

**JUSTICE AND DENIAL**

**HOW THE MAGISTRATES  
TURNED A  
BLIND EYE  
TO THE PANDEMIC  
IN PRISONS**

**Institute for Defense of the Right to Defense**  
(in Portuguese, Instituto de Defesa do Direito de Defesa – IDDD)

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# LIST OF ABBREVIATIONS AND ACRONYMS

- ACP** – Public Civil Action (in Portuguese, Ação Civil Pública)
- ADPF** – Allegation of Non-Compliance with a Fundamental Precept  
(in Portuguese, Arguição de Descumprimento de Preceito Fundamental)
- CNJ** – National Council of Justice (in Portuguese, Conselho Nacional de Justiça)
- DEPEN** – National Penitentiary Department  
(in Portuguese, Departamento Penitenciário Nacional)
- DPESP** – Public Defender Office of the State of São Paulo  
(in Portuguese, Defensoria Pública do Estado de São Paulo)
- IDDD** – Institute for the Defense of the Right of Defense  
(in Portuguese, Instituto de Defesa do Direito de Defesa)
- INFOPEN** – National Prison Information Survey  
(in Portuguese, Levantamento Nacional de Informações Penitenciárias)
- LAI** – Access to Information Law (in Portuguese, Lei de Acesso à Informação)
- MP** – Public Ministry (in Portuguese, Ministério Público)
- SAP** – Secretariat of Penitentiary Administration  
(in Portuguese, Secretaria da Administração Penitenciária)
- SISDEPEN** – Prison Department Information System (in Portuguese, Sistema de Informações do Departamento Penitenciário Nacional)
- STF** – Federal Court of Justice (in Portuguese, Supremo Tribunal Federal)
- STJ** – Superior Court of Justice (in Portuguese, Superior Tribunal de Justiça)
- TJSP** – Court of Justice of the State of São Paulo (in Portuguese, Tribunal de Justiça do Estado de São Paulo)

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# PREFACE\_

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Year II of the COVID-19 pandemic. When we were told, in March 2020, that this would all be over soon, even with all the difficulties we knew our country would face, we could never have had a glimpse of the scenario which we are living in right now. There are not even words to qualify the barbarism that has become a default in the Brazilian political and social dynamics.

It is a fact that the country is built upon violence, kidnapping, enslavement, and extermination of black and indigenous people. However, it was to be expected that, by the 21st century, death as an active policy could have been remedied. It is not. What we live is a political will that is expressed and exercised by the precariousness and decimation of people, by the collapse as a dynamic of social relationships and by the mockery of those who suffer.

When we reflect on Criminal Justice and the prison system, these dynamics marked by violence have always been the norm. Thus, the work of entities and groups of activists to report the “unconstitutional state of affairs” of Brazilian prisons is so necessary and important, because they force us to look in the mirror and to deal with an issue that, despite our desire, concerns each and every one of us. Even so, the Instituto de Defesa do Direito de Defesa – IDDD (Institute for the Defense of the Right to Defense) has decided to go further. IDDD has established a partnership with the Public Defender’s Office of the State of São Paulo to report, to publicize and to take action in a task force in favor of those who were deprived of freedom, but not of dignity in spite of what many wish and work for in a way that dehumanization is produced and reproduced on a daily basis.

Much has been said that the COVID-19 pandemic would be an opportunity for the review of behaviors and that a better humanity would be found at the end of the tunnel. But the tunnel seems to have no end. From Recommendation 62 of the Brazilian National Council of Justice (CNJ), IDDD has worked legally to ensure the effective terms for liberty and release of hundreds of inmates, given that Brazilian prisons are notorious for their overcrowding and unhealthy conditions for decent survival. But what can be seen in the report hereby produced as the result of this action is another chapter of horror and disrespect for human rights.

Focusing on the analysis of cases in which liberty has been granted, only 47.5% of the decisions were based on arguments regarding the pandemic and only 28% cited CNJ's Recommendation 62 for releasing the defendants, while 38% otherwise mentioned used it to delegitimize it and deny the request for liberty<sup>2</sup>. The decisions exposed what we have been pointing out: that we live under a highly hierarchical Criminal Policy and with agents who know little or nothing about the reality of people who are judged daily, which leads to the reproduction of stereotypes and, especially, to a dynamic that has, in Criminal Justice, one of the main contemporary tools for the maintenance of inequalities based on socio-racial hierarchies – a decision that shows, without any shame whatsoever, to be guided by the idea of “lack of proof that the [prison] unit would pose a risk to health” corroborates with our statement.

As the nation that emerges in 3rd place in the number of prisoners in the world<sup>3</sup>, behind only the United States and China, Brazil has managed to swim against a tide, including efforts from international organizations and even the nation with the largest prison population in the world. In many states of the USA, there were policies for extrication during the pandemic and even the District Attorney's Offices from different locations did articulate great work to ensure that groups considered at risk under the COVID-19 and those who have comorbidities or who could worsen the symptoms of COVID-19 were relaxed. This was the case in Oklahoma, where the head of the Tulsa County Public Defender's Office was adamant that “COVID-19 is a magnifying glass to all the problems of the criminal justice system”<sup>4</sup>. Obviously, this movement and effort was only possible with a strong functioning of social movements and, mainly, African Americans. Also in the midst of the pandemic we are following uprisings as seen for a long time for the importance of black lives. The demonstrations turned into tides of mobilization in many countries, since racism is a structure that modulates itself to each reality, but it is impregnated and inseparable from the economic model that ranks and determines which lives matter and which ones do not.

Brazil, unfortunately, made up the ranking of countries with

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2 These are data collected from the “Covid-19 Task Force” Report.

3 Institute for Crime & Justice Policy Research. World Prison Brief. Birbeck: University of London, 2020.

4 ASPINWAL, C.; BLAKINGER, K.; VANSICKLE, A.; THOMPSON, C. “Coronavirus transforming jails across the country”. In: The Marshall Project. Available at: <<https://www.themarshallproject.org/2020/03/21/coronavirus-transforming-jails-across-the-country>>. Accessed at: Jun. 28, 2021.

the most prisoners contaminated by COVID-19 in the world<sup>5</sup>. And the prison system, indeed, remains a black box on how the pandemic has impacted prisons. The measures adopted went against the recommendations of international organizations: suspension of visits, delays and obstacles to the release of inmates and a series of preexisting problems that have worsened in prisons during the pandemic. And this action for precariousness and death did not only affect inmates, but also prison officers, given that the COVID-19 rates in prisons are five times higher than in the rest of the population. According to a survey carried out by Fundação Getúlio Vargas, even in 2020, only 1/3 of the agents claimed to have received items for individual protection and less than 10% felt prepared to deal with the pandemic.

In 2021, the Public Agency<sup>6</sup> presented an unprecedented survey, based on requests for the Law of Access to Information, which indicated that 80% of Brazilian prisons were affected by the COVID-19 pandemic. There are states in which all prison units had inmates with infection, such as Ceará, Rondônia, Sergipe, and Distrito Federal. In São Paulo, the state with the largest prison population in the country, 88% of prisons were affected by the COVID-19 pandemic. As reported by researchers at Infovirus, an observatory of COVID in prisons, there are still many underreports of cases and deaths involving both people in prison situations and civil servants. According to data from the Monitor da Violência<sup>7</sup>, a partnership between G1, the Brazilian Public Security Forum and the USP Violence Study Group, 20,361 servers and 57,247 infected prisoners were registered in the 26 states and the Federal District. In February 2021, the National Council for Criminal and Penitentiary Policy issued a resolution recommending that state authorities include prison staff and inmates among priority groups for vaccination. In March, governors announced that they would start vaccinating servers and inmates from priority groups – over 60 and with co-

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5 STABLE, Artur. "In a list of 47 countries, Brazil is the 4th with more deaths of prisoners by covid-19". In: Bridge Journalism. Available in: <<https://ponte.org/em-lista-de-47-paises-brasil-e-4o-com-mais-mortes-de-presos-pela-covid-19/>>. Accessed on: Jun 28, 2021.

6 CÍCERO, J.; OLIVEIRA, R.; RIBEIRO, R.; SCOFIELD, L. "Covid-19 reached over 80% of arrests in 14 states." In: Public Agency. Available in: <<https://apublica.org/2021/05/covid-19-atingiu-mais-de-80-das-prisoas-em-14-estados/>>. Accessed on: 11 May, 2021.

7 G1. Violence Monitor: "Prison system registers almost 450 deaths by covid-19; that of dead servants is greater than that of prisoners". Available in: <<https://g1.globo.com/monitor-da-violencia/noticia/2021/05/17/sistema-prisional-registra-quase-450-obitos-por-covid-19-no-de-servidores-mortos-e-maior-que-o-de-presos.ghtml>>. Accessed on: May 18th 2021.

morbidities. According to an article by G1, from June this year, in the state of São Paulo, 10 thousand inmates had been vaccinated, despite information from public defender Mateus Moro indicating that around 60 thousand inmates over 41 years of age would be able to receive the immunizing agent. The answer, so far, from the state government is that “vaccination in penitentiaries occurs according to the schedule of the cities where the prison is located”<sup>8</sup>.

In addition to the disregard as a policy when it comes to combating the pandemic, the organization Pastoral Carcerária presented a survey that reports the 82% increase in allegations of human rights violations, comparing data from 2019 to 2020. The cancellation of family and religious visits created the broth for the increase in violence. To obtain information, family members need to go to prisons and wait for the return of lawyers, as information is also neglected.

Faced with all these problems, this report presents adds to the continuous effort of those who fight for unconstitutionality to be faced and eliminated; as a voice that joins those who do not accept silence as sustainer of a dehumanizing and violent dynamic and which, in the depth of observation, serves to maintain privileges for some and genocide for many. IDDD offers another important work that balances word and action, in the sense of promoting the constitutional right and guarantee of all. Fruit of continuous and tireless work for justice, rights, and freedom.

**July 2, 2021**

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8 G1. “Defender says that 60,000 prisoners over 41 are able to take the vaccine against covid-19 in SP; 10,000 were vaccinated”. Available in: <<https://g1.globo.com/sp/sao-paulo/noticia/2021/07/01/defensor-diz-que-60-mil-presos-com-mais-de-41-anos-estao-aptos-a-tomar-vacina-contra-covid-19-em-sp-10-mil-foram-vacinados.ghtml>>. Accessed on: Jul 1 2021.

# PRESENTATION



**T**he Institute for the Defense of the Right of Defense is a civil society organization of public interest, founded by criminal lawyers in 2000. Since then, it has worked for the uncompromising respect for individual guarantees, through projects aimed at transforming the criminal justice system, battle against over-incarceration, strengthening the right to a full defense, and the democratic rule of law. With the arrival of the COVID-19 pandemic in Brazil, IDDD turned its efforts to protect the right to health and life of the population deprived of liberty, monitoring and intervening in the situation of prisons, which are unhealthy, overcrowded, and extremely vulnerable to the virus.

In this regard, actions such as (i) the submission of an incidental request to the Supreme Court (STF) in the Allegation of Non-Compliance with a Fundamental Precept (ADPF) 347, which declared the State of Unconstitutional Things of the Brazilian Prison System, stand out, so that to determine to the competent Courts the adoption of measures to reduce the prison population, considering, above all, prisoners who were part of risk groups; (ii) the filing of a Public Civil Action (ACP) against the State of São Paulo, in partnership with the law firm Tozzini Freire, requiring the adoption of emergency measures to mitigate contagion to protect the prison population in the State of São Paulo ; (iii) sending requests for access to information to state agencies of the penitentiary administration and to the National Penitentiary Department (DEPEN), requesting data on measures to mitigate and prevent contagion<sup>9</sup>; and (iv) **the execution of a prison task-force for the freedom of provisionally imprisoned people, pursuant to Recommendation 62, of March 17, 2020, of the National Council of Justice (CNJ)**<sup>10</sup>.

