

SUPREME COURT OF NEW JERSEY
084412

IN THE MATTER OF THE REQUEST TO
MODIFY PRISON SENTENCES,
EXPEDITE PAROLE HEARINGS AND
IDENTIFY VULNERABLE PRISONERS

RESPONSE TO ORDER TO SHOW CAUSE

BRIEF ON BEHALF OF THE OFFICE OF THE ATTORNEY GENERAL,
DEPARTMENT OF CORRECTIONS, AND THE STATE PAROLE BOARD

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PRELIMINARY STATEMENT

The State of New Jersey – like the rest of the country and, indeed, the world – is confronting unprecedented challenges from the spread of Coronavirus disease 2019 (“COVID-19”), and the State has taken similarly unprecedented measures in order to protect its residents. That includes protecting residents who are currently in prison. On April 10, 2020, Governor Murphy entered Executive Order 124 (“EO 124”), requiring the New Jersey Department of Corrections (“DOC”) and the State Parole Board (“SPB”) to take extraordinary and expeditious steps to identify and evaluate thousands of current inmates for placement into home confinement or parole. See N.J. Exec. Order No. 124 (April 10, 2020). That process requires DOC and SPB to review inmates who are particularly vulnerable to COVID-19 based on their age and/or underlying medical conditions, and it requires DOC and SPB to evaluate other inmates based upon their release dates and their most recent parole denial dates.

Although the threat from COVID-19 remains serious, and the State would never discount the tragic loss of life that has taken place in prisons and jails, as elsewhere in the state, the process established by EO 124 is making a difference. Since the Governor issued his Order, the DOC and SPB have developed and effectuated a detailed plan to identify and vet thousands of inmates, a process which includes, among other things, reviewing feedback on furlough and parole from prosecutors and victims; identifying sponsors and

housing, and sending parole officers to review all housing options; and procuring electronic monitoring devices for, and conducting testing of, every inmate being furloughed. Yet despite having to engage in this process for thousands, the DOC has reviewed nearly 98% of the candidates eligible under the four referral lists established by EO 124, and SPB is continuing to review all of these candidates as quickly as feasible. Based on that review, DOC and SPB have approved furlough or parole for hundreds of inmates to date. Beyond the EO 124 process, DOC has also instituted a series of measures to protect the health of those that remain incarcerated.

The only question before this Court is whether to establish an additional categorical review process on top of the one already set up by the Executive in EO 124, and on top of the relief already available to an inmate on an individualized basis from the courts. Such a process is unnecessary and unwarranted. Although the State, through the Office of the Attorney General, agreed to establish a blanket process for the inmates in county jails, this suit could not differ more. For one, the offenses state inmates committed are different, and the risk to public safety presented by their release differs as well. For another, unlike in the county jail context, there is a generalized review process for state inmates – the one set up by EO 124 – and although its terms are different than the

process set up for inmates in county jail, the differences are tailored to meet the needs of the state prison context.

To be clear, the State agrees that courts have an appropriate and important role to play. But that role is the one contemplated by Rule 3:21-10(b)(2) - to engage in limited and extraordinary review as to whether, based on a particular inmate's individual facts, release is warranted. This avenue of relief is available despite any contrary conclusions of the DOC and SPB as to furlough and parole, and court already have resolved many such individual applications. That combination - furlough and parole under EO 124 and modifications in extraordinary cases under Rule 3:21-10(b)(2) confirms there is no basis for this Court to adopt the approach to the state prisons as was necessary for the county jails.

The State's position is in accord with other state and federal courts to consider the issue. Like the State itself, these courts have recognized the challenges involved with social distancing in prisons and jails, and the need to protect the health and safety of inmates, but they have also recognized the need to accommodate public safety, especially at a time when law enforcement resources are stretched thin. So they have found that applications for relief are best handled by the Executive, supplemented by review on an individualized basis - where courts and parties can fully consider an inmate's need for release and the harms to safety. So too here.

In short, all the State asks for is that this Court allow the current expeditious and individualized approach to continue to govern, as the best way to advance public health and safety.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

COVID-19 is a contagious and - at times - fatal respiratory disease caused by the SARS-CoV-2 virus. In light of the dangers posed by COVID-19, the Governor invoked his powers under the Civilian Defense and Disaster Control Act ("DCA"), N.J.S.A. App. A:9-30 to -63, and Emergency Health Powers Act ("EHPA"), N.J.S.A. 26:13-1 to -31, and issued an Executive Order declaring a State of Emergency and a Public Health Emergency. See N.J. Exec. Order No. 103 (March 9, 2020). The Governor has renewed that declaration of Public Health Emergency twice. See N.J. Exec. Order Nos. 119 (April 7, 2020) & 138 (May 6, 2020). Relying on his emergency authorities, and as COVID-19 spread across New Jersey and an increasing number of individuals required medical care, the Governor issued a series of Executive Orders to take unprecedented steps to reduce community spread of the disease. And as New Jersey makes continued progress in its fight against COVID-19, the Governor has also begun to take steps to lessen a number of those emergency restrictions, even as he has left other such restrictions in place.

¹ These sections are combined for the Court's convenience.

On March 22, 2020, this Court entered a Consent Order to address COVID-19 in New Jersey's county jails. See In re Request to Commute or Suspend Cnty. Jail Sentences, No. 084230 (N.J. March 22, 2020). The Office of the Attorney General, the County Prosecutors Association, the Office of the Public Defender, and the American Civil Liberties Union of New Jersey ("ACLU") all agreed to the Order. The Order required the release of broad categories of county inmates, beginning with any inmate serving a county jail sentence as a condition of probation or as a result of a municipal court conviction. Consent Order, ¶A. The Order next required that all remaining inmates serving any county jail sentence be released. Id. at ¶B. The Order, however, provided the County Prosecutor and Attorney General a mechanism to object to release of an individual inmate, and allowed for disputes to be resolved in expedited fashion by a judge or special master. Id. at ¶C.

On April 8, 2020, Movants wrote to this Court again in hopes of having a similar Order entered for state prison inmates. The release process sought was similar to the Consent Order entered with respect to county jail population. However, the Chief Justice did not act on the application, noting instead in a letter issued the same day that Movants' new "application raises different issues from those presented in the prior Consent Order, dated March 22, 2020, relating to inmates in county jails."

On April 10, 2020, Governor Murphy issued Executive Order No. 124.² The Order notes that the CDC recommends avoiding congregate settings and maintaining social distance in order to slow the spread of COVID-19, see E.O. 124, at 1, acknowledges that such social distancing in correctional settings presents a unique challenge, and accepts that there may be individuals in DOC custody who face a heightened risk of death or serious injury if they contract the virus. See id. at 2. For that reason, and relying on the DOC Commissioner's authority to furlough inmates under N.J.S.A. 30:4-91.3, the Governor ordered the DOC and SPB to engage in a process to identify candidates for furlough or parole when such action would not pose a threat to public safety and where there is "an established plan in place to ensure the inmate has access to a place of residence, and to social services and medical care as the DOC deems necessary." Id. at 3-4.

The process E.O. 124 established requires the DOC to generate four "Emergency Medical Referral Lists," as well as supplemental lists, for referral to SPB and to a specially designated Emergency Medical Review Committee ("the Committee"), who are to evaluate suitability for parole or home confinement, respectively. Id. at ¶¶1(a)-(e). List One consists of inmates who are both 60 years or

² Available at: <https://nj.gov/infobank/eo/056murphy/pdf/EO-124.pdf>.

older and suffer from underlying medical conditions that increase the risk of death or serious injury from COVID-19. Id. at ¶1(a). List Two comprises inmates who meet either of the qualifications for placement on List one, meaning that they are over 60 years or suffer from the relevant conditions. Id. at ¶1(b). List Three is a list of inmates who were denied parole within the last year and who were not otherwise included on lists one or two. Id. at ¶1(c). List Four is made up of inmates who have a maximum release date or parole eligibility date within 90 days of the date the list is generated and who do not already appear on one of the first three lists. Id. at ¶1(d). After the fourth list is generated, the DOC must submit supplemental lists, at least weekly, consisting of any additional inmates the DOC concludes face a heightened risk of death or serious injury from COVID-19, based on their age and/or underlying medical conditions. Id. at ¶1(e). Certain categories of inmates are excluded from the lists, including those prohibited by N.J.S.A. 30:4-91.3b and those serving a sentence for an offense subject to the provisions of the No Early Release Act ("NERA"), N.J.S.A. 2C:43-7.2. Id. at ¶2(b).

After completing each list, the DOC is to immediately send the list to the Director of the Division of Criminal Justice ("DCJ") and to the County Prosecutors. Id. at ¶3. DCJ and the Prosecutors must (a) notify the victim or next of kin about the possibility of the inmate's parole or furlough, and (b) submit the

views of the victim or next of kin and of the prosecuting agency with respect to possible parole or furlough. Id. at ¶¶ 3(a)-(b).

Once each list is completed, the DOC is required to produce the names of all parole-eligible inmates on the list to SPB. Id. at ¶4. The DOC must also notify these affected inmates. Ibid. SPB must then expedite consideration of such inmates for parole, giving priority to those on each list sequentially, beginning with those on List One. Ibid. Inmates identified through this process must be considered for parole regardless of whether they have been denied parole previously or issued a Future Eligibility Term. Ibid.

