing a crime if released or whether if released he posed a threat to public safety. The Court's thoughtful treatment of this subject, albeit in *dicta*, see *id.* at 531-33.

⁸⁵ The appeals of *A.M.* and *Oliver* were consolidated by the Court. Although the name Eddie L. Oliver appears in the caption of the case, the Court refers to Oliver by the name he uses, Al-Damany Kamau.

⁸⁶ *A.M.*, slip op at 4. The details of each defendant's underlying criminal charges exceed the scope of this section of the memorandum and have purposely been omitted. See *id.* at 10-11 (setting forth the facts of *A.M.*'s criminal charges); and see *id.* at 15-16 for Kamau's criminal charges).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 5, 15.

⁹⁰ *State v. A.M.*, 251 N.J. 201 (2022).

⁹¹ *State v. A.M.*, slip op at 20.

⁹² *Id.* at 19.

⁹³ *Id.* at 19-20 (declaring the defendant's crime to be "one of the most heinous, brutal, cold-blooded premeditated murders ever committed in Essex County" before denying the petition).

⁹⁴ *State v. Oliver*, 251 N.J. 209 (2022).

⁹⁵ *State v. A.M.*, slip op at 20. The Court divided this question into two questions: "Does the trial court have discretion to deny compassionate release if an inmate satisfies the Act's medical and public safety conditions? And, if it does, how should it exercise that discretion?" *Id.* at 22.

Analysis

The plain language of N.J.S. 30:4-123.51e(f)(1) appears to vest the court with the discretion to order the compassionate release of an inmate who has satisfied the requirements of this subsection and the Act. After an examination of the use of “mandatory” language in other subsections of the Act⁹⁶ and the legislative history of this statute,⁹⁷ the Court concluded that “the legislative history here reveals an intent to reader the word ‘may’ in subsections (a) and (f)(1) to convey a permissive meaning.”⁹⁸ The Court then turned its attention to how the courts were to exercise this discretion.

The Act is silent regarding how trial courts should exercise their discretion when considering the release of a petitioner who has satisfied the Act’s medical and public safety conditions. The Court recognized that numerous petitioners will be “[a]ging inmates in failing health, who are serving lengthy sentences for serious crimes...”⁹⁹ The Court cautioned that “courts may not exercise discretion in a way that creates de facto categorical barriers to release and overrides legislative intent.”¹⁰⁰ With that caveat, the Court promulgated the criteria to be employed by judges when determining whether to grant a petition for compassionate release.

A petitioner who is not disqualified under the Act’s medical and public safety criteria should be granted compassionate release.¹⁰¹ If, however, one or more extraordinary aggravating factor exists, a court may deny the defendant’s petition for release.¹⁰² The Court’s list of “extraordinary factors” was derived from the criteria used by the trial courts to impose a sentence of imprisonment.¹⁰³ The list of “extraordinary circumstances” includes:

- (1) particularly heinous, cruel, or depraved conduct; (2) a particularly vulnerable victim, based on the person's advanced age, youth, or disability; (3) an attack on the institutions of government or the administration of justice; and (4) whether release would have a particularly detrimental effect on the well-being and recovery process of victims and family members.¹⁰⁴

⁹⁶ N.J. STAT. ANN. § 30:4-123.51e(e)(2) (providing that the State “**shall** provide notice of the petition to any victim or member of the family of a victim... and **shall** notify the victim or family member of the opportunity to present a statement at the hearing on the petition...”). The term “shall” is used thirty-one times throughout this statute. *See generally* N.J. STAT. ANN. § 30:4-123.51e.

⁹⁷ *State v. A.M.*, slip op at 28-30 (noting that both the Sentencing Commission and the Legislature in drafting the bill “used discretionary language to describe the describe the release decision).

⁹⁸ *State v. A.M.*, slip op at 30.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 34 (noting the core aims of the Act are: “to expand the use of compassionate release for inmates with serious medical conditions; to eliminate categorical bars to relief; to protect public safety; and to consider the harm suffered by victims.”).

¹⁰¹ *Id.* at 35.

¹⁰² *Id.*

¹⁰³ *Id.* (citing N.J. STAT. ANN. §§ 2C:44-1(a)(2) to (2)). The fifteen criteria for imposing a sentence of imprisonment are balanced against fourteen criteria for withholding the imposition of imprisonment. No such countervailing criteria is enumerated by the Court when considering the newly created “extraordinary circumstances test.”