In early April 2020, intending to preserve the life and health of the prison population and employees of prison establishments in the state of São Paulo, IDDD established a partnership, without transfer of funds, with the Public Defender's Office of the State of São Paulo (DPESP)<sup>11</sup>, for the realization of the COVID-19 Pandemic Task-Force: for the right to defend life.

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9 The report that systematizes the data can be accessed at: <http://www.iddd.org.br/wp-content/uploads/2021/04/idd-dados-sobre-a-covid-19-no-sistema-prisional-no-1o-e-2o-quadrimestres-1.pdf?fbclid=IwAROVwzOYKOHb-vcq-kuzSJGbAORWqJIH2FSNVz12-uXbBmtJW20tHzLvX4KU>.

10 Available at: <https://atos.cnj.jus.br/atos/detalhar/3246>.

11 Partnership Agreement No. 01/2020.

**THE PURPOSE OF THE TASK FORCE was to carry out requests to flexibilization of imprisonment, grant provisional freedom, and replace preventive detention by alternative precautionary measures or house arrest to provisional prisoners attended by supplementary legal assistance in the State of São Paulo - federation unit with the largest prison population in the country: 218,909 people, with 45,200 responding to lawsuits, with no final conviction<sup>12</sup>. Habeas corpus was also filed in the courts, with priority in the care of prisoners who were part of risk groups by age factor (over sixty years old), as well as pregnant women, nursing mothers, mothers, or guardians of children up to 12 years old or with disabilities, as well as those accused of crimes committed without violence or serious threat (group expressly mentioned in CNJ Recommendation 62/2020).**

Since then, lawyers associated with IDDD started to act in cases screened and sent by DPESP, making efforts to achieve the freedom of the people attended, in the cases described.

Data were extracted from the defenses that enabled IDDD to question the role that the Judiciary Power has been playing in confronting the pandemic in the prison system. The set of pieces of information extracted from the processes suggests that the action of the Justice was marked by the prioritization of formal obstacles<sup>13</sup> and questions about the devastating potential of the infiltration of the virus in prisons, with decisions by magistrates even stating that “the unit would not pose greater risks to the health of the prisoner”.

As it is shown below, in 62 of the cases in which freedom was granted, the pandemic was not even mentioned to justify their release – which leads us to question why these people were kept in prison until this task force was carried out. Such acts, extensively documented, signal disregard for the imminent risk of the decimation of part of the Brazilian prison population.

As the IDDD report Requests for Access to Information - Data on COVID-19 in the prison system during the 1st and 2nd quadrimesters of 2020 concludes, the Brazilian Executive Power did little to prevent a humanitarian catastrophe in prisons. The analysis of data collected during the Institute’s prison task force made it clear that the Judiciary also did not act to prevent the tragedy announced by the arrival and spread of the pandemic in the Brazilian prison system.

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12 According to June 2020 data from the National Penitentiary Information Survey (INFOPEN), of the National Penitentiary Department. Available in: <https://app.powerbi.com/view?r=eyJrIjoibWU3Y2RiNjctODQzMj00YTE4LWFEwMDAtZDIzNlU0Q5YmIzZmZk1liwidCI6ImViMDkwNDIwLWQ0NGMtNDNlNDU0OUMwYyU0LTRiOGRhNmJmZThlMSJ9> Accessed on 06/01/2021.

13 Formal barriers are understood as justifications presented by magistrates who place a disproportionate weight on formal issues of criminal proceedings to the detriment of preserving the life of the person who is imprisoned.

# MAIN FINDINGS

30.6% (59) of white people accused of crimes without violence or serious threat obtained a favorable decision in their case. Among black people in the same situation, 27.3% obtained a favorable decision.

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Contrary to what the CNJ considered in its recommendations, only 47.5% (56) of the 118 favorable decisions mentioned the pandemic. In the 1st instance, 42.8% of favorable decisions did not even consider the health crisis. In the TJSP this number corresponds to 57.6% and in the STJ to 52.8% of the decisions. In the STF, of four favorable decisions, only one mentioned the pandemic and referred to Recommendation 62 of the CNJ.

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Before the 118 favorable decisions, there were 207 rejections of requests for release in the same cases, keeping people in prison. This means that people released in the following instances would not need to be behind bars.

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The rate of mention of the CNJ document in favorable decisions was 28%, against 39% in denial decisions. This indicates that Recommendation 62 was used more often by magistrates to deny than to grant pretrial release or house arrest to prisoners assisted by the IDDD joint effort. Recommendation 62 ended up being mentioned more by magistrates to be delegitimized.

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Only 46.4% of the favorable decisions in the courts considered the pandemic situation as an aggravating factor in the prison scenario, to recognize the greater risk of contagion of COVID-19 in prison.



Some arguments that appeared in the decisions that denied requests for release and that demonstrate the delegitimization of Recommendation 62 by magistrates are the following:

- "The unit does not pose greater health risks": 9 decisions;
- "Lack of proof that the unit would pose greater risks to the defendant's health": 61 decisions 29;
- "The defendant would be exposed to even more risks in freedom": 10 decisions;
- "It is not known whether the defendant would respect health standards when released": 12 decisions;
- "Lack of proof that the defendant would be safer in freedom": 13 decisions;
- "Outside prison, the defendant would be another vector for the disease": 2 decisions;
- "COVID-19 is a risk for the whole society": 15 decisions;
- "Compliance of the prison system to the norms for prevention of COVID-19": 36 decisions;
- "Lack of proof that the defendant belongs to a risk group": 63 decisions;
- "Defendant does not belong to the risk group": 17 decisions;
- "Lack of new facts" (disregarding that the pandemic changes the entire Brazilian scenario and is an increase to the risk in the maintenance of people in prisons): 14 decisions.

# INTRODUCTION



A health crisis with hundreds of thousands of deaths brings to priority the duty of public agencies to act together to save lives. The experience of the *COVID-19 Pandemic Task Force* indicated that part of the magistrates acted as if there was no urgency to protect the lives of those who find themselves in environments known to be unhealthy, and without adequate sanitary conditions to contain the contagion. The vulnerability of the prison system is not – or should not be – new, especially for law professionals working in the criminal area, considering that the STF recognized, in September 2015, the unconstitutional state of affairs of Brazilian prisons in the judgment of the Precautionary Measure in ADPF 347, understanding that people deprived of liberty are subject to conditions such as *“prison overcrowding, [...], filthy and unhealthy cells, the proliferation of infectious diseases, terrible food, lack of drinking water, lack of basic hygienic products [and] access to [...] health”* (our emphasis)<sup>14</sup>.

In addition to the Supreme Court’s decision, two technical opinions specifically dealing with the matter were added to the requests made under the task force, **attesting that the prison population would be more vulnerable to COVID-19 contagion**<sup>15</sup>.

The edition of Recommendation 62/2020 by the CNJ, in line with the understanding of the STF, recognized that the situation of Brazilian prisons creates environments with a greater predisposition for the proliferation of the virus, due to the small-sized spaces - making physical distance impossible -, ventilation and insufficient natural lighting, and shortage of health professionals and medicines to guarantee the effective right to life and health of prisoners. This sum of factors exposes the incarcerated population to such vulnerability, considering the impossibility of implementing health and safety protocols to

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14 The decision can be accessed at: <http://portal.stf.jus.br/processos/download-Peca.asp?id=308712125&ext=.pdf>.

15 The first opinion was issued by Marcos Boulos, Professor of Infectious and Parasitic Diseases at the Medical School of USP and Special Adviser on Infectious and Parasitic Diseases at the São Paulo State Department of Health [ANNEX A]. The second opinion was issued by the Municipal Center for Hospital Infection Control (NMGH/DVE/COVISA), of the Municipal Health Department of São Paulo [ANNEX B].

contain the spread of the virus<sup>16</sup>, which makes the massive maintenance of people in prisons potentially catastrophic.

To guarantee the effectiveness of the CNJ's recommendation, IDDD mobilized its members to work for the benefit of hundreds of people deprived of liberty. However, **the results of the mobilization signaled that the CNJ's concern about the conditions of the prison system was not shared by São Paulo magistrates and ministers of the higher courts.**

In a contradictory way, the Judiciary, quick to recognize the risk offered by the pandemic when opting for hearings and other virtual procedural acts, adopted diametrically opposite posture when the theme is the unnecessary maintenance of people in overcrowded prisons. In other words, all the material resources and logistical investments to implement a virtual justice system were far from being used to protect the health and lives of the imprisoned people.

Given the impossibility of denying the unhealthy conditions of the prison system<sup>17</sup>, it is evident that **the option of keeping people imprisoned during the pandemic is the same as colluding with the high possibility of illness and even large numbers of deaths.**

The verification of the negligence that permeates the actions of the Judiciary regarding the protection of lives of the people under its tutelage, however, needs to be informed about who these people are in prison, left to fall ill. Talking about negligence in the face of the situation faced by the incarcerated population is to talk about the **selectivity and racism that characterize the criminal justice system**, considering that the country's prison population is predominantly composed of young and black people, with low education and income<sup>18</sup>.

This disregard is manifested in decisions that do not value the lives of prisoners. Such a conclusion is inevitable when we are faced with

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16 As widely publicized by the media, among the various actions to reduce the risk of contagion are the distance between people, hand hygiene, the use of masks, and good ventilation in establishments. More information available at: <https://www.paho.org/pt/brasil>.

17 As can be seen in various materials and reports already published, such as (a) BBC. "5 chronic problems in Brazilian prisons - and how they are being solved around the world". 01/09/2017. Available in: <https://www.bbc.com/portuguese/brasil-38537789>. Last accessed on 04/16/2021. (b) Conectas. "PRISON MAP - New data from the Ministry of Justice portrays a failed system". 11/27/2014. Available in: [https://www.conectas.org/noticias/mapa-das-prisoas?qclid=Cj0K-CQjw6-SDBhCMARIsAGbI7UgYs3A08hrt\\_kQtYpDjLmVqkAdit\\_SoCAM7uP8JBLyp-g8Ycp08lhGqaAnXCEALw\\_wcB](https://www.conectas.org/noticias/mapa-das-prisoas?qclid=Cj0K-CQjw6-SDBhCMARIsAGbI7UgYs3A08hrt_kQtYpDjLmVqkAdit_SoCAM7uP8JBLyp-g8Ycp08lhGqaAnXCEALw_wcB) Last accessed on 04/16/2021.

18 As shown by surveys conducted by civil society organizations, including the survey conducted by IDDD in tracking more than 2,500 custody hearings held in 13 cities in 9 states, available at: [http://www.iddd.org.br/wpcontent/uploads/2020/07/OFimDaLiberdade\\_completo.pdf](http://www.iddd.org.br/wpcontent/uploads/2020/07/OFimDaLiberdade_completo.pdf), pp.59/63. It is important to highlight that official data from DEPEN/INFOPEN no longer provide information on the socio-economic profile of the prison population.

decisions that deny freedom to a person using the argument that “the prison unit would not offer greater health risks” or that “COVID-19 is a risk to the whole society”, and not only to those deprived of liberty, or even that there would be a lack of “proof that, in liberty, the person would be safer”.

The abandonment of hundreds of thousands of people to their fate is not a novelty brought about by the context of the pandemic but were exposed in it, gaining even more cruel contours, given that **the absence of public entities in the protection of people deprived of liberty - and that are under their responsibility - indicates that they are being left to get sick and die.**

This report aims to support the discussion on the deficient role of the São Paulo Judiciary Branch and of the higher courts during the pandemic, presenting data referring to the role of lawyers in seeking freedom for prisoners.

The 118 cases in which, until January 18, 2021, a favorable decision had been issued, will be analyzed - among those that granted freedom (with or without imposition of precautionary measures alternative to imprisonment) or replaced preventive detention by house arrest, issued by lower court judges, prosecutors of the São Paulo Court of Justice (TJSP) or ministers of higher courts, in the context of requests for provisional or preliminary release or, also, appreciation of the merits of the requests for *habeas corpus* issued<sup>19</sup>, among the 448 processes that had the performance of lawyers associated with the IDDD<sup>20</sup>.