The Order further establishes and lays out the role of the Emergency Medical Review Committee, chaired jointly by designees of the Commissioner of the DOC and Chairman of the SPB. Id. at ¶5. (These designees are the DOC's Chief of Staff, and the Executive Director of SPB). EO 124 establishes that, within seven days of receiving each list, the Committee must prepare a recommendation as to whether the Commissioner should grant each inmate a period of emergency medical temporary home confinement. Ibid.

Each Committee recommendation must include the following: (a) the views of the prosecuting agency, and victim or next of kin where applicable; (b) identification of a community sponsor for the inmate; (c) a proposed supervision plan, including the use of telephonic check-ins and electronic monitoring where appropriate; (d) proposed conditions governing home confinement, including

travel restrictions; (e) verification that sufficient medical and social services will be available to the inmate during home confinement, should they contract COVID-19; (f) verification of the availability of appropriate housing, including the possibility of a hospital setting; (g) verification that the DOC has produced or will produce photo identification for the inmate prior to furlough; and (h) verification that the furlough placement would present a lower risk of contracting COVID-19 than the inmate would face if housed in a DOC facility. Id. at ¶5(a)-(h).

These safeguards ensure that inmates are not furloughed when home confinement would do them more harm than good and/or would present an excessive risk to public safety. These safeguards also ensure that DOC continues to monitor any individuals on furlough, who still remain in DOC custody even if they are not being housed in traditional confinement settings. EO 124 urged the Committee, when engaging in this balancing test, to consult with medical experts, the Department of Human Services, and any others who can assist in identifying resources to promote the health and safety of those inmates placed on furlough. Id. at ¶7.

Within three days of receiving Committee recommendations, the Commissioner will decide whether to furlough an inmate pursuant to his authority under N.J.S.A. 30:4-91.3. Id. at ¶8. The Order says the Commissioner should furlough an inmate when the Commissioner is satisfied that the proposed conditions will, in fact, adequately

protect the health and safety of the inmate, the public, and any victims of the inmate's offense. Ibid. EO 124 also addresses those inmates who do not receive parole or furlough, and requires the DOC to take all necessary steps to mitigate health risks to inmates who remain in congregate custody. Id. at 10.

On May 8, 2020, Movants returned to this Court, requesting relief again in light of the perceived "painstakingly slow process of identifying people for release and releasing them," the concern that "only a small number of people get the benefit of the Order," and the fear that EO 124 would "actively prevent[] hundreds of people from accessing the courts." OPD & ACLU Ltr. to Chief Justice Rabner (May 8, 2020), at 2. On May 11, 2020, this Court signed the pending order to show cause, and added that the parties should, inter alia, "provide updated information on the status of the implementation" of EO 124. The State now responds.

ARGUMENT

POINT I

THE STATE HAS NEARLY COMPLETED THE FULL IMPLEMENTATION OF EXECUTIVE ORDER 124, WHICH ENSURES STATE AGENCIES ARE ENGAGING IN A SPEEDY BUT THOROUGH PROCESS TO PROTECT THE LIVES OF THE DOC INMATES AND STAFF WHILE, AT THE SAME TIME, ENSURING PUBLIC SAFETY.

Because the Court signed the order to show cause after receipt of a letter raising concerns about the speed of the EO 124 process, and the number of inmates furloughed or paroled using that process, the State begins by laying out the steps that DOC and SPB took to

effectuate EO 124 to protect inmate health and public safety, and by updating this Court on the progress to date and the numbers of inmates granted either furlough or parole. The bottom line is this: DOC has completed its review of nearly all inmates on the Emergency Medical Referral Lists; SPB has made significant progress to that same goal; and to date, DOC and SPB have approved furlough or parole for up to 673³ inmates. This progress reflects the urgency with which the DOC and SPB have treated EO 124 and the threat of COVID-19. At the same time, the State describes the significant steps that the DOC is taking to protect the health of inmates in its custody.

A. DOC and SPB's Processes Under EO 124.

Prior to the issuance of EO 124, no DOC Commissioner had ever relied on his authority to furlough inmates either at the scale or in the manner in which DOC is now using it. While the unprecedented threat posed by COVID-19 certainly called for such unprecedented measures, it also meant the DOC needed to build from scratch its review process, home confinement evaluation system, and monitoring

³ This number reflects the combination of the total number of furloughs approved and the number of parole applications approved, from the EO 124 lists. Because DOC and SPB reviewed portions of these lists simultaneously, there may be some duplication between those two totals, which the Division of Law is reviewing. The State will advise the Court and the parties of the number of duplicates and provide updated number regarding total inmates approved for furlough and/or parole.

rules. Certification of Darcella Sessomes, Assistant Commissioner ("Sessomes Cert.") at ¶2. SPB, for its part, also had to engage in significant new measures to achieve EO 124's command to expedite review of inmates on the four lists. And both had to do so despite the challenges of conducting inmate interviews and evaluating home confinement options presented by COVID-19.

1. The DOC Created and Implemented New Comprehensive Procedures.

Shortly after issuance of EO 124, the DOC - on an emergent basis - promulgated and enacted a detailed Internal Management Procedure setting forth the DOC's internal policies and procedures to be followed in implementing EO 124. Sessomes Cert. at ¶2.⁴ The process functions, in most pertinent part, as follows.

Once the EO 124 lists are generated by the DOC's Office of Information Technology, they are sent to the Emergency Medical

⁴ A good example of the new policies the DOC had to develop relates to medical care. Though the DOC provides inmates with medication and other care, and though individuals on home confinement remain subject to DOC custody, no process existed by which inmates could obtain outside medical care. Sessomes Cert. at ¶3. This was of heightened concern because, in light of EO 124's structure, a number of furloughed inmates have underlying medical conditions. Ibid. So to ensure that inmates could obtain outside medical care upon furlough, the DOC entered into agreements with federally funded community health care centers to provide for the care of inmates. Id. at ¶4. Upon furlough, the DOC provides inmates a letter to give to community-based federal qualified healthcare centers and professional service providers indicating how claims for payment can be made to the treatment of the inmates. Ibid. Moreover, since these centers require identification, the DOC also created an Emergency Medical Home Confinement identification card for this purpose. Id. at ¶5.

Review Committee, SPB, and DCJ (for prosecutor notification), as well as to DOC's Division of Operations and Health Services Unit. Id. at ¶2, Ex. A, 3-5. Each inmate on one of the E0 124 lists is interviewed by the Office of Transitional Services to determine if that individual wishes to complete an application for furlough consideration. Id. at 6. The interview is conducted by a prison social worker or halfway house counselor. Ibid. Inmates who wish to be considered for furlough will fill out an application and a site investigation form, and will sign a form acknowledging and consenting to abide by the rules for home confinement. Ibid. Any inmates who decline to be considered for furlough must sign a form so indicating. Ibid. Inmates are provided with copies of all forms for their records. Ibid. Once these forms are completed, they are forwarded to SPB to enable it to conduct an investigation of the proposed sponsor's dwelling. Id. at 7.

Simultaneously, the DOC compiles information on each eligible inmate upon generation of each E0 124 list. Classification collects the following the documents for each inmate: (1) face sheet; (2) presentence investigation report; (3) criminal justice report; (4) most recent psychological evaluation; and (5) progress notes. Id. at 5. Furthermore, the Special Investigations Division ("SID") conducts a contemporaneous review of each inmate for any (1) active investigations, (2) investigation history, and (3) applicable intelligence information. Ibid. Depending on the confidentiality

of the results of SID's review, the results are either sent to the Committee or directly to the Commissioner. Ibid.

Because an inmate placed on furlough is still in the custody of the DOC, the suitability of each inmate's home confinement plan is critical. And since the DOC lacks experience evaluating home confinement placements, parole officers review such placements on behalf of the Committee. Among other things, parole officers will assess the placement relative to any victims, co-defendants, court orders, substance abuse/mental health issues, crimes against minors, and warrants and restraining orders. They also request information from all household members, including their relationship with the offender, and they visit the home and interview the household members to ensure suitability. That includes inquiries as to the sponsor's willingness to cooperate with DOC rules and whether anyone in the household is sick or tested positive for COVID-19 and/or works in a hospital or is a first responder. Ultimately, suitability is based on factors such as criminal activity in the home, presence in the home of a victim and/or co-defendant, lease requirements, prior supervision issues, weapons in the home, and related issues. Certification of James Dickinson, Director of Division of Parole and Community Programs ("Dickinson Cert."), at ¶¶ 2-4.

Once an inmate's file is complete, that file is produced to the Committee for review and recommendation. Sessomes Cert. at ¶2.

Each individual case file is thoroughly reviewed by the Committee, on a rolling basis, and all recommendations are forwarded to the Commissioner for his decision. Certification of Suzanne Lawrence, Chief of Staff ("Lawrence Cert."), ¶5; Sessomes Cert. at ¶2, Ex. A, 5. The Committee, and ultimately the Commissioner, must conduct the review and render a recommendation or a decision, respectively, as set forth in EO 124. Sessomes Cert. at ¶2, Ex. A, 5; see Point II.B, supra.

For those inmates the Commissioner approves for furlough, a number of additional steps must immediately be taken to ensure the safety of the inmate and community where they will serve home confinement. First, the DOC sends a letter to the Chief of Police in the municipality where the inmate is to be confined at home. Sessomes Cert. at ¶2, Ex. A, 3-5. Next, the DOC issues the inmate a home confinement identification card. Id. at 12. The DOC's Business Department also arranges for the inmate to withdraw up to \$200 from their inmate account for expenditures while on furlough. Id. at 14. Further, as noted above, the Health Services Department issues the inmate a letter for the inmate to take to a local federally funded healthcare center, committing DOC to pay for all healthcare rendered to the inmate there. Id. at 11, 13.