¹⁰⁴ *Id.*

The Court cautioned that a high standard of objection reasonableness should be applied to the fourth factor and that the factors “are limited to exceptional and rare circumstances to comport with the statute’s goals of increasing the use of compassionate release.”¹⁰⁵ According to the Court, the “inappropriate exercise of judicial discretion” will be checked through appellate review.¹⁰⁶

The Court applied the newly minted “extraordinary circumstances” criteria to the petitions filed by A.M. and Kamau. In A.M.’s case, she deliberately murdered her husband with at least one of their three children in the home at the time.¹⁰⁷ The Court found no extraordinary aggravating factors that would bar her from release.¹⁰⁸ Kamau murdered one law enforcement officer, wounded three others, and planned to kill a judge.¹⁰⁹ Here, the Court found “extraordinary circumstances that justif[ed] denying relief.”¹¹⁰

C. *State v. F.E.D. and State v. A.M. - Confidentiality*

In *State v. F.E.D.* and *State v. A.M.*, the New Jersey Supreme Court noted that the Compassionate Release statute’s confidentiality provision appears to be inconsistent with the Judiciary’s practice of disclosing the identity of adult litigants in the oral or written, published or unpublished, opinions issued by each court in this State.¹¹¹ The question of whether the “Legislature envision[ed] that [the] courts will depart from [the] general practice of disclosing to the public the identity of a litigant seeking relief in the setting of a future compassionate relief proceeding” was raised by the New Jersey Supreme Court each of these opinions.¹¹²

The confidentiality provision in the Act, does set forth an exception that allows for the disclosure of information contained in a petition.¹¹³ The provision provides that “[t]he information contained in the petition and the contents of any comments submitted by a recipient in response thereto shall be confidential and shall not be disclosed to any person who is not authorized to receive or review the information or comments.”¹¹⁴ As enacted, the Court considered whether opinions involving petitions for compassionate release may refer to the adult petitioners by name.

The New Jersey Judiciary maintains the policy of “open access to records of the judiciary.”¹¹⁵ It is the practice of the Judiciary, with narrow exceptions, to “disclose to the public in [their] opinions the identity of adult litigants in the appeals... even when information about a litigant’s medical condition is addressed in an opinion.”¹¹⁶ One exception to this policy involves

¹⁰⁵ *Id.* at 35-36.

¹⁰⁶ *Id.* at 35-36.

¹⁰⁷ *Id.* at 11.

¹⁰⁸ *Id.* at 38.

¹⁰⁹ *Id.* at 39.

¹¹⁰ *Id.*

¹¹¹ *FED* at 536 and *A.M.*, slip op at 18. Compare N.J.S. STAT. ANN. § 30:4-123.51e(e)(4) with N.J. CT. R. 1:38-1A.

¹¹² *F.E.D.*, 251 N.J. at 536 and *A.M.*, slip op at 18.

¹¹³ See generally, discussion *F.E.D.*, 251 N.J. at 536-3; N.J. STAT. ANN. § 30:4-123.51e(f)(1), (l).

¹¹⁴ *F.E.D.*, 251 N.J. at 536.

¹¹⁵ *F.E.D.*, 251 N.J. at 537 (citing N.J. CT. R. 1:38-1).

¹¹⁶ *Id.*

“[r]ecords required to be kept confidential by statute....”¹¹⁷ The confidentiality provision of N.J.S. 30:4-123.51e(e)(4), require petitions, like those filed in *F.E.D.* and *A.M.* to withhold the name of the petitioner.¹¹⁸ The Supreme Court stated that this “is not consistent with our general practice.”¹¹⁹

The *F.E.D.* Court noted a second concern with the confidentiality provision of the CRA – how to maintain confidentiality given the public nature of compassionate release proceedings. A petition for compassionate release must be filed with and heard in the Superior Court, as opposed to an administrative proceeding.¹²⁰ The Act provides that victims and members of their families are required to receive notice that a defendant has filed a petition for compassionate release and are permitted to testify at a hearing.¹²¹ The statute is silent, however, regarding how the name of the petitioner, the information contained in the petition, or the comments submitted by recipients are to be kept confidential given the public nature of these proceedings.

The issues surrounding the confidentiality provision in the CRA prompted the New Jersey Supreme Court, on two occasions, to “respectfully urge the Legislature to provide guidance with respect to whether it envisions that our courts will depart from our general practice of disclosing to the public the identity of a litigant seeking relief in the setting of a future compassionate relief proceeding.”¹²²

Pending Bills

To this date, there are no bills currently pending in the New Jersey Legislature regarding N.J.S. 30:4-123.51e that would modify the statute in the manner set forth by the Court in *F.E.D.*

Conclusion

Staff requests authorization to conduct additional research to determine whether N.J.S. 30:4-123.51e would benefit from modification to address the issues discussed in *State v. F.E.D.* and *State v. A.M.*

¹¹⁷ *F.E.D.*, 251 N.J. at 536. N.J. CT. R. 1:38-3.

¹¹⁸ *F.E.D.*, 251 N.J. at 536.

¹¹⁹ *Id.* at 536-37.

¹²⁰ N.J. STAT. ANN. § 30:4-123.51e(e).

¹²¹ N.J. STAT. ANN. § 30:4-123.51e(e)(2), (7).

¹²² *FED* at 537 and *A.M.*, slip op at 18. *Compare* N.J.S. STAT. ANN. § 30:4-123.51e(e)(4) with N.J. CT. R. 1:38-1A.