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19 For the other 330 cases in which the IDDD acted, freedom had not yet been achieved or the replacement of preventive detention by house arrest of the person arrested until that date, or the information had not been sent to the IDDD team for the case to be inserted in the analysis. The option to analyze only cases in which there was a success at some stage was due to (i) the fact that, at the time of writing this report, the actions of lawyers associated with IDDD were still ongoing in other cases in which the people attended continued imprisoned and (ii) because it was possible to analyze the denial decisions of the requests made that preceded the favorable ones, making it possible to counter the arguments used in the same cases, sometimes to keep the person served imprisoned, sometimes to release them.

20 It is important to highlight that the IDDD executive team counted on the collaboration of its members in sending information about the cases and decisions rendered for the compilation and systematization of the data presented herein. Thus, the sample of 118 favorable decisions refers to the number of decisions rendered up to January 18, 2021, that have also been sent for analysis by the team up to that date.

# 1. TASK FORCE OVERVIEW\_



- The task force was attended by **103 IDDD members**, 92 lawyers, and 11 law students.
- The IDDD acted on **448 cases of people arrested** in the State of São Paulo, which had the participation of legal lawyers (appointed to sponsor the defense in the districts where there is no Public Defender installed). The cases were referred to IDDD by the Public Defender Office of São Paulo, which screened them based on the scope defined in the Partnership Agreement signed with IDDD.
- The 448 people assisted by the task force were imprisoned in **47 different prisons** in the State of São Paulo<sup>21</sup>.

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21 CDP Americana; CDP BAURU; CDP BELÉM I; CDP BELÉM II; CDP Campinas; CDP Capela do Alto; CDP CARAGUATATUBA; CDP DA PRAIA GRANDE; CDP of Caiuá; CDP of Icém; CDP of Nova Independência; CDP of Pacaembu I; CDP of Paulo de Faria; CDP DE SUZANO/SP; CDP DE TAUBATE; CDP Franco da Rocha; CDP Guarulhos I; CDP GUARULHOS II; CDP Itapeceira da Serra; CDP Jundiaí; CDP Limeira; CDP MAUÁ; CDP OSASCO I; CDP OSASCO II; CDP PINHEIROS III; CDP Piracicaba; CDP SERRA AZUL; CDP Sorocaba; CDP TAIUVA; CDP Taubaté; CDP VILA INDEPENDÊNCIA; CPP Butantan; CPP DE FRANCO DA ROCHA; CPP Hortolândia; CRF Rio Claro; P.E.TARCIZO L.P.CINTRA-TREMEMBE; COMPACT PENITENTIARY II DE SERRA AZUL; Penitentiary of Assis – ADP; Penitentiary of Lucélia; Penit II Guareí; Penit II Itapetininga; Penit II Itirapina; Penit II Sorocaba; Penit Iperó; Penit Valparaíso; PI GUARULHOS; PIII FRANCO DA ROCHA; P MARILIA.

- The 448 cases in which the IDDD acted, were divided into **111 districts** in the State of São Paulo<sup>22</sup>. The districts with the most cases of the joint effort were:
  - o Catanduva: 70 cases
  - o Assis: 36 cases
  - o Olímpia: 33 cases
  - o Jales: 19 cases
  - o Conchal: 12 cases
  - o Fernandópolis: 11 cases
  - o Palmital: 11 cases
  - o Cândido Mota: 9 cases

**118 CASES (26.3% OF THE TOTAL TASK FORCE CASES) had favorable decisions, between granting provisional freedom - with or without the imposition of precautionary measures alternative to imprisonment - or replacement of preventive detention by home, between April 2, 2020, and January 18, 2021**

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22 We did not have access to information about the district in 15 cases. The districts attended were: Aguaí; Amparo; Angatuba; Aparecida; Apiaí; Araras; Artur Nogueira; Arujá; Assis; Atibaia; Bariri; Barueri; Birigui; Boituva; Brotas; Caçapava; Campo Limpo Paulista; Cândido Mota; Capão Bonito; Casa Branca; Catanduva; Conchal; Cruzeiro; Dracena; Embu das Artes; Embu-Guaçu; Espírito Santo do Pinhal; Estrela D'Oeste; Fernandópolis; Francisco Morato; Franco da Rocha; Garça; Guaíra; Guaratinguetá; Hortolândia; Ibiúna; Iguape; Ilha Solteira; Indaiatuba; Itanhaém; Itapeva; Itapevi; Itapira; Itápolis; Itatiba; Itirapina; Itu; Jales; Jandira; Jarinu; Junqueirópolis; Laranjal Paulista; Leme; Lorena; Mairinque; Mairiporã; Matão; Mococa; Mogi Guaçu; Mogi Mirim; Mongaguá; Monte Mor; Nhandeara; Novo Horizonte; Olímpia; Ourinhos; Ouroeste; Pacaembu; Palmeira D'Oeste; Palmital; Panorama; Paraguaçu Paulista; Paulínia; Paulo de Faria; Pederneiras; Peruibe; Piedade; Piracaia; Pirassununga; Poá; Pompeia; Porangaba; Porto Feliz; Rio das Pedras; Rosana; Salto; Salto de Pirapora; Santa Adélia; Santa Fé do Sul; Santa Isabel; Santo Anastácio; São Caetano do Sul; São João da Boa Vista; São José do Rio Pardo; São Paulo; São Roque; Socorro; Sorocaba; Suzano; Tabapuã; Taboão da Serra; Tambaú; Tatuí; Tremembé; Tupi Paulista; Ubatuba; Urupês; Valparaíso; Vargem Grande do Sul; Votorantim; Votuporanga.





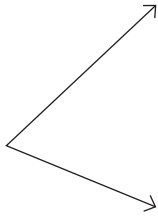
2.

# PROFILE OF PEOPLE ATTENDED BY THE TASK FORCE AND PEOPLE BENEFITING FROM FAVORABLE DECISIONS<sup>23</sup>

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<sup>23</sup> The information that composes the presented profile was extracted from the analysis of the procedural documentation (incident report, notice of arrest in the act, and case records). Unlike past task forces already carried out by IDDD, in this one we did not have the opportunity, due to the new coronavirus pandemic, to personally interview the people assisted.

**Gender<sup>24</sup>**



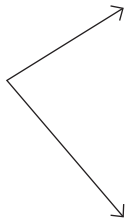
**PEOPLE ASSISTED (SAMPLE: 416 CASES)**

- Male: 98,44% (441)
- Female: 1,56% (7)

**PEOPLE BENEFITING FROM A FAVORABLE DECISION (SAMPLE: 118 CASES)**

- Male: 96,6% (114)
- Female: 3,4% (4)

**Race/color<sup>25</sup>**



**PEOPLE ASSISTED (SAMPLE: 416 CASES)**

- White people: 51,4% (214)
- Black people (black and brown): 48,6% (202)

**PEOPLE BENEFITING FROM A FAVORABLE DECISION (SAMPLE: 114 CASES)**

- White people: 57,1% (65)
- Black people (black and brown): 42,9% (49)

**30.4% OF THE 214 ASSISTED WHITE PEOPLE AND 24.3% OF THE 202 ASSISTED BLACK PEOPLE HAD FAVORABLE DECISIONS IN THEIR CASES.**

24 (i) Information on the gender of the people assisted, when not included in the documentation, was attributed through inference from the name of the registry. The choice of gender heteroclassification was imposed by the impossibility of interviewing the people assisted. The sample for information on gender is the sample of total cases analyzed herein (448). (ii) Three of the seven women assisted and two of the four women benefiting from a favorable decision were mothers of children up to 12 years old or were pregnant.

25 As with the data on gender, information on the color/race of the people assisted could not be obtained through self-declaration, having been extracted from the documentation of the process.

**Age**

**PEOPLE ASSISTED (SAMPLE: 432 CASES)**

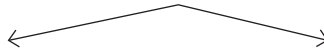
- 18 to 24 years old: 34,5%
- 25 to 29 years old: 16%
- 30 to 34 years old: 13,7%
- 35 to 59 years old: 22,6%
- 60 years old or over: 13,2%

**PEOPLE BENEFITING FROM A FAVORABLE DECISION (SAMPLE: 116 CASES)**

- 18 to 24 years old: 37,9%
- 25 to 29 years old: 17,2%
- 30 to 34 years old: 7,8%
- 35 to 59 years old: 12,5%
- 60 years old or over: 12,1%

**57 PEOPLE 60 YEARS OLD AND OVER WERE ASSISTED IN THE PROJECT, BUT ONLY 14 OF THEM WERE RELEASED OR PLACED UNDER HOUSE ARREST DURING THE PERIOD THE MONITORING WAS BEING CARRIED OUT.**

## Main Crime<sup>26</sup>



### PEOPLE ASSISTED (SAMPLE: 436 CASES)

- Drug trafficking: 71,3% (311)
- Theft: 10,1% (44)
- Homicide: 6,2% (27)
- Rape of vulnerable: 4,4% (19)
- Robbery: 1,6% (7)
- Non-compliance with urgent protective measures: 1,4% (6)
- Reception: 1,4% (6)
- Trafficking association: 0,7% (3)
- Embezzlement: 0,7% (3)
- Threat: 0,7% (3)
- Illegal possession of firearms of permitted use: 0,4% (2)
- Coercion in the course of the process: 0,2% (1)
- "Driving while intoxicated": 0,2% (1)
- Use of false document: 0,2% (1)
- Harassing a child into practicing a libidinous act: 0,2% (1)
- Possessing, among other conducts, a firearm: 0,2% (1)



### PEOPLE ASSISTED (SAMPLE: 436 CASES)

- Crime with violence or serious threat: 58 (13,3%)
- Crime without violence or serious threat: 378 (86,7%)

### PEOPLE BENEFITING FROM A FAVORABLE DECISION (SAMPLE: 118 CASES)

- Drug trafficking: 73,7% (87)
- Theft: 12,7% (15)
- Non-compliance with urgent protective measures: 3,4% (4)
- Rape of vulnerable: 2,5% (3)
- Homicide: 1,7% (2)
- Robbery: 0,8% (1)
- Trafficking association: 0,8% (1)
- Embezzlement: 0,8% (1)
- Threat: 0,8% (1)
- Coercion in the course of the process: 0,8% (1)
- "Driving while intoxicated": 0,8% (1)
- Use of false document: 0,8% (1)



### PEOPLE BENEFITING FROM A FAVORABLE DECISION (SAMPLE: 118 CASES)

- Crime with violence or serious threat: 6,8% (8)
- Crime without violence or serious threat: 93,2% (110)

26 (i) The criterion used to identify the crime of which the person served was being accused, in cases where there was more than one criminal offense, was the one with the highest penalty provided for in the legislation. (ii) The percentages of data on the main crime of people benefiting from a favorable decision do not add up to 100% due to the rounding of decimal numbers.

15.4% (10) of white people of 60 years of age or older had a favorable decision in their process



4 of them were being accused of a crime committed without violence or serious threat

8.2% (4) of black people of 60 years old or over had a favorable decision in their process



3 of them were being accused of a crime committed without violence or serious threat

**30.6% (59) OF WHITE PEOPLE ACCUSED OF CRIMES WITHOUT VIOLENCE OR SERIOUS THREAT OBTAINED A FAVORABLE DECISION IN THEIR CASE, FOUR OF WHOM WERE 60 YEARS OLD OR MORE. AMONG BLACK PEOPLE ACCUSED OF CRIMES WITHOUT VIOLENCE OR SERIOUS THREAT, 27.3% OBTAINED A FAVORABLE DECISION THROUGH THE ACTION OF THE IDDD AND THREE OF THEM WERE 60 YEARS OLD OR OLDER.**

**THE NUMBER OF PEOPLE WHO WERE 60 YEARS OLD OR OVER AMONG THOSE ACCUSED OF CRIMES WITHOUT VIOLENCE OR SERIOUS THREAT SERVED BY IDDD IS SIMILAR BETWEEN WHITE PEOPLE AND BLACK PEOPLE, BUT THERE WAS A PREVALENCE OF GRANTING THE REQUEST TO WHITE PEOPLE.**



3.