All approved inmates are also given a COVID-19 test, and must test negative to be released. Id. at ¶¶4-5. SPB is then notified so it may install the necessary monitoring equipment, which ensures

that individuals approved for emergency home confinement do not leave the approved housing location. Id. at ¶15. The Administrator of the prison where the inmate resides will receive notice of the inmate's approval for home confinement and must ensure the inmate has not received any new disciplinary charges or findings of guilt since applying. Id. at ¶9. Prior to departure, inmates are provided with their ID card, funds they have withdrawn from their inmate account, and a release packet with forms and information regarding their responsibilities while on home confinement and with respect to reentry. Id. at ¶¶9-10. The inmate's furlough sponsor is notified, and arrangements are made for the sponsor to pick up the inmate at the facility. Id. at ¶¶10, 12-13.

The DOC developed this entire process expeditiously after EO 124 was issued, reflecting the DOC's effort to approve as many individuals for home confinement as possible without undermining public safety. Sessomes Cert. at ¶2. The DOC's process results in furlough of the most qualified candidates, and does not allow for furlough of those who would pose a threat to the public, or who otherwise lack appropriate housing or sponsors. EO 124 itself contemplates that many inmates considered will not ultimately be approved, and requires the DOC to implement measures to protect the thousands of inmates who remain in custody. The system that the State tirelessly put in place in this context is working; this Court should not now throw it out in favor of a brand new one.

2. SPB Took Steps to Expeditiously Review All Applicants from the Four Emergency Medical Referral Lists.

Although SPB did not have to establish whole new processes to evaluate inmates' parole eligibility, those processes do take time, so SPB implemented new measures to ensure the process would move as expeditiously as feasible.

There are a number of steps SPB must take in order to ensure that a candidate warrants parole. In general, SPB receives a pre-parole report from the institution where an inmate is incarcerated. Certification of Lawrence Gregorio, Director of Release ("Gregorio Cert.") at ¶7. The report contains the pre-incarceration records of the inmate, states the inmate's conduct during the current period of confinement, and includes a full report on the inmate's social, physical, and mental conditions. Ibid. Inmates also undergo a mental health evaluation by a trained medical professional. Id. at ¶8. The mental health evaluation includes an assessment of risk of recidivism. Ibid. Once the pre-parole report and the mental health evaluation are complete, the inmate is scheduled for an initial hearing with a parole hearing officer. Id. at ¶9. Ultimately, if the parole hearing officer determines it necessary, an SPB panel determines whether to grant or deny parole. Id. at ¶¶10-14.

For those inmates who obtain a grant of parole, the SPB must conduct an investigation before releasing the inmate from custody.

Id. at ¶¶12-13. The SPB investigation consists of (1) reviewing the circumstances of the inmate's offense to ensure that any other residents at the address are not a victim or co-defendant, and (2) determining if the residence is government regulated such that the inmate might be prohibited from living there. Id. at ¶13. The investigator must also enter the residence to conduct a home check which involves: (1) physically entering the home; (2) ensuring the home is suitable, i.e., the inmate has a room in the home; (3) interviewing the other residents of the home; (4) ensuring that no one else in the home is under parole supervision; and (5) ensuring there are no weapons in the home. Ibid.

Once the investigation is complete, the case is presented to the Institutional Release Committee to determine whether the inmate's parole plan is sufficient. Id. at ¶14. If so, a release date is set. Ibid. Before an inmate can physically be released from custody, inmates meet with the DOC to be provided their medical records, social security card, birth certificate, and other the documents held by the DOC that they will need upon release in order to obtain identification. Id. at ¶15.

As required by EO 124, SPB is expediting the complete parole process for the inmates on lists one, two, and four. Gregorio Cert." at ¶¶2-5. To expedite the parole review process, SPB has undertaken several measures, including conducting initial hearings without an inmate present, and instead only having the inmate

present at panel hearings. Id. at ¶18. Further, panel hearings are now held either telephonically or over video conferencing. Ibid. This allows the SPB panel to conduct hearings from multiple institutions in one day, rather than traveling to each institution. Ibid. Furthermore, SPB has implemented several additional measures outside the usual course of the parole process, including: (1) shortening the normal time between the initial and panel hearings; (2) assigning additional administrative hearing officers to conduct initial hearings; and (3) providing means for hearing officers to work remotely to prepare cases and prepare for initial hearings remotely, rather than preparing and conducting the initial hearings at the facility. Id. at ¶20. Critically, caseloads have also been increased to allow for increased processing volume. Id. at ¶22. Moreover, all inmates on these lists were considered for parole regardless whether they were previously denied parole and/or if they had been issued a Future Eligibility Term.

SPB also developed a process for quickly reviewing all parole applicants on the third list - namely, those who had been denied parole within the last year. Unlike for inmates on the other lists, inmates had completed and largely up-to-date parole files, which included receipt and review of all relevant records and completion of initial and panel hearings. So to save time and, for expediency, SPB did not engage in wholesale hearing and fact-gathering process for these inmates, but instead administratively reconsidered such

files, to decide whether the advent of COVID-19 warranted a different result for that inmate's parole application. In other words, the panel members could and did again review the previous information, but this time along with relevant updates, including the mitigating factor of the COVID-19 emergency. Gregorio Cert. at ¶¶ 33, 36-38.

3. The Pandemic Itself Has Presented Challenges to the DOC's and SPB's Implementation Efforts.

As the above discussion shows, DOC and SPB moved quickly to implement the terms of EO 124 and to process the almost 3,000 inmates eligible for consideration on the four Emergency Medical Referral Lists. But the reality of the COVID-19 threat has had a tangible impact on many aspects of the process, as the DOC works to avoid the spread of the virus to inmates and staff in the course of implementation. See Sessomes Cert. at ¶¶8-10.

With respect to the required interviews, the DOC is conducting them in person, but has put in place strict social distancing requirements. The DOC also reduced the social services workforce in an effort to stem the spread of the virus, and has reduced the maximum number of occupants in each building where interviews are conducted. Id. at ¶¶9-10. These requirements - along with the limited availability of time slots for interviews and space to conduct them at any given time - render the interview process safe and effective, but admittedly less swift than the DOC would prefer.

See generally ibid. Nevertheless, the DOC is confident that this process, which is now complete for the first four Emergency Medical Referral Lists, was critical to securing the information necessary for the Committee to make furlough recommendations that simultaneously protect the health and safety of inmates and the general public, and was necessary for the DOC Commissioner to make well-informed and reasoned furlough determinations. See generally. The DOC thus believes it will also be necessary for those on the supplemental lists.

There is also one critical detail that, early in the process, contributed to especially significant delays: all inmates selected for furlough or parole under EO 124 must be tested for COVID-19 before release. Certification of Michelle Ricci, Assistant Commissioner ("Ricci Cert.") at ¶ 2. The Court can imagine why this is necessary; the DOC cannot furlough on home confinement an inmate who may be in the midst of a health emergency requiring medical intervention, and cannot risk introducing the virus to the family or other support system of that individual. During the early days EO 124's implementation, testing added an average of 10 days to the time to furlough due to the nationwide shortage in testing kits and the lag in lab reporting. Id. at ¶3. Fortunately, the DOC is now using Rutgers' recently FDA-approved saliva test, reducing delays. Id. at ¶4. The DOC has even obtained access to the lab's

database, which has shortened the time for lab results to approximately two or three days. Ibid.

B. DOC and SPB's Progress so far Under EO 124.

Notwithstanding the new processes that they had to establish and the challenges in implementation presented by COVID-19, the DOC and SPB have nearly completed the review process for all four of the Emergency Medical Referral Lists, with a focus on protecting inmates, ensuring public safety, and making sure that inmates who are ultimately approved for furlough or parole will have access to social and medical support. In total, the DOC and SPB have either approved furlough or parole for up to 673 inmates.

As of the date of this submission, the DOC has completed its review of almost every inmate on all four lists, which covers all DOC inmates who are particularly vulnerable to COVID-19 because of age and/or underlying medical condition, who have been denied parole in the past year, and who have "max out" dates in the next three months. Collectively, those lists totaled 3,050 inmates: 55 on the first referral list; 1,051 on the second; 921 on the third; and 1,023 on the fourth. Since some inmates either declined to be considered for furlough or were otherwise released, the number of inmates per list that the DOC had to consider was: 51 on the first, 927 on the second, 809 on the third, and 713 on the fourth. This means the DOC implemented the above-described process, and the Commissioner conducted review and made an individualized furlough

decision, for 2,452 inmates across the four lists since April 10, 2020; just 48 are still in the review process (largely from the fourth list) for case-specific reasons, including related to review of housing plans. Lawrence Cert. at ¶¶11, 20. SPB likewise made significant progress in reviewing inmates on the four lists. SPB reviewed 7 inmates on the first, 111 on the second, and 329 on the fourth. And SPB conducted 755 administrative reconsiderations for inmates on the third list, who had been denied parole in the past year. Gregorio Cert. at ¶¶ 26- 27, 29, and 39.

Given the progress that SPB and the DOC have made, up to 673 inmates have been approved for either furlough or parole. While the State recognizes that not all of these inmates are yet out of prison, some of these approvals were recent, and the DOC and SPB continue to work diligently to release everyone to their approved parole or home confinement as quickly as feasible. The numbers of approvals are broken down across lists as follows: 14 inmates placed on the first list were approved for furlough or parole; 194 on the second list; 42 of the third list; and 423 of the fourth list. SPB expects that those numbers will grow as it finishes its review of the remaining lists. Moreover, because DOC has decided to award emergency medical home confinement to individuals who have been granted but not yet released on parole, and because DOC will be reviewing supplemental emergency referral lists on a weekly

basis, the number of inmates who are furloughed may ultimately change as well. See generally Lawrence Cert. and Gregorio Cert.

