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N.J. Supreme Court could release more prisoners as coronavirus cases rise behind bars

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New Jersey's top court is weighing releasing more state prisoners as expanded testing has revealed hundreds more coronavirus cases behind bars.

Although Gov Phil Murphy signed an executive order more than a month ago allowing some at-risk and non-violent inmates to be temporarily released, the process has lacked both urgency and transparency, the American Civil Liberties Union of New Jersey and the state's public defender told the state Supreme Court on Wednesday.

The groups asked the court to speed up the process of releasing prisoners and expand who is eligible.

"This executive order has failed to protect the vulnerable and the staff," New Jersey Public Defender Joseph Krakora said. "It's made it impossible for the prisons to protect those people who remain in ... and has enhanced the risk to the community as a whole."

Anyone scheduled to finish their sentence within a year should be quickly considered for release, they said, which would include people deemed ineligible under the governor's order.

A state attorney representing the corrections department disagreed, saying the hundreds of people released so far coupled with prisons' "enhanced cleaning measures" and testing were adequate to protect prisoners and staff. Inmate hospitalizations were also down, said Assistant Attorney General Stephanie Cohen.

"The department of corrections and the juvenile justice commission are very concerned about the spread of the virus," she said.

New Jersey has the highest coronavirus inmate death rate in the nation, and most of its 43 prisoner deaths happened after Gov. Phil Murphy signed the executive order. At least three employees have also died, and an NJ Advance Media investigation found the state repeatedly failed to stem the outbreak.

Out of more than 3,000 people flagged for possible release under Murphy's executive order, 607 were approved for either temporary home confinement or parole, according to court documents filed by the state attorney general's office.

A little more than half that number, 337, have been released so far, leaving hundreds who received approval in limbo. (State officials previously reported higher totals, and the court documents said previous reports accidentally duplicated numbers.)

New Jersey has released about 180 people to a home, and paroled about 170.

Part of Wednesday's three-and-a-half hour hearing centered on what rights prisoners should have.

Inmates denied home release currently weren't being told why, according to ACLU-NJ lawyer Alexander Shalom, nor were they given a chance to appeal. The denial sometimes stemmed from a lack of stable housing, he said, and an appeals process could let prisoners fix the problem.

Cohen responded that due process wasn't necessary for inmates in this case, because state officials were technically just transferring inmates from one facility to another, even if the new facility was a prisoner's house. Since they remained under state supervision, she said, the corrections commissioner had no obligation to let inmates argue their cases.

Although the corrections commissioner has finished reviewing all 3,000-plus people flagged by the executive order, Cohen said, he could still weigh future releases on a case-by-case basis, and inmates could still petition courts individually.

Many of the seven justices seemed hesitant to override the governor's executive order, but some also appeared skeptical of Cohen's argument that giving inmates more information would be "burdensome" to state officials.

Allowing some due process could help make sure "government is not acting arbitrarily when people's health is in the balance" Justice Jaynee LaVecchia said.

About 8%, or 1,500 inmates currently have the virus, according to state data, a much higher rate than the general population. More than half of the approximately 18,000 people within the adult system had been tested as of Tuesday, and more than 730 employees have also tested positive.

The justices said they would review the arguments quickly but gave no timeline for a decision.

NJ Advance Media staff writers S.P. Sullivan and Joe Atmonavage contributed to this report.