# **TIMELINE OF CNJ RECOMMENDATIONS IN THE PANDEMIC**



## Recommendation 62 – 03/17/2020

It recommended “to the Courts and magistrates the adoption of preventive measures against the spread of infection by the new coronavirus – COVID-19 within the scope of the criminal justice and socio-educational systems”, establishing as one of its specific purposes, in art. 1st, I:

“I - the protection of life and health of people deprived of liberty, magistrates, and all public servants and agents who are part of the criminal, prison and socio-educational justice system, especially those who are part of the **risk group, such as the elderly, pregnant women and people with chronic, immunosuppressive, respiratory and other pre-existing comorbidities that may lead to a worsening of the general health status from the contagion, with special attention to diabetes, tuberculosis, kidney diseases, HIV and co-infections;**”<sup>27</sup>(our emphasis)

In its article 4, I, a, b, c, the Recommendation also provided, “regarding reducing epidemiological risks and in compliance with the local context of virus dissemination”, that magistrates observe and consider the following measures:

I – a reavaliação das prisões provisórias, nos termos do art. 316, do Código de Processo Penal, **priorizando-se:**

a) pregnant women, lactating women, mothers or people responsible for children up to twelve years of age or people with disabilities, as well as the elderly, indigenous people, people with disabilities, or those who fit into the risk group;

b) **persons imprisoned in penal establishments that are occupied above capacity**, that do not have a health team located in the establishment, that are under an order of

interdiction, with precautionary measures determined by an organ of the international jurisdiction system, or that **have facilities that favor the spread of the new coronavirus;**

c) preventive arrests that have exceeded 90 (ninety) days or that are **related to crimes committed without violence or serious threat to the person;**” (our emphasis).

The measure would be valid for 90 days but was extended for another 90 by Recommendation 68.



## Recommendation 68<sup>28</sup> – 06/17/2020

It was also published during the term of Minister Dias Toffoli (former president of the STF and CNJ) and extended Recommendation 62 for another 90 days, without making any changes to the list of beneficiaries.



## Recommendation 78<sup>29</sup> – 09/15/2020

Edited five days after Minister Luiz Fux took office as president of the STF and the CNJ, on September 15, 2020. It added article 5-A to Recommendation 62, to exclude from the list of beneficiaries people “convicted for crimes provided for in the Law No. 12,850/2013 (criminal organization), in Law No. 9,613/1998 (laundering or concealment of assets, rights, and values), against the public administration (corruption, concussion, malfeasance, etc.), for heinous crimes or crimes of domestic violence against women”, in addition to extending the period of validity of Recommendation 62 for another year.

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28 Available at: <https://atos.cnj.jus.br/atos/detalhar/3364>

29 Available at: <https://atos.cnj.jus.br/atos/detalhar/3480>





## Recommendation 91<sup>30</sup> – 03/15/2021

It made no new changes to the list of beneficiaries, bringing “additional preventive measures to the spread of infection by the new coronavirus and its variants - COVID 19, within the scope of the criminal justice and socio-educational systems”<sup>31</sup>, indicating the need for a vaccination plan, but without significant impacts for the scope of action of the IDDD prison task force.

**All requests for freedom made during the task force were based on Recommendation 62**, in addition to having in them, concrete justifications of the risks to which persons deprived of liberty were subjected. Although certain types of criminal offenses have been removed from the scope of the CNJ measure, the crime of drug trafficking among them (equated to heinous and excluded by Recommendation 78), the persons accused of it did not have their services suspended during the task force. Sars-CoV-2 makes no distinction of this nature and these people’s lives remain at risk, regardless of the changes in the recommendations. Furthermore, as it is a criminal offense to which violence or serious threat to the person is not attributed, the crime of drug trafficking continued to be included in the scope of the lawyers’ activities.

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30 Available at: <https://atos.cnj.jus.br/atos/detalhar/3785>

31 Available at: <https://atos.cnj.jus.br/atos/detalhar/3785>

4.

# THE JUDICIARY'S DISREGARD\_



The role of lawyers in the task force was based on requests for release from the first instance, in cases in which Recommendation 62 had not yet been discussed in the process, that is, in cases where the judge had not yet made a statement about the situation of deprivation of liberty of the defendant considering the change of scenario brought about by the pandemic. After that, it followed the filing of habeas corpus in the Court of Justice of São Paulo (TJSP), in the Superior Court of Justice (STJ), and the Federal Supreme Court (STF), consecutively.

The table below shows in which instance each of the 118 favorable decisions was rendered

TABLE 1 - FAVORABLE DECISIONS BY A DECISION-MAKING BODY

Instance	Number of favorable decisions rendered
1ª instância	23,7% (28)
TJSP	28% (33)
STJ	45% (53)
STF	3,3% (4)

Source: COVID-19 Pandemic Task-Force: for the right to defend life.

The following table lists the arguments most frequently used in these decisions<sup>32</sup>:

32 The categories consist of possible arguments to be used by the judges to deny or grant the request made by the lawyer. These categories were created based on a sampling exam. First, a sample of decisions from each instance was analyzed, verifying which arguments were used. Subsequently, given the arguments found in this sample, the categories were elaborated. At the end of this report, there is a glossary [ANNEX C] that presents the categories created and their respective explanations. It is also clarified that more than one argument may have been found in the same decision so that the number of arguments used by judges, prosecutors, or ministers is greater than the number of favorable decisions

**TABLE 2 - MAIN ARGUMENTS USED IN FAVORABLE DECISIONS**

<b>Arguments</b>	<b>No. Mention</b>
Concrete gravity/Concrete analysis of the case <sup>33</sup>	78
Mention to the amount of drug <sup>34</sup>	62
Weakness of previous decisions	51
First Defendant	45
Sufficiency of precautionary measures alternatives	44
Mention to Recommendation No. 62*	33
Unjustified overtime	32
Proportionality and reasonableness	31
Reference to Precedent 691 <sup>35</sup>	30
Crime without violence or serious threat	30
Pandemic*	23
Abstract gravity of the offense <sup>36</sup>	19
Recidivism	16

**\* Arguments related to the COVID-19 pandemic.**

Source: *COVID-19 Pandemic Task-Force: for the right to defend life.*

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- 33 The categories consist of possible arguments to be used by the judges to deny or grant the request made by the lawyer. These categories were created based on a sampling exam. First, a sample of decisions from each instance was analyzed, verifying which arguments were used. Subsequently, given the arguments found in this sample, the categories were elaborated. At the end of this report, there is a glossary [ANNEX C] that presents the categories created and their respective explanations. It is also clarified that more than one argument may have been found in the same decision so that the number of arguments used by judges, prosecutors, or ministers is greater than the number of favorable decisions.
- 34 In the decisions that granted the requests, the argument related to the amount of drugs reflected the judge's opinion on what he considered to be a "small amount", although the legislation does not establish a minimum/maximum for the classification of the crime of drug trafficking.
- 35 When the argument "Reference to Precedent 691" appears in favorable decisions, the meaning is to overcome the formal issue ("suppression of instance"), understanding that in preventive detention the flagrant illegality needed to grant the request.
- 36 According to the glossary [ANNEX C], the category "abstract seriousness of the crime" means: a concept that considers the seriousness of the criminal type itself, without taking into account the specific elements of the case under analysis.

## 4.1 ILLEGAL PRISONS IN THE MIDDLE OF THE PANDEMIC - DISREGARD AS AN INCREASE TO THE RISK TO THE HEALTH AND LIFE OF THE POPULATION DEPRIVED OF LIBERTY

**A**s shown in the table above, in the categories “Mention to Recommendation No. 62” and “Pandemic”, although all requests were made based on the current scenario and anchored in CNJ Recommendation 62, **only 47.5% (56) of the 118 favorable decisions mentioned the COVID-19 pandemic.** For a better understanding of what was meant by “mention of the pandemic”, the criteria used to apply each of the two categories are described below:

a) In “Reference to Recommendation No. 62” the arguments in which the magistrate expressly cited CNJ Recommendation No. 62 on the grounds of his decision were framed. The cases in which it was only mentioned in the decision report do not fit here, simply mentioning the allegations of the parties.

b) “Pandemic” includes arguments that address the pandemic situation without citing CNJ Recommendation 62. The option to separate these two arguments was because some magistrates did not have.<sup>37</sup>

The fact that in **52.5% of the decisions in favor of freedom or replacement by house arrest the pandemic** was not even mentioned was astonishing, that is, it was possible to observe that **a large part of São Paulo magistrates did not take into account their decisions the health crisis scenario or just corrected a situation that was already illegal regardless of the change in the scenario brought by the pandemic.**

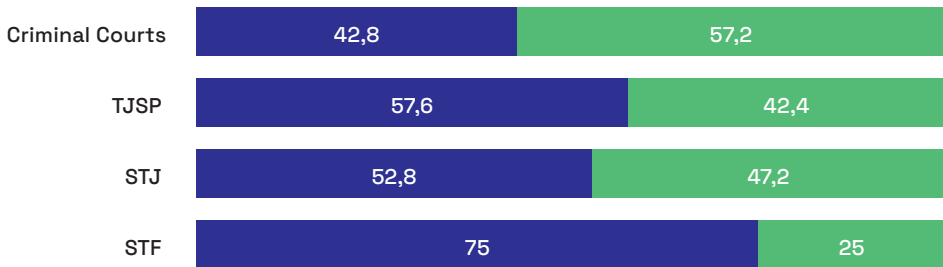
In **criminal courts**, 42.8% of favorable decisions did not mention the pandemic as a reason for granting what was being requested. In the **TJSP** this number corresponds to 57.6%, and in the **STJ**, to 52.8% of the decisions. In the **STF**, of the four favorable decisions rendered, only one considers the pandemic for the granting of freedom and protection of the right to life, expressly mentioning CNJ Recommendation 62.

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37 The categories “Mention to Recommendation No. 62” and “Pandemic” had, in the analysis carried out, alternative applicability. That is if the magistrate made express mention of the Recommendation in its grounds, the argument was classified in the category “Reference to Recommendation No. 62”; if there was no express mention of the Recommendation, but considerations about the COVID-19 pandemic, the argument was classified in the “pandemic” category. To classify the arguments in any of the categories, the simple mention in the decision report was not enough, it needed to be present in its foundations.

## PANDEMIC CONSIDERATION FOR JUSTIFY THE FAVORABLE DECISION (in %)

- Decisions that did not consider the pandemic
- Decisions that considered the pandemic



If, on the one hand, it is strange that the decisions do not pay attention to the context of the pandemic, considering that this was the scope of the work of lawyers in the task force, on the other hand, the fact that **people were being held in detention although there was no need for the deprivation of liberty measure is alarming.**

These numbers suggest that, since the situation caused by the pandemic has not been considered, it is essential to establish controls, as determined by the criminal procedural law<sup>38</sup>, capable of remedying situations involving the maintenance of illegal prisons. Had it not been for the task force due to the pandemic, these people could have remained imprisoned.

- In the **first instance**, the arguments most used to justify the release of people from prison, whether through the granting of freedom or replacement of preventive detention by house arrest, were the “**unjustified overtime**”, which was present in 16 of the 28 decisions, and the fact of being the “first offender”, which was brought in 13 decisions.
- In the **TJSP**, the most frequent argument was the “concrete gravity/concrete analysis of the case”, used in 18 of the 33 decisions, when the decision analyzed the case in detail and concluded that there was not enough concrete seriousness in the conduct to justify the maintenance of preventive detention. The second argument that appeared most frequently was “first offender”, present in 17 decisions. In this instance, it is worth noticing, Recommendation 62 and the pandemic are not even among the six most used arguments.
- In the **STJ**, as well as in the TJSP, the most used argument was also the “concrete gravity/concrete analysis of the case” and was present in 45 of the 53 cases, while the

“quantity of drugs” argument appeared in 39 decisions, always together with the “concrete seriousness/concrete analysis of the case”, to refer to the “small amount of drug seized” in cases where the defendant was accused of the crime of drug trafficking. Recommendation 62 and the pandemic are also not even among the six arguments most used in this instance.