While Movants may highlight that the percentage of inmates released from county jails is much higher than from state prisons, that comes as no surprise. The county jail population is comprised of those who served a sentence of less than one year – and thus for lesser crimes. By contrast, 63% of all DOC inmates were committed for violent crimes against others, and another 14% for weapons violations.⁵ See also Lawrence Cert. at ¶8 (noting that hundreds of inmates on the EO 124 lists are Category 1 sex offenders, and also noting that other inmates on the EO 124 lists have committed acts of domestic violence and yet listed the victims of the violence as the proposed sponsor). Indeed, the DOC's prison population has been reduced by roughly one-third over the past two decades,⁶ thus largely leaving only the most serious offenders incarcerated. Id. at ¶9. As a practical matter, this reduces the available pool of candidates who can be placed on home confinement without risk to public safety or victims. Ibid.

⁵ Offenders in New Jersey Correctional Institutions on January 2, 2019, By Base Offense, available at: https://njtheDOC.gov/!TEMP/pdf/offender_statistics/2019/Offenders%20Baseline%20-%20offender%20Characteristics%20Report.pdf.

⁶ Why is the N.J. prison population shrinking? (It's not just about less crime...), available at: https://www.nj.com/news/2017/09/why_is_the_nj_prison_population_shrinking_its_not.html.

To be clear, the State is not suggesting that such individuals cannot be candidates for furlough; if they are not excluded by statute or by EO 124, they were considered based on individualized records, as the Governor established they should be. The State is simply noting that the risk of releasing inmates with serious criminal records and convictions from state prison is different from the risk of releasing inmates with disorderly persons offenses, and it logically follows that a smaller proportion of the prison population will be approved for furlough or parole than from the county jails. *Id.* at ¶¶9-10; see also Apr. 8, 2020, Ltr. from Chief Justice Rabner (noting this application “raises different issues from those presented in the prior Consent Order”).

C. The DOC’s Measures to Protect Inmates and Staff.⁷

The DOC’s process results in the successful furlough of the most qualified candidates, and SPB’s process results in ensuring individuals can expeditiously be reviewed for and awarded parole, but both are designed to deny relief to those who pose a threat to public safety or who lack suitable sponsors and/or housing. EO 124

⁷The DOC recognizes that the public – including the loved ones of the thousands of inmates and staff within the DOC’s facilities – has a powerful interest in detailed, up-to-date information about its response to COVID-19. Accordingly, it has launched a webpage dedicated to its COVID-19 response. COVID-19 Updates, available at: <https://www.state.nj.us/corrections/pages/COVID19Updates.shtml>. The webpage is updated daily with detailed data and responses to COVID-19 frequently asked questions.

thus contemplates that many inmates will not be approved for either furlough or parole, and it requires the DOC to implement measures to protect those inmates who remain in its custody. And so the DOC implemented a broad range of measures to stem the spread of COVID-19 in prisons, as well as to provide prompt and thorough medical treatment, with no copay, to inmates. See Certification of Alfred Kandell, Director of Operations ("Kandell Cert."). While the DOC certification lays out in detail the myriad steps the DOC is taking to protect its inmates, this brief highlights some of the most significant ones, including a commitment to test all inmates, which is anticipated to be complete by June 1, 2020. Ricci Cert. at ¶ 5.

1. The DOC Implemented Significant Measures to Promote Social Distancing and Limit COVID-19 Transmission.

Although social distancing can be a challenge in congregate custody settings, and even as New Jersey remains an epicenter for COVID-19 diagnoses, the DOC has taken a number of important steps to reduce COVID-19 transmission in its facilities. These include limiting person-to-person interactions at DOC facilities whenever feasible; limiting movement into DOC facilities; providing PPE to staff and inmates; and enhancing sanitization protocols.

First, notwithstanding the challenges involved in maintaining the same social distancing the Governor has ordered for the general public, DOC has still taken steps to this effect, including among

its workforce. First, DOC limited staff foot traffic within DOC facilities by employing flexible work arrangements for any non-essential personnel, including a reduced and rotational workforce, and halted all construction projects except for essential services to power plants, water treatment plants, wastewater treatment plants and critical infrastructure repairs. Kandell Cert. at ¶¶7, 9. Second, with respect to the inmate population, activities that may lead to person-to-person contact - including group dining, recreation, and education - have been suspended or modified to minimize potential exposure and encourage social distancing. Id. at ¶7. For example, independent study has been implemented for education programs, and inmates are being offered independent treatment support options for substance abuse programming. Id. at ¶¶7, 9. The DOC also had to change the dining process to prevent dining together; inmates now pick up a meal and return with it to their cells. Id. at ¶ 12. The DOC has also placed limits on the maximum number of inmates on transport buses and vans, and the necessity of any given transport is evaluated on a case-by-case basis. Id. at ¶ 9. The medical department has taken further steps to encourage social distancing by modifying treatment plans and expanding use of keep-on-person medications, where medically advised, in an effort to encourage further social distancing. Ibid. Medical staff have also suspended non-critical appointments. Ibid. DOC believes such extensive measures, across contexts, will help

limit the spread of COVID-19.

At the same time, DOC recognizes that the movement of inmates, visitors, and personnel within the facilities presents its own risk of COVID-19 transmission. The DOC has taken steps that recognize the need to limit risk of transmission, while taking into account the critical needs of the prison system and the needs and rights of inmates. See generally Kandell Cert.

For one, all entrants into DOC facilities are subjected to mandatory health screenings, which include temperature scans and questionnaires about travel and contact with individuals who have tested positive for COVID-19. Id. at ¶4. Those permitted to enter are required to wear a surgical mask, issued by the DOC. Id. at ¶¶ 5, 9. To limit possible carriers of disease entering its facilities, the DOC has suspended all visits, with the exception of attorney visits in recognition of the importance of inmate right to counsel. Id. at ¶9. At the same time, in recognition of inmates' need to maintain social contact, the DOC has increased access to low-risk means of communication, including increasing the number of free phone calls that inmates are entitled to have, increasing access to JPAY kiosks (used to send and receive emails) in facilities, and authorizing additional free stamps for letter writing. Id. at ¶10. (Phones and JPAY kiosks are frequently sanitized). Ibid. In addition, any new inmates are held and monitored for COVID-19 for 15 days, id. at ¶9, and at present the

DOC has suspended inter-institutional transfers of inmates for visit hardship reasons, as it would pose an unnecessary risk and when such visits are suspended. Ibid.

Beyond the limits on person-to-person interaction, as well as the limits on new entrants introducing the virus into facilities, DOC has adopted new measures to protect individuals even if person-to-person interaction does occur through universal distribution of surgical masks and strategic deployment of N95 masks, as well as through more frequent and thorough cleaning. With respect to the former, while CDC recommends that the general population wear cloth face coverings in public,⁸ the DOC has gone further and has provided all inmates and staff with surgical masks and with instructions on usage. Id. at ¶5. Furthermore, personnel managing individuals with symptoms consistent with COVID-19 are provided, and must use, N95 respirator masks. Id. at ¶9. Next, inmates who are placed in medical isolation must wear surgical masks for movements in and out of the unit, and staff, both medical and custody, must wear full personal protective equipment ("PPE") during such movements.

⁸ Recommendation Regarding the Use of Cloth Face Coverings, Especially in Areas of Significant Community-Based Transmission, available at: <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>; Should I purchase or wear a mask for protection from COVID-19?, available at: <https://covid19.nj.gov/faqs/nj-information/how-to-minimize-your-risk/should-i-purchase-or-wear-a-mask-for-protection-from-COVID-19>.

Id. at ¶16. Finally, staff having contact with any inmate in the infirmary must wear full PPE. Id. at ¶17.

With respect to cleaning, the DOC has increased sanitization efforts throughout prisons by employing widespread use of bleach for cleaning, and with increased frequency. Id. at ¶¶ 8, 10. The DOC has also increased access to soap for inmates and hand sanitizer for staff. Id. at ¶ 8. The DOC's fleet of transportation vehicles is now routinely sanitized, as are any communication devices with high risk of virus transmission. Id. at ¶¶9-10. Finally, the DOC has educated all personnel on CDC guidance regarding mitigation of the spread of germs. Id. at ¶8. The DOC is taking myriad steps to keep COVID-19 off surfaces and out of the ambient air in facilities.

2. The DOC Adopted Significant Medical Care Policies, Including Universal Testing.

Beyond the emphasis on social distancing, dissemination and use of PPE, and sanitization, the DOC has employed a comprehensive healthcare response to COVID-19.

Perhaps the most significant recent step in the DOC's efforts to combat COVID-19 has been initiation of a process to conduct COVID-19 testing of the *entire* inmate and staff population. Ricci Cert. at ¶5; Kandell Cert. at ¶¶ 14-15, 17-18. Universal testing has begun, and it is expected to be complete by June 1, 2020. Ricci Cert. at ¶5. In partnership with UCHC and Accurate Diagnostics

Lab, the DOC anticipates that all of its approximately 18,000 inmates and 8,000 employees will be tested with Rutgers' FDA-approved saliva test. Ricci Cert. at ¶ 5. This has been made possible by advancements in testing technology and an increase in testing availability in New Jersey. See Kandell Cert. at ¶¶ 7, 9. Although the DOC already offers testing to those inmates for whom it is deemed medically necessary, this new testing protocol will allow the DOC to identify all those in need of medical care and quarantine, so those with the virus can be cared for and those without it can be protected from it. See id. at ¶9.