- In the **STF**, in the same sense as the two other courts, the four favorable decisions analyzed in this report had the “concrete gravity/concrete analysis of the case” as one of their reasons, this being the argument that most appeared in the court.

In general, **52.5% of the 118 favorable decisions did not mention the health crisis to justify freedom or replacement of preventive detention by house arrest.** This may demonstrate a resistance on the judges’ side to recognize the fact that Brazilian prisons are an environment of high risk for the contamination of COVID-19 - as the Recommendation itself does -, while reinforcing the lack of need for maintenance of the deprivation of liberty of the accused, even if there was no pandemic.

## 4.2 DISREGARD THE STRUCTURE OF THE PRISON SYSTEM AS AN INCREASE IN HEALTH RISK IN THE PANDEMIC \_

**P**art of the decisions recognizes a risk scenario for people deprived of liberty due to the pandemic but does not consider it a sufficient reason for granting the request for release made in the context of the task force.

207 decisions were rejecting the requests for release made that preceded the 118 favorable decisions analyzed by this report. In other words, before freedom was granted, 207 decisions were rendered in the same cases, keeping the people assisted by the task force in prison.

When analyzing these negative decisions, the IDDD identified that 39.1% (81) expressly mentioned Recommendation 62 and still maintained pre-trial detention, indicating a low level of legitimacy of the CNJ's guidance - mainly because, in these same cases, there was later a favorable decision rendered in the same case<sup>39</sup>. The urgency imposed by the pandemic does not seem to have touched some magistrates.

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39 The favorable decision may have been rendered in the same instance (when the request for a preliminary injunction in habeas corpus is denied, but the merits are granted) or by another higher instance.



Considering that the express mention rate of the CNJ document in favorable decisions was **28% against 39% in denying decisions, it is concluded that the Recommendation was more used by magistrates to deny than to grant provisional freedom or house arrest to prisoners assisted by the task force**, which indicates, in these cases, that Recommendation 62 was mentioned to be delegitimized.

Reading the decisions that denied the requests allows us to perceive the **lack of knowledge or contempt for the unhealthy situation of the prisons and the fact that the prisoners are exposed to a greater risk of contagion**. Among the arguments that evidence this, are the following:

- “The unit does not pose greater health risks”: 9 decisions;
- “Lack of proof that the unit would pose greater risks to the defendant’s health”: 61 decision<sup>40</sup>;
- “The defendant would be exposed to more risks in freedom”: 10 decisions;
- “It is not known whether the defendant would respect health regulations”: 12 decisions;
- “Lack of proof that the defendant would be safer in freedom”: 13 decisions;
- “Outside prison, the defendant would be another vector for the disease”: 2 decisions;
- “COVID-19 is a risk for the whole society”: 15 decisions;
- “Adequacy of the prison system for the prevention of COVID-19”: 36 decisions;
- “Lack of proof that the defendant belongs to a risk group”: 63 decisions;
- “Defendant does not belong to the risk group”: 17 decisions;
- “No new facts” (not considering that the pandemic changes the entire Brazilian scenario and increases the risk of keeping people in prisons): 14 decisions.

It is possible, therefore, to state that the resistance on the part of the Judiciary to imple-

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40 Specifically at this point, given the high number of decisions in which the argument appears, it is worth mentioning the following excerpt, from the technical opinion issued by the Municipal Center for Hospital Infection Control (NMCIH/DVE/COVISA), regarding preventive measures and risks for the acquisition of COVID 19 in the prison system, requested by the IDDD to the agency and provided on May 25, 2020 [ANNEX B] - **added to the requests for release made in this task force**: *“The weakness in implementing preventive measures against COVID-19 makes the penitentiary system a high-risk environment for the spread of the disease and outbreaks of infection, with increased morbidity and mortality associated with individuals with risk factors for severe disease. On May 11, 2020, there are records of employees on leave or of prisoners isolated on suspicion or confirmation of COVID-19 in 62 of the 176 prison units in the state, or 35% of the total prisons under the responsibility of the Secretariat of Penitentiary Administration of the State of Sao Paulo. This condition reinforces the worsening and progression of the COVID-19 pandemic in the prison system in the State of São Paulo. [...] Avoiding overcrowded and poorly ventilated environments is a measure strongly recommended by official public health agencies for prevention against COVID-19. These measures also apply to the prison system, as described in official documents of the federal and state government of São Paulo.”* Considering the scenario of overcrowding in Brazilian prisons, already mentioned in this report, there is no basis to support the assertion that there is no evidence that any prison unit poses greater risks to a person’s health.

ment Recommendation 62 also represents **resistance to measures to preserve the lives of prisoners.**

Finally, the information that 62 people were released through the task force without the pandemic having been a factor supporting this result, leads to the questioning of **why, then, were these people arrested.** It is the role of the Judiciary to be constantly aware of the procedural situation of incarcerated persons and the conditions of the prison units. Art. 316 of the Code of Criminal Procedure determines that a periodical review by judges of the arrests that they decree is carried out. When it turns out that, according to the decision of the magistrates, these 62 people would have the right to freedom regardless of the COVID-19 pandemic, another question comes to life, about **how many of the nearly 760,000 people imprisoned in Brazil<sup>41</sup> would be out of prisons if judges, prosecutors, and ministers to look at their cases attentively and individually.** And, of course, in the context of the health crisis in which we find ourselves, the answer to these questions is even more urgent..

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41 According to data from SISDEPEN, available at: <https://www.gov.br/depen/ptbr/assuntos/noticias/depen-lanca-dados-do-sisdepen-do-primeiro-semester-de-2020>. Last accessed on 06/10/2021. It is worthy to notice that the Information System of the National Penitentiary Department (SISDEPEN) has some inconsistencies, since, in the link provided above, the data indicated as the total number of people incarcerated is 759,518, while in the data panel of the same System the data corresponds to 702,069 people (<https://app.powersbi.com/view?r=eYJrljoiMjU3Y2RjNjctODQzMl00YTE4LWEwMDAtZDIzNW05YmlzMzk1liwidC16ImViMDkwNDlwLTOONGMtNDNmNjU05MWWYyLTRiOGRhNmJmZTh-IMSJ9>)

A close-up photograph of a person's hand with a tattoo on the back, holding a rose. The image is overlaid with a dark blue and green gradient. The text is white and bold.

5.

**THE LACK OF  
RECOGNITION  
OF RISKS OF  
THE PANDEMIC  
FOR PRISON  
POPULATION BY  
THE INSTANCES  
OF THE JUDICIARY\_**

## 5.1 DECISIONS RENDERED BY JUDGES OF CRIMINAL COURTS IN THE FIRST INSTANCE

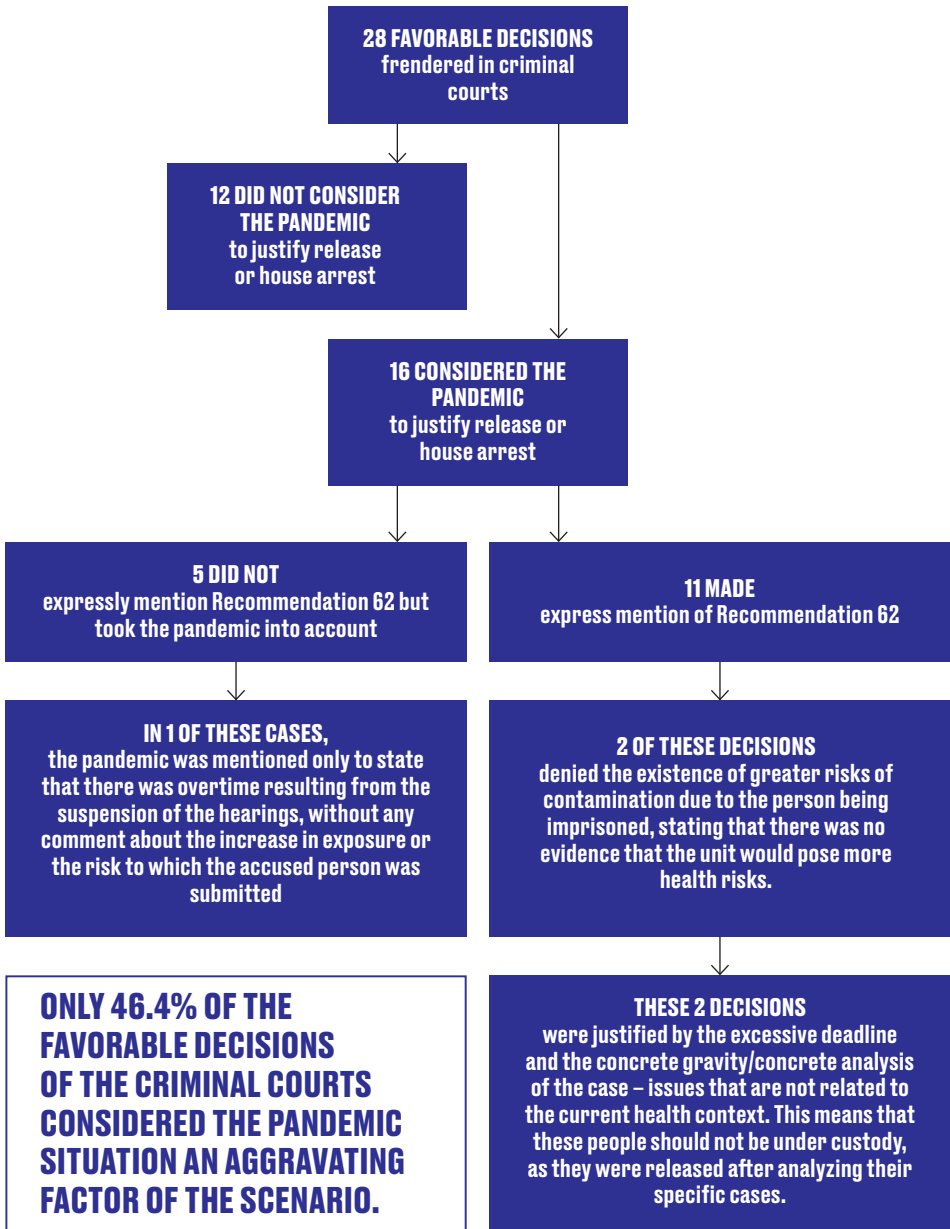
Only 57.1% of favorable decisions handed down in criminal courts took into account the pandemic. Although this rate is low, it is surprising to note that it is higher when compared to other instances - TJSP, STJ, and STF.

In addition, even in cases where there was express mention of Recommendation 62, it was observed that, in two of them, the magistrate denied the existence of greater risks of contamination because the person was imprisoned and, in both cases, they stated that there was “no evidence that the unit would pose greater risks to health”<sup>42</sup>, justifying the favorable decision due to the excess of time and the concrete gravity/concrete analysis of the case. These arguments are not related to the current health context but demonstrate that **the person should not be imprisoned considering issues related to the crime for which he was accused and the process itself.**

**Only 46.4% of favorable decisions in the courts considered the pandemic situation as an aggravating factor in the prison scenario**, to recognize the greater risk of contagion of COVID-19 in prison and the risk to life that these people, under state custody, would be exposed.

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42 According to the technical opinion issued by the Municipal Center for Hospital Infection Control (NMCIH/DVE/COVISA), regarding preventive measures and risks for the acquisition of COVID-19 in the prison system, required by IDDD to the agency and provided on May 25, 2020 [ANNEX B] - added to the requests for freedom made in this task force: *“The weakness in implementing preventive measures against COVID-19 makes the penitentiary system a high-risk environment for the spread of the disease and outbreaks of infection, with increased morbidity and mortality associated with individuals with risk factors for severe disease. On May 11, 2020, there are records of employees on leave or of prisoners isolated on suspicion or confirmation of COVID-19 in 62 of the 176 prison units in the state, or 35% of the total prisons under the responsibility of the Secretariat of Penitentiary Administration of the State of São Paulo. This condition reinforces the worsening and progression of the COVID-19 pandemic in the prison system in the State of São Paulo. [...] Avoiding overcrowded and poorly ventilated environments is a measure strongly recommended by official public health agencies for prevention against COVID-19. These measures also apply to the prison system, as described in official documents from the federal and state government of São Paulo.”* Considering the scenario of overcrowding in Brazilian prisons, already mentioned in this report, there is no basis to support the assertion that “there is a lack of evidence that the unit poses greater risks to the health” of a person.



**TABLE 3 - MOST USED ARGUMENTS IN FAVORABLE DECISIONS BY CRIMINAL COURTS<sup>43</sup>**

<b>Arguments</b>	<b>No. Mention</b>
Unjustified Overtime	16
First Defendant	13
Mention to Recommendation 62 *	11
Concrete gravity/Concrete case analysis <sup>44</sup>	11
Crime without Violence or Serious Threat	7
Pandemic *	5
Mention to the amount of drug	6
Defendant belongs to the Risk Group	5
Abstract gravity of the offense <sup>45</sup>	5

**\* Arguments related to the COVID-19 pandemic.**

Source: *COVID-19 Pandemic Task-Force: for the right to defend life*

43 To understand the created categories, refer to the glossary [ANNEX C].

44 Refer to footnote No. 33.

45 Refer to footnote No. 36.

## 5.2 DECISIONS OF THE COURT OF JUSTICE OF SÃO PAULO

In the TJSP, **the pandemic was considered in only 42.4%** of the favorable decisions analyzed rendered in this instance, but, unlike what occurred in the criminal courts, all these decisions considered that the risk of contamination by COVID 19 was aggravated due to the situation of deprivation of liberty.

However, it is also worth noting **that only six of these decisions expressly mentioned Recommendation 62**. That is, the other decisions (8) dealt with the pandemic without mentioning the CNJ document. It is also worth noting that, while in all favorable decisions the rate of direct mention of Recommendation 62 is 52.5%, in the TJSP it corresponds to 18.2%, which may indicate greater resistance by the TJSP in recognizing the legitimacy of the recommendations given by the CNJ.

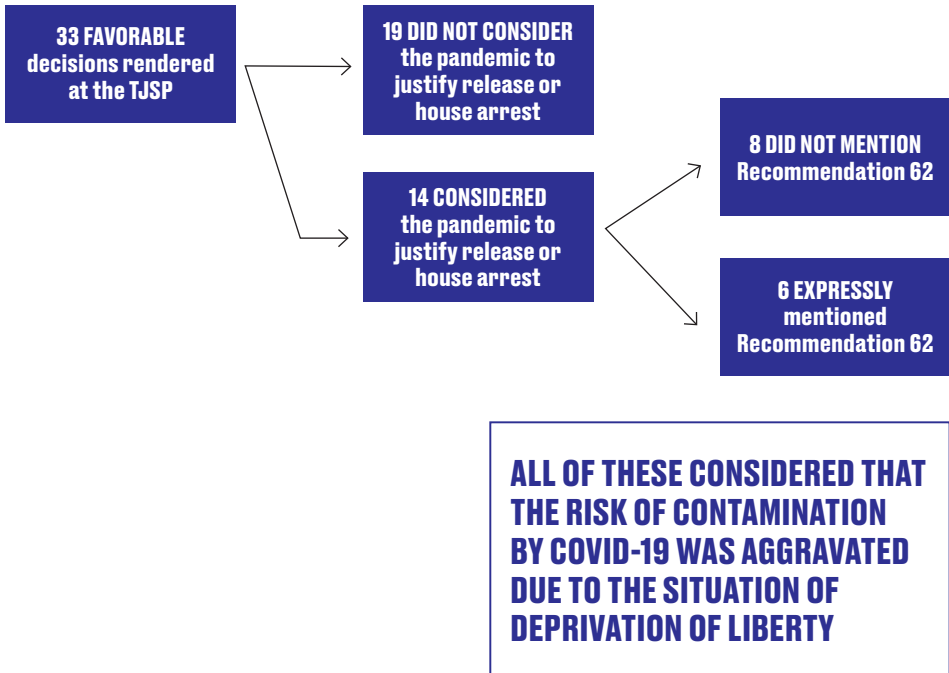


TABLE 4 - MOST USED ARGUMENTS IN THE FAVORABLE DECISIONS OF THE TJSP<sup>46</sup>

Arguments	No. Mention
Concrete gravity/Concrete case analysis <sup>47</sup>	18
First Defendant	17
Mention to the amount of drug	14
Weakness of previous decisions	11
Proportionality and Reasonableness	11
Sufficiency of Precautionary Alternatives	11
Pandemic*	8
Unjustified Overtime	8
Crime Without Violence or Serious Threat	7
Abstract gravity of the offense <sup>48</sup>	7
Mention to Recommendation No. 62*	6

**\* Arguments related to the COVID-19 pandemic.**

Source: *COVID-19 Pandemic Task-Force: for the right to defend life*

46 To understand the created categories, refer to the glossary [ANNEX C].

47 Refer to footnote No. 33.

48 Refer to footnote No. 36.



## 5.3 DECISIONS OF THE SUPERIOR COURT OF JUSTICE

**A**t the STJ, the argument of “weakness of previous decisions” was present in 69.8% of the favorable decisions rendered, which indicates that there **is recognition by the STJ that previous decisions that maintained preventive detention were poorly substantiated**<sup>49</sup>.

It is also worth noticing that the majority of favorable decisions rendered in the STJ (25 out of 53) were in the Regimental Appeal, concluding that there was flagrant illegality that would authorize the overcoming of Precedent No. 691/STF. This means that **most of the favorable decisions rendered in the STJ disagreed with a previous decision, rendered monocratically by the President of the Court, which stated that no manifested illegality would justify the granting of freedom.**

Upon examining these 25 decisions, it was found that in 24 cases (96%) the decision that brought about the filing of the Regimental Appeal was handed down by Minister João Otávio de Noronha, then President of the STJ. All these decisions handed down by the Minister, except for what appeared in his reports, are very similar. The Minister decided in all of them to defend Precedent No. 691 of the STF and affirmed the absence of manifest illegal constraint that would lead to overcoming the formal obstacle imposed by the so-called “suppression of instance”. However, there is no sign that an analysis has been carried out on the specific circumstances of the case to ascertain the presence of flagrant illegality and analyze the seriousness of the situation in which the prison is maintained. This scenario is even more alarming considering that, in the Regimental Appeal, the STJ itself identified the occurrence of manifested illegality in

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49 The various requests for release submitted to the STJ have different natures: some were made based on the rejection of a request for a preliminary injunction in habeas corpus filed with the TJSP. In these cases, when the STJ outright dismissed the habeas corpus, alleging that there was a suppression of instance, the lawyers filed an appeal to review this preliminary injunction. Some of the favorable decisions handed down by the STJ, therefore, took place amid this Appeal; others took place without the need to file an Interlocutory Appeal, when the STJ, understanding that there was flagrant illegality, overcomes the formal issue (“suppression of instance”) and grants the injunction request; and finally, some decisions were rendered in the habeas corpus judgment filed against the judgment on the merits of the TJSP, which follows the normal rite of any habeas corpus. Thus, the 53 favorable decisions rendered by the STJ are divided as follows: nine (17.0%) were rendered in an injunction of habeas corpus filed against a negative injunction in the TJSP; 25 (47.2%) were rendered in the Regimental Appeal; 14 (26.4%) were rendered in an injunction of habeas corpus filed against the TJSP’s decision on the merits, and 5 (9.4%) were rendered in judgment on the merits of the habeas corpus filed against the judgment on the merits of the TJSP

24 cases. **Therefore, the freedom of these people was delayed, who were subjected to the risk of contagion while the appeals were processed, in which, later, their freedom was granted.**

It is evident, therefore, the **lack of analysis of the concrete situation of each case** - in favor of a formal barrier -, not only because the same court subsequently recognized the existence of manifest illegality previously denied, but also because of the standardization of the decisions rendered, which points to a lack of consideration for the critical health situation, a context that, by itself, constitutes a high risk of contamination of prisoners in the context of Brazilian prisons.

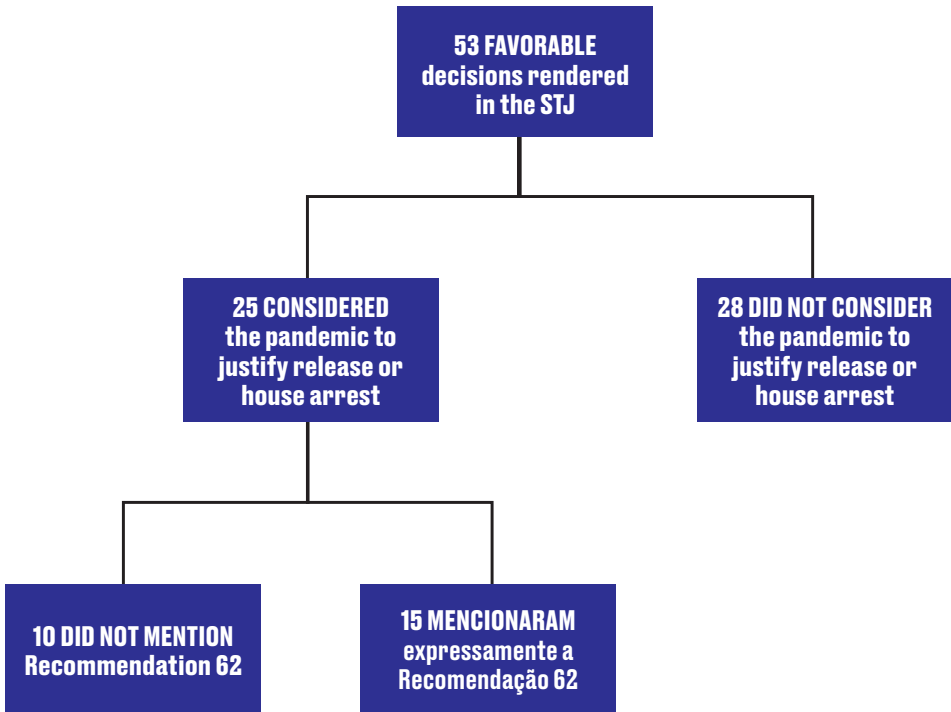


TABLE 5 - MOST USED ARGUMENTS IN FAVORABLE DECISIONS OF THE STJ<sup>50</sup>

Arguments	No. Mention
Concrete gravity/Concrete case analysis <sup>51</sup>	45
Mention to the amount of drug	39
Weakness of previous decisions	37
Sufficiency of alternative injunctions	29
Reference to Precedent 691 <sup>52</sup>	27
Proportionality and Reasonableness	17
Mention to Recommendation 62 *	15
Crime without violence or serious threat	15
First Defendant	12
Pandemic *	10

\* Arguments related to the COVID-19 pandemic

Source: COVID-19 Pandemic Task-Force: for the right to defend life

**69.8% OF THE FAVORABLE DECISIONS OF THE STJ RECOGNIZE THE FRAGILITY OF THOSE THAT WERE GIVEN PREVIOUSLY AND THAT MAINTAINED PREVENTIVE DETENTION.**

50 To understand the created categories, refer to the glossary [ANNEX C].

51 Refer to footnote No. 33.

52 Refer to footnote No. 35.

**25 FAVORABLE DECISIONS** of the STJ were in the Regimental Appeal, concluding for the existence of **flagrant illegality** that authorizes the overcoming of Precedent No. 691/STF.