In addition to testing, the DOC has established quarantine units in its facilities and has substantially increased capacity for medical isolation. Kandell Cert. at ¶9. Per CDC guidance, the DOC has mandated a 14-day quarantine for all individuals who come into contact with a confirmed COVID-19 patient, defined as being within 6 feet of the COVID-19 patient for more than 10 minutes. Id. at ¶¶6-16. Quarantined inmates will be monitored by medical staff and will be evaluated for medical isolation or referred to hospital if they become symptomatic. Id. at ¶16. Furthermore, DOC established policies to ensure that any inmate who presents any COVID-19 symptoms receives a medical assessment to determine testing needs, and will be quarantined, medically isolated, or hospitalized, as prescribed. Id. at ¶14. Those inmates presenting with even mild upper respiratory symptoms are evaluated by staff

and placed in medical isolation. Id. at ¶16. Inmates are released from isolation seven days from the onset of symptoms and at least three days after resolution of fever and significant improvement in symptoms, whichever comes later. Ibid.

Similarly, inmates presenting with fever, cough, or shortness of breath will be directed to the hospital as determined by medical staff. Id. at ¶17. Such inmates will be evaluated by the hospital, medically isolated, and provided a COVID-19 test. Ibid. Inmates may be discharged if the test is negative and the inmate is medically cleared to return to the facility. Ibid. Inmates released from the hospital are admitted to the infirmary until released by medical staff. Ibid. Inmates admitted to infirmary care are monitored for co-morbid conditions as they recover. Ibid.

Finally, to encourage inmates to maintain the best possible health during this challenging time, the DOC is waiving medical copays for all medical services, whether related to COVID-19 or not. Id. at ¶19. By removing any barrier to seeking medical care, the DOC has further promoted the wellbeing of its inmates.

POINT II

THE PROPOSED ORDER IS UNNECESSARY AND UNWARRANTED IN LIGHT OF THE PROCESS ESTABLISHED UNDER EO 124

Given that the Executive Branch has now conducted individual review for thousands of prison inmates – the sort of individualized review this sensitive issue demands – this Court should not issue

the proposed Order. Said another way, to the degree the proposed judicial review process overlaps with EO 124, it would be duplicative and would rehash those efforts already undertaken. Any concerns in extraordinary cases should instead be handled in such individual cases via a Rule 3:21-10(b)(2) motion. And to the degree that the proposed Order differs from EO 124, each of the proposed variances would be unwarranted. Courts in other jurisdictions to consider similar questions have agreed.

A. The Proposed Order Is Unnecessary Given the Review That Has Already Occurred under EO 124.

The proposed Order suffers from four distinct, but related, flaws: it removes from the process the thorough and individualized considerations that have been and should be the hallmark of inmate release in this context; it is largely duplicative of EO 124; it shifts the burden to the State to oppose release, despite the risks associated with the state prison population as compared to county jail populations; and it sweeps in populations the Executive Branch found categorically to present a risk to public safety.

1. The Proposed Order Would Not Involve Sufficiently Thorough Individualized Review.

First, Movants transform Rule 3:21-10(b)(2) from a tool used in extraordinary cases based on comprehensive review of individual inmates' facts – as it should be used – into one that instead calls for the release of prisoners on an expedited, wholesale basis. But Rule 3:21-10(b)(2) “offers extraordinary relief to a prisoner,”

allowing the courts to amend a custodial sentence to permit release "because of illness or infirmity of the defendant." State v. Priester, 99 N.J. 123, 135 (1985) (noting "the Rule must be applied prudently, sparingly, and cautiously").

Courts have adopted a balancing test to determine whether to grant such a medical release, which considers (among other factors) "the serious nature of the defendant's illness," the "serious nature of the crime and the circumstances attendant upon its commission," the "danger to the public attendant to his release," and the extent to which the prisoner's condition can be treated within the prison. See Priester, 99 N.J. at 133-34; State v. Sanducci, 167 N.J. Super. 503, 510 (App. Div. 1979). As the Appellate Division observed, the "humane objective of providing appropriate care" for prisoners "must be balanced against the demands of public security." State v. Verducci, 199 N.J. Super. 329, 334-35 (App. Div. 1985).

That balancing of interests will be different in each case. Thus, where a defendant was serving a sentence for a nonviolent conviction and had no prior criminal record, and where his diabetic condition risked "the loss of one or both of his legs due to infection," the balance favored release. State v. Tumminello, 70 N.J. 187, 190 (1976). But in Verducci, where a mentally ill inmate had committed a violent robbery and was a known flight risk, the "serious risk to the public safety" . . . "necessarily tip[ped]"

the scales "in favor of continued incarceration despite" the harms he might face. 199 N.J. Super. at 334-35. The bottom line is that courts are always balancing competing interests when they decide whether to permit a medical release, and that balancing would be best done on a case-by-case basis, as under EO 124. The Movants' insistence that their process is individualized is not completely accurate. It requires that all inmates on the various lists automatically be considered for furlough or parole, and then would require extraordinarily speedy review wherever the Prosecutors object - a review that makes it more challenging to sufficiently consider all the public safety and public health risks involved.

Relatedly, the effort to transform Rule 3:21-10(b)(2) into a basis for a sweeping Court-ordered process would make it harder to ensure that an effective "plan [is] in place to ensure the inmate has access to a place of residence, and to social services and medical care," which EO 124 did by requiring the Committee "to review each applicants' file for a community sponsor; a proposed supervision plan; verification of the availability of appropriate housing; and verification that sufficient medical and social services will be available to the inmate." These are the very questions that are only answered through a factual investigation, to find sponsors and inspect the proposed housing and interview the proposed sponsors, -- all of which the State did during the EO 124 furlough review. To the degree the proposed Order seeks to

establish a second, expedited process, that process could fail to adequately assess the housing and environment to which someone will be released – something not captured in this level of detail for the releases of the county jail populations. And to the degree that the proposed Order *would* allow for delays so as to review the proposed sponsors and housing in this manner, then it is becoming even more like the process EO 124 already established.

2. The Proposed Order Is Largely Duplicative.

Second, the process would be largely duplicative of what has already taken place under EO 124. In their April 8, 2020 letter to this Court, Movants sought categorical judicially-ordered review for various categories of inmates, including those whose sentences were set to expire in the short term, those who are eligible for parole, and those who are elderly and medically vulnerable. The State answered by implementing EO 124. Indeed, EO 124 established that individuals over 60 and/or at high risk from COVID-19 due to underlying medical conditions would be reviewed for furlough and for parole, and it did the same for all individuals who had been denied parole in the past year, as well as all individuals who are due to complete their maximum sentences in the next three months. Point I.B, infra. The order would require the County Prosecutors along with the Division of Criminal Justice, who will ostensibly receive the information from DOC, to again review every single inmate to determine whether to object to release. This duplication

is inefficient.

That duplication is especially inappropriate because Courts have, historically, shown great deference to the expertise of state agencies as they make incredibly difficult and complex decisions that implicate public safety and inmate health and welfare. See R.R. v. New Jersey Dept. of Corrections, 962 A.2d 563, 568 (N.J. Super. App. Div. 2009) (giving deference to the DOC in its custody and care of sexually violent predators); State v. Bond, 839 A.2d 888, 895 (N.J. Super. App. Div. 2003) (giving substantial deference to SPB's regulation of parole). Whether to grant furlough or parole requires consideration of multiple factors, including the safety of the inmate and the public, all of which fall within the expertise of the PSB and the Commissioner. Ortiz v. N.J. Dept. of Corrs., 406 N.J. Super. 63, 70 (App. Div. 2009) (noting "[t]he breadth and importance of the Commissioner's expertise and discretionary authority in matters of prison policy, regulation, and administration."). Indeed, the law governing furloughs reflects the Legislature's judgment that the Executive Branch is the one to make these individualized determinations as to whether and when an inmate can be furloughed consistent with public safety. N.J.S.A. 30:4-91.3(a). Even though this is not a direct challenge to agency action, Movants are nevertheless still requesting that this Court set up a process that essentially revisits the agencies' careful and individualized analysis of such questions as it relates

to thousands of inmates, so the same concerns apply.

State v. Boone, the only case on which Movants rely for the proposition that New Jersey courts have inherent authority to order furloughs, proves the point. 262 N.J. Super. 220 (Law. Div. 1992). That case involved an inmate who was diagnosed with a potentially fatal condition requiring prompt treatment that could only be performed at a particular hospital in Texas. Besides court action, there was no other legal alternative to permit a furlough outside New Jersey, since the governing statute did not authorize the Commissioner to allow a furlough beyond the state's borders. Id. at 222. And the State brought the defendant's medical condition to the court's attention in the first place and confirmed that the Commissioner would have issued a furlough if he had the power. Not so, here, where the parties agree the Commissioner can order a furlough under the governing statutes, and the only question for thousands of inmates is whether the Court should step in when he has decided not to do so. Nothing in Boone calls for, or suggests, such duplicative processes.