**IN 24 CASES**, the decision giving rise to the filing of a Regimental Appeal was handed down by Minister João Otávio de Noronha, then president of the STJ.

**ALL OF THESE DECISIONS**, except for what appeared in their reports, are similar.

**ALL THESE DECISIONS** were questioned by lawyers in the Regimental Appeal and the STJ itself recognized in these cases the existence of manifested illegality, granting freedom, or house arrest.

**IN ALL DECISIONS** there was the following excerpt: "Under the terms of Statement No. 691 of the Precedent of the Federal Supreme Court, it is not appropriate for habeas corpus against the rejection of an injunction in another writ, except in cases of **flagrant illegality** or **teratology** of the singular decision, under penalty of undue suppression of instance." (our emphasis)

**IT IS EVIDENT, THEREFORE, THE LACK OF ANALYSIS OF THE CONCRETE SITUATION OF EACH CASE AND THE INSTRUMENTALIZATION OF A FORMAL BARRIER TO KEEP PEOPLE IMPRISONED DURING THE PANDEMIC.**

## 5.4 SUPREME COURT DECISIONS

**O**f the four cases of a favorable decision handed down by the STF<sup>53</sup>, in three the charge was for the crime of drug trafficking and in one of them was theft. That is, the four cases were crimes committed without violence or serious threat.

In the three cases of trafficking, the accused were first offenders and in two of them, the amount of drugs seized did not reach 12 grams. In these three cases, the favorable decision pointed to the weakness of the first-degree decision that decreed or decided to maintain preventive detention.

Once again, it was possible to note that **the pandemic context was not the main factor considered for favorable decisions**, since of the four cases analyzed, only in one of them there is an argument that takes into account CNJ Recommendation No. 62 and the public health situation caused by COVID-19. In the other three cases, **the pandemic was not even mentioned**.

Although the number of cases is small, it concerns the protection of the lives of four people, exposed to a very high risk of contagion within a prison unit. Considering that in three of these cases the pandemic was not the main reason for the granting of freedom, **the troubling question that is repeated is why these people were then held in prison until their cases were taken to the highest body of our justice system?** In addition to the considerably longer time taken to achieve freedom, there is also the fact that the number of cases that demand a position from the highest jurisdictional body could be drastically reduced if there were, by the lower courts, strict observance and compliance with the law, in addition to careful and qualified analysis of these cases, thus avoiding countless injustices.

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53 Because this report analyzes only the favorable decisions obtained in the task force up to January 18, 2021, the role of lawyers in several cases had not, until then, reached the STF. As a result, only four of the 118 favorable decisions were rendered in this court. Based on this amount, therefore, it is not possible to further analyze the behavior of the instance throughout 2020.

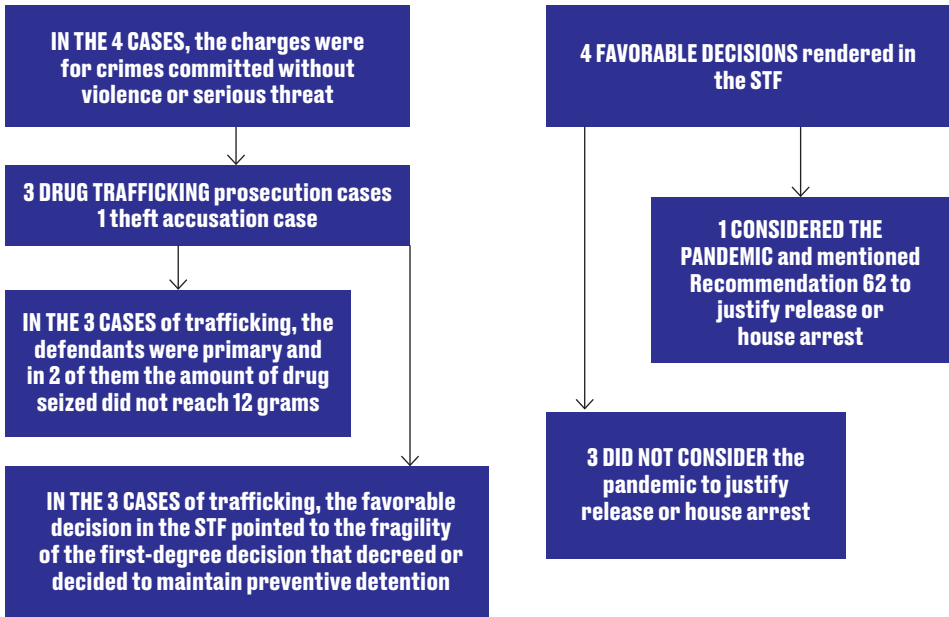


TABLE 6 - MOST USED ARGUMENTS IN FAVORABLE DECISIONS OF THE STF<sup>54</sup>

Number of mentions in decisions in the STF

Concrete gravity/Concrete analysis of the case <sup>55</sup>	4
Mention to the Precedent 691 <sup>56</sup>	3
First Defendant	3
Weakness of previous decisions	3
Mention to the amount of drug	3
The unit poses greater health risks	1
Mention to Recommendation No. 62*	1
Defendant belongs to the risk group	1
Crime without violence or serious threat	1
Proportionality and reasonableness	1
Sufficiency of injunctions alternatives	1

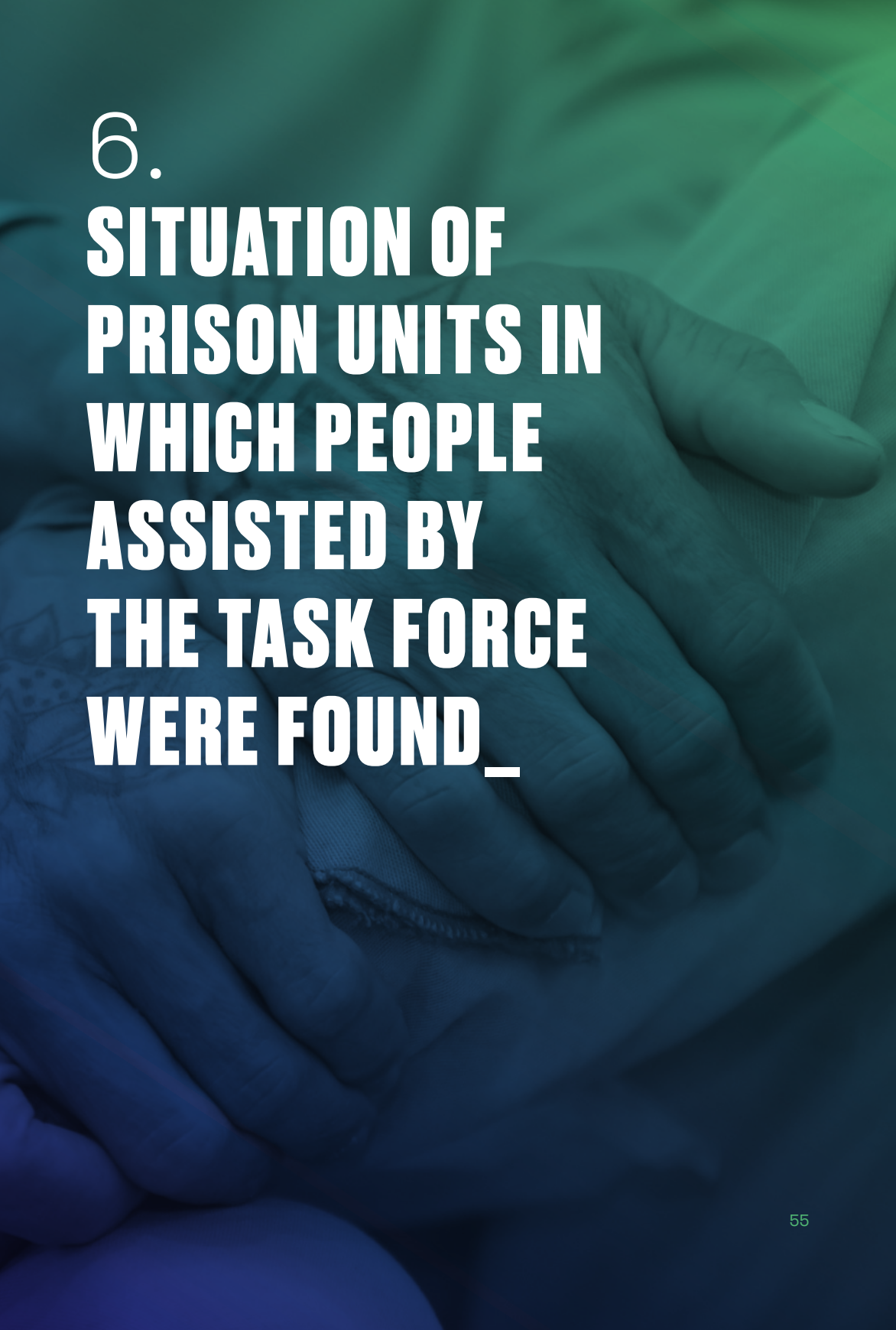
\* **Argumentos relacionados à pandemia de COVID-19.**

Source: *COVID-19 Pandemic Task-Force: for the right to defend life*

54 To understand the created categories, refer to the glossary [ANNEX C].

55 Refer to footnote No. 33.

56 Refer to footnote No. 35.



**6.**  
**SITUATION OF  
PRISON UNITS IN  
WHICH PEOPLE  
ASSISTED BY  
THE TASK FORCE  
WERE FOUND\_**

## 6.1 LACK OF COORDINATION OF PUBLIC BODIES IN PROVIDING INFORMATION

**D**uring the pandemic, there was no **standardization of official data regarding the presence of COVID-19 in prisons**, as demonstrated by the existing contradiction between data provided by different government agencies. This scenario constitutes a **strong obstacle to confronting the pandemic within the Brazilian prison system**, as well as reflecting a structural problem of lack of consistent data production and transparency on information around prisons<sup>57</sup>. Likewise, **the lack of information and transparency about the prison situation contributes to magistrates being able to express opinions and draw conclusions without any empirical foundation.**

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57 Due to these obstacles, to map the situation of the prisons in which the people assisted by the joint effort were found, different sources were used: (i) responses to requests made by IDDD based on the Access to Information Law and (ii) newsletters of the CNJ.



## 6.2 OVERVIEW

The task force operated in 26.4% of the prison units in the State of São Paulo (47 of the 178 units in São Paulo).

Doctor's office (sample: 44 units)	General practitioners (sample: 27 units)	Nurses sample: 39 units)
<ul style="list-style-type: none"><li>• 2 doctors' office: 5 units</li><li>• - 1 doctors' office: 39 units</li></ul>	<ul style="list-style-type: none"><li>• No general practitioner: 3 units</li><li>• 1 general practitioner: 15 units</li><li>• 2 general practitioner: 7 units</li><li>• 3 general practitioner: 2 units</li></ul>	<ul style="list-style-type: none"><li>• 1 nurse: 14 units</li><li>• 2 nurses: 9 units</li><li>• 3 nurses: 9 units</li><li>• 4 nurses: 5 units</li><li>• 5 nurses: 1 units</li><li>• 7 nurses: 1 units</li></ul>

## 6.3 PRISON UNITS MOST ASSISTED BY THE TASK FORCE

### > CDP “Marcos Amilton Raysaro” de Icém:

123 assisted by the task force

- Capacity: 27,2% (231 people imprisoned); this means, **IDDD was involved in the process of 53.2% of the people arrested at the ICEM CDP and won the freedom of 37.4% of the total number of people assisted.; This means, of 19,9% of the people were imprisoned in this unit.**

- 1 doctor’s office

- 1 general practitioner

- 4 nurses

- Situation concerning COVID-19: contamination of at least 36 people arrested, from March to December 2020 (data obtained via LAI).