3. The Proposed Order Would Inappropriately Shift the Burden to the State to Oppose Release.

Third, one of the key changes between the proposed Order and EO 124 - to shift the burden to require the *State* to show release is not warranted, rather than require the inmate to show release is warranted - is inappropriate here. Indeed, the traditional case-

by-case approach under Rule 3:21-10(b)(2), an inmate must prove the propriety of release. See Priester, 99 N.J. at 135 (holding “the prisoner must show that the medical services unavailable at the prison would be not only beneficial . . . but are essential to prevent further deterioration in his health”); see also Rule 3:21-10(c) (requiring defendant’s motion to “be accompanied by supporting affidavits . . . set[ting] forth the basis for the relief sought”).

Although this Court can relax that rule in the interests of justice, see R. 1:1-2(a), justice would not be served by shifting the burden to the State for two reasons: (1) the offenses prison inmates committed are notably more serious than those committed by county jail inmates, where the burden was flipped; and (2) all the inmates who would have been covered by this process have been individually denied release by DOC and/or SPB, or categorically denied release under the terms of EO 124, which is strong evidence against the propriety of burden-shifting here. Simply put, and as this Court noted, this proposed Order presents “different issues from those . . . relating to inmates in county jails,” Apr. 8, 2020, Ltr. from Chief Justice Rabner, and so the proposed burden-shifting framework employed in that Consent Order is inappropriate here.

4. The Proposed Order Includes Populations Who Present a Risk to Public Safety.

Fourth, the other divergence between the proposed Order and

EO 124 – to expand the relevant populations covered by categorical review – is uncalled for, because the Governor has made the decision on which categories of prisoners may be considered for release. A generalized process is especially inapt for the remaining populations, i.e., those (1) inmates whose max-out date will occur in the next year, and (2) inmates serving a parole ineligibility term for an underlying NERA conviction.

There are two problems with the argument that inmates should be included in a blanket judicial process based on a one-year max-out date. For one, these inmates necessarily are not at any special risk based on age or underlying medical condition, or they would have appeared on either of the first two Emergency Medical Referral Lists. That means this particular group is an especially poor fit for a process based upon Rule 3:21-10(b)(2). See, e.g., Priester, 99 N.J. at 135 (noting “[t]he predicate for relief under the Rule is proof of the serious nature of the defendant’s illness”); Reyes v. Edwards, 2020 WL 2474423, at *7 (D.N.J. May 13, 2020) (rejecting claim “that all segments of the population are at risk of severe illness or death from COVID-19,” and noting the CDC “has not advised that men between the ages of eighteen and forty-nine are higher risk for severe illness or death if they contract COVID-19”).

For another, an individual who has reached the max out date for his sentence may well be doing so because he was denied parole

- even more than once - on account of misconduct in prison or the SPB's conclusions as to the public safety threat he poses and/or risk of recidivism or flight; because he was never eligible for parole; and/or because he was granted parole and was returned to prison for violating the conditions of that parole. See Verducci, 199 N.J. Super. at 335 (finding medical release inappropriate when "defendant's initial parole eligibility date has been delayed by virtue of his misconduct while in prison"). In contrast to those individuals who are only serving one year in total and thus present lower safety risks, an inmate who is reaching his maximum sentence within one year likely presents an especially high risk to public safety, and would be most in need of robust reentry planning before release. See Lawrence Cert. at ¶16. Someone just three months out is obviously more likely to be considerably further along in that reentry process, which explains why EO 124 included those individuals, but not all inmates who would max out within one year can say the same.

The same public safety concerns arise from any process that allows for blanket review of those serving a parole ineligibility term for an underlying NERA conviction. All such individuals are serving sentences for the crimes that the Legislature viewed as so troubling, and so threatening to the public's safety, that it took the step of mandating specific parole ineligibility terms for them. The Governor then had a clear basis to exclude them from the

expedited *categorical* review process of EO 124, and, in deference to these co-equal branches of government, this Court should not take a different tack.

B. Inmates Who Are Seeking and/or Have Been Denied Furlough and Parole Can Seek Individualized Review from Courts in Individual Cases under Rule 3:21-10(b)(2).

To be clear, although the State does not believe a categorical Court-ordered process should supplement the Executive's EO 124 process, the State agrees that courts have an important role to play. That role is the one contemplated by Rule 3:21-10(b)(2), which lays out a process for court intervention in an inmate's sentence, "to permit the release of a defendant because of illness or infirmity of the defendant." In essence, this Rule would authorize a court to modify a sentence so as to allow release in the extraordinary case when the court concludes that doing so is necessary based upon a specific inmate's individual facts, and is consistent with public safety, despite the contrary conclusions of the DOC and SPB during the EO 124 review process.

The State wholeheartedly agrees with Movants that EO 124 does not prevent inmates from seeking relief in an individual case under Rule 3:21-10(b)(2). Though Movants raised concerns that inmates may be barred from accessing the courts since courts have required them to first exhaust their remedies under EO 124, this Court can address that misconception by holding that EO 124 does no such thing. As a threshold matter, the process the Commissioner engaged

in is all but complete, so in practical terms few individuals would still face an exhaustion bar. But for those still going through a furlough review, including inmates on supplemental referral lists, exhaustion does not apply. That is because the furlough review is an administrative classification process, in which DOC is deciding whether an inmate can serve his sentence at home confinement. And nothing about EO 124, which establishes categories of inmates the DOC must review and the structure that must be followed to provide the Commissioner with key information and recommendations, changes that fact. That means there is no mechanism for inmates to seek or appeal denial of furlough, see infra, Part I.D, and no remedy to exhaust before an inmate seeks relief under Rule 3:21-10(b)(2).⁹ This Court should clarify this to address Movants' concerns.

In the same way, any decision by the DOC not to furlough an inmate and by SPB to deny him parole, respectively, also would not preclude the inmate from later seeking relief where individualized facts demonstrate sentence modification would be appropriate. (It also would not prevent the DOC and/or SPB from reconsidering any of their own decisions should new facts come to light.) In fact, lower courts have already considered and ruled upon the merits of many Rule 3:21-10(b)(2) petitions related to COVID-19. And while

⁹Although parole determinations do require exhaustion of remedies when challenging *that* specific denial, that exhaustion rule also does not apply to bar relief under Rule 3:21-10(b)(2).

Movants may argue that many petitions have been denied, that reflects what the State found in the EO 124 process – the risks to public safety make the results of this process different from that of county jails. Courts are considering inmates’ applications for release due to COVID-19 on a case-by-case basis, precisely as the State and the Court Rule contemplate, and exactly as warranted given the sensitive judgments about public health, public safety, and access to housing, social, and medical supports that must be made during this analysis.

C. Courts Across the Country That Have Considered the Issue Have Rejected Similar Efforts.

In recent weeks, numerous other state and federal courts have been required to rule on similar requests in response to the COVID-19 pandemic. In adjudicating these requests, courts have generally coalesced around two key principles.

First, courts have generally denied requests where the prison officials are already working to prevent the spread of COVID-19 among inmates and/or releasing vulnerable prisoner groups. See, e.g., Comm. for Pub. Counsel Servs. v. Chief Justice of Trial Ct., 142 N.E.3d 525, 530 (Mass. 2020) (denying petition filed on behalf of state prisoners “seek[ing] the release to the community of as many individuals as possible as expeditiously as possible” and reasoning that the lack of a constitutional violation “precludes the judiciary from using its authority . . . to revise and revoke

sentences in a manner that would usurp the authority of the executive branch”); Matter of Petition Requesting Indiana Sup. Ct. to Engage in Emergency Rulemaking, 142 N.E.3d 911 (Ind. Apr. 8, 2020) (denying petition requesting the court to compel state prison officials to facilitate the release of detainees and convicted prisoners in light of the various “proactive measures” taken by prison officials and availability of judicial relief to individual inmates); Money v. Pritzker, __ F. Supp. 3d __, 2020 WL 1820660, at *50-51 (N.D. Ill. Apr. 10, 2020) (RA23-50)(denying request to order the State to implement process to furlough/release thousands of inmates to home confinement based in part on existence of internal prison protocols to protect inmates from COVID-19); Livas v. Myers, __ F. Supp. 3d __, 2020 WL 1939583, at *8 n.12 (W.D. La. Apr. 22, 2020) (RA13-22); Plata v. Newsom, __ F. Supp. 3d __, 2020 WL 1908776 at *9 (N.D. Cal. Apr. 17, 2020)(RA51-62).

In denying requests, courts cited concerns about preempting efforts by prison officials to identify and release vulnerable prisoner populations. In Money, ten Illinois prisoners brought a class action seeking the release approximately 12,000 inmates in light of the COVID-19 pandemic. 2020 WL 1820660, at *1-2. In support of their position, the inmates argued that the prison environment made them particularly vulnerable to COVID-19 and that Illinois’s response was “insufficient or not fast enough or both.” *Id.* at *2. Though the case arose in the Eighth Amendment context,

the analysis is instructive. The court there rejected the request for immediate release, noting that the State came “forward with a lengthy list of the actions [it has] taken to protect IDOC inmates.” Id. at *18. In response to the argument that it was “not moving quickly or broadly enough,” the court observed:

Clearly Defendants are trying, very hard, to protect inmates against the virus and to treat those who have contracted it. The record simply does not support any suggestion that Defendants have turned the kind of blind eye and deaf ear to a known problem that would indicate “total unconcern” for the inmates’ welfare. . . . It may not be the plan that Plaintiffs think best; it may not even be the plan that the Court would choose, if it were sufficiently informed to offer an opinion on the subject. But the Eighth Amendment does not afford litigants and courts an avenue for de novo review of the decisions of prison officials, and the actions of Defendants here in the face of the COVID-19 outbreak easily pass constitutional muster.