### > Assis Penitentiary + Provisional Detention Attachment:

65 assisted by the task force

- Capacity: 106,8% (1,194 people arrested)

- 1 doctor’s office

- 1 general practitioner

- 4 nurses

- Situation concerning COVID-19: there was no news of contamination by COVID-19 from March to December 2020 (data obtained via LAI).

### > CDP by Paulo de Faria:

43 assisted by the task force

- Capacity: 115,30% (949 people imprisoned)

- 1 doctor’s office

- 1 general practitioner

- 1 nurse

- Situation concerning COVID-19: contamination of at least 10 detainees, from March to December 2020 (data obtained via LAI).

### > Penitentiary II “João Batista de Arruda Sampaio” in Itirapina:

31 assisted by the task force

- Capacity: 157,78% (2190 imprisoned people)

- 2 doctor’s offices

- 1 general practitioner
- 2 nurses
- Situation concerning COVID-19: contamination of at least 112 prisoners, from March to December 2020, and these contaminations were recorded between August and September 2020 (data obtained via LAI).

**> CDP of Sorocaba:**

25 assisted by the task force

- Capacity: 151,34% (1070 imprisoned people)
- 1 doctor's office
- 1 general practitioner
- 1 nurse
- Situation concerning COVID-19: death of one person and contamination of at least 9 detainees, from March to December 2020 (data obtained via LAI).

## 6.4 UNITS WITH THE HIGHEST NUMBER OF PEOPLE CONTAMINATED BY COVID-19 IN WHICH THE JOINT EFFORT ACTED

TABLE 7 - PRISON FACILITIES PER ASSISTED AND CONTAGION RATE

	No. of watched for the joint effort in the unit	Cases of COVID-19 (2020)	Contagion rate per population in unit <sup>58</sup>	Contagion rate per population in the municipality <sup>59</sup>
CPP Hortolândia	1	1.017	55,42%	4,24%
Penit. Sorocaba II	5	878	43,92%	4,00%
Penit. Guareí II	15	684	35,31%	11,14%
CDP. Osasco II	1	382	25,07%	3,04%
Penit. II de Serra Azul	1	318	18,68%	5,12%

Sources: Requests for Access to Information - Data on COVID-19 in the prison system during the 1st and 2nd quadrimesters of 2020 and Special COVID-19

58 Data provided by SAP via LAI. These data correspond to the number of people contaminated by COVID-19 within prisons.

59 Data obtained from: <https://brasil.io/covid19/SP/>. Last accessed on 02/03/2021. These data correspond to the number of people contaminated by COVID-19 in the municipalities where the prisons are located.

Entre essas 23 pessoas atendidas que estavam presas nas cinco penitenciárias em piores condições no que diz respeito à disseminação do coronavírus, em **apenas 11 casos foi concedida a liberdade** ou substituída a prisão preventiva por domiciliar até 18 de janeiro de 2021.

## CASE 1

**Paulo**<sup>60</sup>, a 21-year-old black man, accused of drug trafficking, was at CDP II in Osasco when his case was received by IDDD. **His freedom was denied** at the 2nd Court of Embu das Artes after a request made by IDDD and an opinion against his release by the Public Ministry. Although official data indicated that the Osasco CDP II had a contagion rate of more than 25%, as shown in the table above - more than eight times higher than that of the municipality where the CDP is located -, one of the reasons for his freedom was denied was that, in freedom, Paul would be exposed to more risks

**“Amid the public health crisis we are experiencing, the agent’s release could represent a risk to his health, considering we have no news of infected inmates in the agent’s prison.” (our emphasis)**

Paulo **was only released** in a subsequent preliminary injunction – confirmed by a decision on the merits – in a habeas corpus filed with **the TJSP**, which did not even consider the pandemic for his release.

## CASE 2

**João**<sup>61</sup>, a 19-year-old black youth, accused of **drug trafficking**, had his **freedom denied** at the 2nd Court of Itapira, after a request made by IDDD and a contrary statement by the MP. João was incarcerated in Guareí Penitentiary II, which, according to official information, had a rate of contagion per person greater than 35%, more than three times higher than the rate in the municipality of Itapira, where the penitentiary is located. The Court’s decision, although taking into account CNJ Recommendation 62, **stated that the prison system would be adequate to prevent COVID-19**. Based on an assumption and on a situation that is beyond the magistrate’s decision-making competence, the decision points out:

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60 Fictitious name.

61 Fictitious name.

**“Incidentally, an individual who does not respect Brazilian law, will also not have it because of the social isolation guidelines of the health authorities, making all efforts of the population to contain the virus unfeasible.” (our emphasis)**

João was granted **provisional release only in the STJ**, so that, despite **not having mentioned the pandemic situation**, he pointed out fragility in the decisions handed down previously.

## CASE 3

**Gustavo**<sup>62</sup>, a 36-year-old white male, accused of the crime of theft, was also in Penitentiary II in Guareí when his case was received by IDDD. In the lower court decision that kept him imprisoned, the judge **argued that there was no proof that the prison unit would pose more risks to his health** and that it had not been proven that he belonged to the risk group, ignoring the conditions of the prison unit in which Gustavo was in and Recommendation 62, which does not establish membership in a risk group as the only criterion.

**“Moreover, the hazy panorama that lies ahead should the pandemic reach the already battered prison system, but it is not justified to release those who have already been convicted and are regularly held by the state while the orderly population complies, with undeniable sacrifice, the social isolation imposed by the fear of being contaminated and contaminating others. And it would be - to say the least - rather childish to expect that many criminals, set free in these circumstances, remain meek and serene in a pleasant home retreat waiting for the pandemic to pass.” (emphasis)**

In this case, the **TJSP also kept him imprisoned and argued that COVID-19 is a risk to society** as a whole and, again, it is not known whether, released, Gustavo would respect sanitary standards. In the **STJ and STF**, the performance of IDDD encountered the same obstacles: **requests for release were denied** under similar or identical justifications.

## CASE 4

**Henrique**<sup>63</sup>, a 25-year-old white man, also accused of **drug trafficking**, had the trajectory of his process marked by decisions similar to those of Gustavo, who, passing through the Criminal Court, in the first instance, by the TJSP, STJ, and STF, **had no his escape from prison achieved during the pandemic**. In the decision rendered by the judge of the 2nd Relief Court, it was mentioned:

**“In addition, the pandemic that is plaguing the country at the moment, far from justifying the opening of cells for investigated, defendants and convicts, guides more than ever the non-movement of such incarcerated population, because even honest and law-abiding citizens are currently inmates in their homes, which happens to those who respect the law and the community voluntarily, as they comply with social isolation as a way to meet government guidelines in favor of public health.**

**Such conduct cannot be expected from those who engage in criminal activities, as is the case of the person investigated in these records, which reveals indiscipline and disregard for society.”(our emphasis)**

**Neither Gustavo nor Henrique got out of prison until January 18, 2021**, even though the charge against both concerned crimes was committed without violence or serious threat to the person and that they were detained in units with serious conditions of contamination by the coronavirus<sup>64</sup>.

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63 Fictitious name.

64 Although outside the scope of analysis of this report, the two cases were brought to exemplify the resistance of the Judiciary in recognizing the importance of adopting what is recommended by the CNJ. Just like these, there are many others, among those 330 cases that still have the work of lawyers working in this task force, in an attempt to conquer people's freedoms.

# CONCLUSION\_





**A** calamity with hundreds of thousands of dead evidence, like few historical events, the fact that survival is a product of social conditions<sup>65</sup>. This finding becomes evident in the case of people deprived of liberty, whose routines and time are radically subjected to state regulation. Today, in Brazil, we have more than 740 thousand people in this situation, and most of them – almost 219 thousand – are incarcerated in the State of São Paulo<sup>66</sup>.

The moment, therefore, demands an uncompromising commitment from the authorities with the preservation of these people's lives, which could only be achieved with environments that are minimally compatible with ensuring the health of the imprisoned population - meaning, firstly, massively expelling them and, secondly, provide access to the main methods of contagion reduction by COVID-19 (physical distance, water, personal protective equipment, among others).

All these measures are expected from the government if they were guided by ethics and responsibility for the fate of people in custody and those who work in Brazilian prisons.

Having the results of the COVID-19 Pandemic Mutirão: for the right to defend life as one of the mechanisms for monitoring the living conditions of people in prison during the health crisis, IDDD could observe that the Judiciary Branch avoided bearing its responsibility for maintenance of environments capable of ensuring the right to health and life.

In this same sense, it can be seen that the Judiciary goes hand in hand with the Executive Power by not satisfactorily adopting sanitary measures to combat the dissemination of COVID-19 in the prison system, as indicated in the publication *Requests for Access to Information - Data on COVID-19 in the prison system in the 1st and 2nd quadrimesters of 2020*, of IDDD.

If, on the one hand, CNJ Recommendation 62 demonstrated the agency's concern with the lives of incarcerated people, on the other hand, it cannot be understood solely as an achievement, as, in practice, it did not mean the guarantee of protection for people deprived of liberty, generally. **Any**

65 BUTLER, Judith. War Paintings: when is life subject to mourning? Rio de Janeiro: Ed. Civilização Brasileira, 2015, p.58.

66 56 According to data from SISDEPEN, available at: <https://app.powerbi.com/view?r=eyJrIjoiaWJUZSY2RjNjctODQzMi00OYTE4LWUwMDAtZDZlNWQ5YmIzZmZk1iIiwidWl0IjoiVjI0dWwNDlwlLWQ0NGMtNDNmNU05MUYyLTRiOGRhNmJmZThlMSJ9>. Last accessed on 6/16/2021.

**measure aimed at preserving the right to life should be observed and celebrated by the public power, and not denied and delegitimized by its representatives, as was Recommendation 62.**

If from this same Power guidelines have been issued for the virtualization of Justice, it is amazing that this concern of the body is not universal, making it explicit that certain actions to safeguard the health and, ultimately, life, are selective and intended only the part of the operators of the Criminal Justice System, deliberately excluding those arrested.

All of this also allows us to conclude that we are facing the reiteration of a historic posture of the Brazilian Judiciary, of **distancing itself from the reality of prisons**, as demonstrated by several arguments present in court decisions, listed and analyzed in this report. It is even more serious to identify that, in many cases, although the gravity of the current crisis has been recognized, the Judiciary's **option was to keep people incarcerated.**

In this context, questions are raised regarding the **role of its authorities in producing preventable deaths** during this calamity.

To these conclusions, it is essential to incorporate the fact that **it is the young, black, and low-income population that is most affected by the criminal justice system.** This shows us that the fact that prisoners are left to their own devices in Brazilian prisons during the pandemic also expresses the predominant character of state policies, which usually attribute different values to the lives of our population.

Especially during a large-scale tragedy, the State, its representatives, and its set of decisions have the primary role of contributing to determine and regulate the distribution of public mourning<sup>67</sup>, that is, to define which losses will be regretted by society and which will have a cold reaction in response. This is because the State is invested with social legitimacy and, therefore, the deaths caused by it – by action or omission – will be less likely to be seen as radically unjust and will arouse indignation.

On the opposite side, the results of the project Mutirão Pandemia COVID-19: for the right to defend life intends, through the systematization of information and documentation, **to contribute to making legible the events that occurred during the COVID-19 pandemic, giving social meaning to the illnesses and deaths, and alerting authorities** – especially those of the Judiciary – **to their responsibilities for human losses, each of which is irreparable.**

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67 BUTLER, Judith. War Paintings: when is life subject to mourning? Rio de Janeiro: Ed. Civilização Brasileira, 2015, p.66.

# ANNEXES

**ANNEX A** - [Opinion Dr. Marcos Boulos](#)

**ANNEX B** - [Technical Opinion of the Hospital Infection and Control Center \(NMCIH/DVE/COVISA\): regarding preventive measures and risks for the acquisition of COVID-19 in the prison system](#)

**ANNEX C** - [Glossary](#)

**id**  
**dd** instituto de  
defesa do  
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