[Id. (quoting Rosario v. Brawn, 670 F.3d 816, 821 (7th Cir. 2012).]

Although the underlying legal claim is different, the same could be said here – that where DOC has acted with concern for inmates, and where hundreds of inmates have been released, *de novo* review through a second categorical process is not warranted.

In contrast, courts have been inclined to intervene only when the Executive Branch’s response to COVID-19 was truly “alarming.” See United States v. Rodriguez, ___ F. Supp. 3d ___, 2020 U.S. WL 1627331 (E.D. Pa. Apr. 1, 2020) (RA97-108); Wilson v. Williams, ___

F. Supp. 3d ___, 2020 WL 1940882 (N.D. Ohio Apr. 22, 2020) (RA130-42). In those cases, the plaintiffs were held at the Elkton Federal Correctional Institution in Ohio. In addition to not effectively implementing any social distancing measures, the Court commented that Elkton had received only 50 COVID-19 swab tests and one Abbott Rapid testing machine with 25 rapid tests. See 2020 WL 1940882 at *1-2; Rodriguez, 2020 WL 1627331 at *9 (“[t]he situation at FCI Elkton in particular is alarming. The first cases of COVID-19 appeared there after the government assured the Court that the [Bureau of Prisons] was taking aggressive action to contain the disease. Elkton is filled to capacity and appears to have few tests.”). That is a far cry from the facts the DOC has described here.

The second consensus that has emerged is that the overwhelming majority of courts have evaluated requests for prisoner release on a case-by-case basis with a particular focus on individual inmates’ underlying conditions. See, e.g., United States v. Patel, 2020 WL 1698785, at *7 (D.N.J. Apr. 8, 2020) (RA89-96) (denying pretrial detainee’s motion for release and finding general fear of contracting COVID-19 insufficient); United States v. Rodriguez-Orejuela, __ F. Supp. 3d ___, 2020 WL 2050434, at *5 (S.D. Fla. Apr. 28, 2020)(RA109-116); United States v. Roscoe, 2020 WL 1921661, at *6-9 (E.D. Mich. Apr. 21, 2020)(RA117-125); United States v. Coles, 2020 WL 1899562, at *5 (E.D. Mich. Apr. 17,

2020)(RA74-78); United States v. Feliciano-Montanez, 2020 WL 1890728, at *2 (N.D. Ohio Apr. 16, 2020)(RA86-88); United States v. Dawson, 2020 WL 1812270, at *1 (D. Kan. Apr. 9, 2020)(RA126-129).

The common thread in these cases appears to be that courts in the District of New Jersey and elsewhere have denied relief “where the record shows that the individual petitioner is not particularly vulnerable to severe illness due to age or an underlying medical condition,” and also that they have balanced any such health risks against the public safety and flight risks involved. See Reyes v. Edwards, 2020 WL 2474423, at *6 (D.N.J. May 13, 2020) (citing cases); Kevin M.A. v. Decker, __ F. Supp. 3d __, 2020 WL 2092791, at *7 (D.N.J. May 1, 2020) (identifying same factors and collecting cases); United States v. Ashley, 2020 WL 1675994 (D. Md. Apr. 6, 2020) (denying relief due to likelihood of attempt to flee given lengthy remaining sentence); United States v. Young, 2020 WL 1673043 (W.D. Wash. Apr. 6, 2020) (denying relief in part based on defendant’s danger to public safety).

These courts’ two-pronged analyses only confirm the validity of the State’s position. The State has taken significant steps to release inmates on furlough or parole when warranted, and the DOC has instituted a series of protective social distancing and health measures to protect those who remain. Almost every single eligible, vulnerable inmate has been considered for home confinement

pursuant to that process, and a significant number have been considered for parole. To the degree extraordinary cases exist where action by the judiciary is called for, then as other courts have held, those situations are best addressed by individual courts who are able to review an individual inmate's factual records exhaustively – just as the DOC and SPB have done when implementing EO 124. This Court need not order an additional categorical process at this time.

D. The Remaining Argument That This Court Should Require the DOC to Follow Additional Procedures in Deciding who to Place on Furlough Also Misses the Mark.

The remaining argument in support of the proposed Order is that EO 124 failed to establish enough safeguards to satisfy the requirements of the Due Process Clause. That view misunderstands the operation of EO 124 and furlough more generally. As explained above, furlough review is an administrative classification system, in which the Commissioner evaluates an inmate for suitability to serve a portion of his sentence at home confinement, rather than in his current housing assignment. The inmate is still under DOC custody and subject to DOC rules. Even Movants recognize, this is not a process by which inmates can seek or appeal denial of a furlough – exactly why the State agrees that exhaustion does not apply. And EO 124, which provided the structure to allow for consideration of certain classes of inmates for furlough, and laid out information to be considered and entities to be involved, did

not change that fundamental fact. This does not in any way undercut the importance of furloughs in appropriate cases, or of EO 124 in general, but it does explain what the Commissioner's authority and the governing Executive Order are and what they are not.

It follows, then, that due process requires no more process than the Executive Branch already provided. After all, New Jersey courts have consistently held that inmates do not have a protected liberty interest in their housing assignment or custody status. See, e.g., Szemple v. Dep't of Corrs., 384 N.J. Super. 245, 249 (App. Div.), (citing cases to show prisoners lack "liberty interest in remaining free from transfer to more restricted facilities"); Moore v. Dep't of Corrs., 335 N.J. Super. 103, 110 (App. Div. 2000) ("There is no constitutionally protected interest in reduced custody status."); Sandin v. Conner, 515 U.S. 472, 484 (1995) (same). Of particular relevance here, courts have found that for purposes of the Due Process Clause, inmates lack a liberty interest in placement in a halfway house or in a transfer to a prison in the inmate's home country. See Shabazz v. N.J. Dep't of Corr., 385 N.J. Super. 117, 124 (App. Div. 2006) (noting that "halfway house placement does not involve a liberty interest giving rise to due process rights"); O'Neal v. N.J. State Parole Bd., 149 N.J. Super. 174, 181 (App. Div. 1977) (same); Alexander v. N.J. Dep't of Corr., No. A-2081-15T3, 2017 WL 1717126, at *2 (App. Div. May 3, 2017), certif. denied, 231 N.J. 219 (2017) (same); Shimoni v. N.J. Dep't

of Corr., 412 N.J. Super. 218, 223 (App. Div. 2010) (denying inmate's request to serve sentence in home country). The same result obtains here, where the issue once again regards classification, this time either in home confinement custody or in traditional DOC custody.

Critically, as the State has highlighted repeatedly in this brief, there are available procedural avenues for inmates seeking relief. For inmates seeking parole, they have the right to appeal a denial of parole, including the right to judicial review of final Parole Board decisions. See N.J.A.C. 10A:71-4.1 to -4.4 (administrative appeals process); Trantino v. N.J. State Parole Bd., 154 N.J. 19, 24-25 (1998) (discussing review of Parole Board decisions). These existing appeals procedures already provide the hearing rights and statement of reasons that Movants request. Moreover, *all* inmates have an right to seek a release under Rule 3:21-10(b)(2) regardless of the status of review under EO 124. The availability of relief under the Rule provides a hearing right at which defendants can be meaningfully heard; the participation of defense counsel; adversary presentation; and ability to seek emergent relief in the Appellate Division, and then in this Court.

Especially given the massive undertaking of providing more process and formality for thousands of inmates at once, nothing in the Due Process Clause mandates the additional procedures that the Movants have proposed in this case.

POINT III

THE JUVENILE JUSTICE COMMISSION IS AT THE FOREFRONT IN EFFORTS TO PROTECT ITS RESIDENTS FROM THE COVID-19 PANDEMIC

Relief is also not warranted relative to residents in the Juvenile Justice Commission's ("JJC") facilities. First, the data demonstrates that the JJC responded quickly and thoroughly to the pandemic to ensure the safety of staff and residents. Since the outbreak, the JJC has had only 28 residents test positive for COVID-19 – despite the fact that New Jersey is at the epicenter of the Nation's COVID-19 outbreak. None of the residents have experienced symptoms which required hospitalization, and the vast majority remained asymptomatic. Certification of Jennifer LeBaron, Ph.D., Acting Executive Director ("LeBaron Cert.") at ¶8. Second, the JJC continues to take appropriate steps to protect residents, including testing all residents and staff. Third, the JJC's youthful population, many of whom have been adjudicated delinquent or convicted of serious offenses, does not lend itself well to a blanket release process. And fourth, the JJC already has taken steps to release residents when appropriate and consistent with public safety and resident safety. These proactive efforts have contributed to a 15% drop in the total number of residents since

early March.

A. The JJC Has Implemented Comprehensive Measures to Protect Its Residents and Staff.

As this brief and attached LeBaron Certification lay out, the JJC has protected its staff and residents by responding swiftly to the pandemic and acting quickly to prevent the spread of COVID-19. See id. at ¶ 4 (detailing a list of policies and procedures that the JJC has implemented in response to the COVID-19 pandemic). The mitigation efforts detailed below help to explain the low prevalence of COVID-19 among JJC residents, and the lack of hospitalizations and deaths to date.

First, and importantly, the JJC has committed to testing all residents and staff for COVID-19. As Director LeBaron explains, “on April 21, 2020, the JJC initiated the implementation of a universal COVID-19 testing plan for the approximately 275 residents then in JJC custody and for all youth subsequently admitted to JJC facilities. The first round of universal COVID-19 testing of all youth in the JJC’s custody is scheduled to be completed on May 19, 2020. On that date, the remaining 12 youth in the JJC’s custody that have not been tested for COVID-19 are scheduled to be tested.” Id. at ¶ 5. The JJC will likewise begin testing all of its approximately 666 direct care employees for COVID-19 on or around June 9. Id. at ¶ 6.

In addition to establishing universal testing, as Director LeBaron's Certification lays out in detail, the JJC has: provided masks to all staff and residents; conducted temperature screening at all facility entrances; conducted daily temperature screening of all residents in JJC facilities; prohibited the intake of youth presenting with symptoms consistent with COVID-19; engaged in enhanced daily and weekly cleaning and sanitizing at facilities; initiated contact tracing if an individual tests positive for COVID-19; implemented social distancing among staff and residents, including cohort quarantining (i.e., only allowing residents to interact with other youth in their housing unit) to minimize the spread of COVID-19; and initiated medical monitoring protocol for residents identified by the JJC's healthcare provider as having an underlying health condition that may place that resident at higher risk for complications from COVID-19. Id. at ¶ 4(a)-(c), (e)-(f), (i)-(l), and (o). These steps help to explain the low prevalence of COVID-19 among JJC residents, and the lack of hospitalizations and deaths to date.

The JJC has also enforced enhanced social-distancing, limited face-to-face contact, and taken steps to drastically reduce the number of individuals entering its facilities. For example, the JJC has replaced in-person visits with video and phone calls; (2) suspended visits of volunteers; (3) implemented work-from-home programs for all non-essential staff; (4) temporarily suspended

work release programs for residents; (5) cancelled all non-essential transports; and (6) suspended all staff trainings and group meetings. See id. at ¶ 4(d)(i)-(iii) and (vii)-(viii).

When person-to-person contact does still occur, the JJC has taken steps to reduce, to the greatest extent possible, any risk of COVID-19 transmission. Among other measures, the Commission is (1) providing residents with at least 2 new face masks per week with additional masks available if they become damaged or soiled; (2) providing PPE to staff, with more extensive PPE being mandated for use by staff working with youth in medical isolation, including, for example, gloves, gowns, face shields, and/or goggles; (3) conducting daily temperature screenings of the temperature of all staff, residents, and individuals entering JJC facilities; (4) conducting contact tracing; (5) ordering a 14-day quarantine for those who have contracted COVID-19 or were in close contact with someone who tested positive for the virus, and requiring that an individual who tests positive for COVID-19 obtain medical clearance to return to work (for staff) or to be removed from medical isolation (for residents); and (6) implementing “cohort quarantining” and “modified cohort quarantining”¹⁰ for

¹⁰ “Cohort quarantining” is a process where residents remain in their assigned units except for outdoor recreation for 14 days to minimize the spread of COVID-19. See LeBaron Cert. at ¶ 4(m). After 14 days, the residents are placed into “modified cohort quarantine,” which provides greater freedom of movement (i.e., residents can utilize the gym, programming space, and the dining

residents exposed to COVID-19 by a staff member; and, (7) moving furniture to ensure that residents are practicing social distancing. Id. at ¶ 4(a)-(b), (e), and (h)-(k).

Additionally, important sanitation protocols have been put in place to further protect JJC's residents and staff. The JJC is (1) implementing enhanced daily and weekly cleaning and sanitizing protocols at all JJC facilities using CDC recommended and EPA approved products; (2) engaging an environmental cleaning vendor to disinfect facilities where a staff member or resident tested positive for COVID-19; and (3) regularly educating residents about preventative hygiene practices through written and routine conversation. See id. at ¶ 4(g)(1).

The JJC has also taken significant steps to ensure that all residents' medical needs are met. The JJC'S contracted medical provider has a 24/7 presence at JJC secure facilities. See id. at ¶ 9. Medical services are provided through a combination of physicians, advanced practice nurses, and nurses. Ibid. When a physician is not among the staff on-site, an on-call physician is available for consultation. Ibid.

On top of this around-the-clock medical care, the JJC has initiated a medical monitoring protocol for youth identified as having underlying medical conditions that may make them more likely

room), but residents can only interact residents in their cohort. See id. at ¶ 4(n).

to suffer complications were they to contract COVID-19. See id. at ¶ 4(o). As part of this protocol, an alert is placed in the resident's file, UCHC engages the youth in discussions about his/her increased risk, and the resident is closely monitored. Ibid.

And when residents do require any medical isolation because they tested positive for COVID-19 or have to be placed in quarantine because they had close contact with someone who tested positive, the JJC has provided residents with an array of opportunities and items to keep them comfortable and engaged, including extra phone calls and video calls to families, video games, DVD players, television, books, puzzles, educational materials and/or school assignments, special meals, daily interaction with medical staff, and regular contact with and/or access to social services staff, chaplaincy services, and the ombudsman. See id. at ¶ 4(n).

Simply put, the JJC has not "turned [a] kind of blind eye and deaf ear to a known problem," Money, 2020 WL 1820660 at *18, and in fact the opposite is true. The JJC has taken significant steps to address the spread of COVID-19 in its facilities, obviating the need for the kind of categorical release process requested here.

- B. Considering the Needs of the JJC Residential Population and Public Safety, the JJC Has Taken Appropriate Steps to Assess Which Residents Are Appropriate for Release.

A judicially established review process is particularly ill-

suited to the JJC context in light of the JJC's overall population, and the JJC's own efforts to release youth when appropriate.

As a threshold matter, the JJC population is generally a poor fit for the kind of categorical process outlined in the proposed Order. The population is, by definition, youthful, which means that residents are generally less likely to suffer significant complications as a result of contracting COVID-19. On the other side of the ledger, the offenses for which they have been adjudicated delinquent or convicted are quite serious, and so their wholesale release could pose public safety risks. In fact, "[o]ver the past two decades, as the result of significant youth justice reforms led by the JJC, the population of youth committed to state custody has changed dramatically." See LeBaron Cert. at ¶ 10. Youth who commit non-violent offenses are no longer placed in JJC custody. Instead, 85% of JJC residents now have a history of violent offenses, including homicide, sexual assault, carjacking, aggravated assault and armed robbery. Ibid.

On top of that, there are very few youth in the JJC's custody, making individualized review (which the JJC is supporting) more appropriate than a categorical Court Order. For example, there are only 257 youth in the JJC's custody, as compared to approximately 18,000 in DOC custody. Of those 257 youth, 55 committed/waived residents in the JJC's custody have a maximum release date in the next 12 months (excluding those adjudicated on a NERA offense, but

including those adjudicated delinquent/convicted of second-degree robbery and burglary offenses – the group described in the proposed Order). See LeBaron Cert. at ¶¶ 11, 14. But only seven of them have underlying medical conditions, and those residents are already closely monitored by UCHC. Moreover, the residents on this list generally would be poor candidates for release because many of them are currently “subject to detainers from other courts, have been adjudicated delinquent/convicted of endangering the welfare of a child, have committed multiple serious disciplinary infractions, and/or have required placement in the JJC’s most secure facility because of their harmful behavior while in custody.” See id. at ¶ 11.

And, notably, when someone is a good candidate for release – in light of their individual needs and consistent with public safety – the JJC is engaging in important steps to support that process. As Movants acknowledge, the Family Court retains jurisdiction over cases in which a juvenile has been adjudicated delinquent, Movants’ Br. at 29, and this remains the appropriate vehicle to address concerns in the event a specific juvenile has a compelling case for sentence modification on the facts. The Family Court can, on an expedited basis, delve into a juvenile’s unique circumstances to determine whether he or she is suitable for parole or post-incarceration supervision. The JJC “has supported the Public Defender’s Office and Rutgers Law School’s

Criminal & Youth Justice Clinic's efforts to modify dispositions so that youth scheduled for release in the near future can be released early when appropriate. To date, 14 youth have been released from the JJC's custody as a result of this collaboration. This partnership is ongoing, and additional youth may be released." See LeBaron Cert. at ¶ 12.

That is not all. Even without Family Court intervention, the JJC is "review[ing] the cases of youth that have been placed in JJC residential community homes as a condition of probation to determine who might be eligible for early release." See id. at ¶ 13. Notably, "ten youth have been released from the JJC's care as a result of this review," and the "process is ongoing, and additional youth will likely be released early." Ibid. The JJC is also working with SPB to conduct release hearings via telephone and/or video conferencing for residents. See id. at ¶ 4(d)(vi).

These processes are making a difference. Indeed, "[o]n March 1, 2020, there were 303 youth in the JJC's custody. By May 15, 2020, the population had been reduced to 257 youth – representing a 15 percent decrease in the JJC's overall population." See id. at ¶ 14.

Simply put, there is no need for intervention by this Court. Each of the individualized review processes the JJC is already supporting offer a better approach for addressing a JJC resident's needs than a blanket order, because release from custody "mandates

individualized consideration of an inmate's suitability for release and on what conditions, for the safety of the inmate, the inmate's family, and the public at large." Money, 2020 WL 1820660 at *14. That is especially so given the safety precautions JJC has taken, and the review and release process in which it has already been engaged.

CONCLUSION

EO 124's process is largely complete, and a second, judicially created categorical review process is unnecessary and unwarranted; as needed, inmates can seek individualized review through courts under Rule 3:21-10(b)(2); and the DOC is undertaking comprehensive measures to protect inmates, including its commitment to universal testing. For these reasons, the State respectfully requests that the Court decline to issue the proposed order.

Respectfully submitted,

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