



**PHIL MURPHY**  
*Governor*

**TAHESHA WAY**  
*Lt. Governor*

***State of New Jersey***  
**Office of the Public Defender**

Special Litigation Unit  
31 Clinton St., 12th Floor  
Newark, New Jersey 07102  
**Michael R. Noveck, Deputy Public Defender**  
Tel: (973) 424-8942 · Fax: (973) 877-1615

**JENNIFER N. SELLITTI**  
*Public Defender*

August 8, 2024

**Via eCourts**

Supreme Court of New Jersey  
Office of the Clerk  
Richard J. Hughes Justice Complex  
PO Box 970  
Trenton, NJ 08625-0970  
Attn: Yuri P. Albertao, Case Manager

**Re: In re Petition for Rulemaking to Amend N.J.A.C. 10A:71-3.11;  
In re Petition for Rulemaking to Amend N.J.A.C. 10A:71-3.11,  
N.J.A.C. 10A:71-2.2, and N.J.A.C. 10A:71-3.20,  
Appellate Division Docket Nos. A-000494-22, A-001180-22  
Supreme Court Docket Number 089529**

Mr. Albertao:

This Office represents all three Petitioners—Ronald Robbins, Public Defender Joseph E. Krakora, and the New Jersey Office of the Public Defender (OPD)—in the above-captioned matters.<sup>1</sup> Please accept this short letter brief, as permitted by *Rule 2:6-2(b)*, in lieu of a more formal reply brief in response to Respondent's opposition brief dated July 29, 2024.

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<sup>1</sup> Krakora was the Public Defender at the time these appeals were filed. On February 1, 2024, Jennifer N. Sellitti replaced Krakora as Public Defender.

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### ARGUMENT

Petitioners primarily rely upon the arguments set forth in their Petition for Certification. Petitioners file this Reply Brief to make three specific points in response to the opposition brief filed by the State Parole Board (SPB).<sup>2</sup>

First, the SPB argues that “N.J.A.C. 10A:71-2.2(c), when read in conjunction with the related Department of Corrections’ regulation, N.J.A.C. 10A:22-2.7, protects the due process concerns that the *Thompson* court articulated.” Rc12. The Appellate Division similarly credited the SPB’s “assurances” that N.J.A.C. 10A:22-2.7 supported the SPB’s position. Pca35. But this case is about SPB records, not DOC records—specifically, pre-parole psychological evaluations prepared by the SPB. *See* N.J.S.A. 30:4-123.54(b)(1); N.J.A.C. 10A:71-3.7(h), (i). Therefore, the DOC regulation, N.J.A.C. 10A:22-2.7, is “inapposite” and “irrelevant to the question presented in this case” because it “is located in a chapter of the Administrative Code

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<sup>2</sup> Pc – Petition for Certification. Pca – Appendix to Petition for Certification. Pa – Petitioners’ Appellate Division Appendix. Rc – Respondent’s Brief in Opposition to Petition for Certification. Rb – Respondent’s Appellate Division Brief.

concerning ‘the records of the Department of Corrections’” (and not the records of the SPB). Pc12 (quoting N.J.A.C. 10A:22-1.2). The SPB regulation, by contrast, refers disjunctively to “material . . . classified as confidential by the Board *or* the Department.” N.J.A.C. 10A:71-2.2(c) (emphasis added). Neither the SPB nor the Appellate Division has explained why N.J.A.C. 10A:22-2.7 can or should be read “in conjunction” with N.J.A.C. 10A:71-2.2(c), when the latter is the only provision of the Administrative Code that addresses the confidentiality of SPB psychological assessments. And with respect to SPB material, the regulation categorically classifies “materials concerning an offender’s medical, psychiatric or psychological history, diagnosis, treatment or evaluation” as confidential, N.J.A.C. 10A:71-2.2(a)(1), and categorically withholds such materials from people seeking parole, N.J.A.C. 10A:71-2.2(c). These categorical restrictions cannot be squared with *Thompson v. N.J. State Parole Bd.*, 210 N.J. Super. 107 (App. Div. 1986), which held that “[a] Parole Board rule or policy flatly prohibiting prisoner access to parole files would no longer be sustainable.” *Id.* at 122. This Court should therefore grant certification to resolve the inconsistency between *Thompson* and the current regulations that the Appellate Division upheld in this case. *See R. 2:12-4* (certification should be granted “if the decision under review is in conflict with any other decision of the same . . . court”).

Second, the SPB claims that “in practice, cases turning on N.J.A.C. 10A:71-2.2 have followed the procedures outlined in *Thompson*.” Rc12. The SPB’s position is based on its cramped view that *Thompson* applies only once a case is on appeal, when the Appellate Division decides whether to release records to the person who is appealing the denial of parole. *See* Rb28-29 (arguing that *Thompson* was limited to “outlin[ing] [a] procedure for the Board to follow ‘after making a parole decision adverse to the prisoner’” (quoting *Thompson*, 210 N.J. Super. at 126)). But *Thompson* also provides for “a limited right to disclosure of prison records *in parole proceedings*.” 210 N.J. Super. at 121 (emphasis added). “The appellate procedure set forth in *Thompson* therefore presupposes that the SPB has carried out its obligation to conduct ‘good faith determinations’ of whether confidential records must be withheld from the person seeking parole.” Pc14 (internal citation omitted) (quoting *Thompson*, 210 N.J. at 124). A regulation that imposes a categorical bar on the disclosure of SPB psychological evaluations in parole proceedings does not follow the procedures described in *Thompson*; rather, the SPB must in the first instance establish rules that comply with controlling law.<sup>3</sup>

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<sup>3</sup> The SPB is also incorrect to state that “the Appellate Division has consistently affirmed the Board’s decisions to withhold confidential documents.” Rc12.

Third, the SPB repeats the Appellate Division’s assertion that “there is ‘no credible evidence in the record the Board was violating the due process rights of inmates seeking parole by improperly withholding the disclosure of relevant confidential information.’” Rc12 (quoting Pca36). But the SPB, like the Appellate Division, misunderstands Petitioners’ claim. This case is not about the SPB’s “actual practices”; instead, “[t]he plain language of the rule,” which categorically requires the withholding of SPB psychological evaluations from people seeking parole, was “sufficient for the Appellate Division to reject the denial of the Petitions.” Pc11; *see also* Pc16 (“If the SPB’s rules already called for the type of case-by-case analysis required by *Thompson*, and the OPD’s objection was to the SPB’s failure to follow its own rules, then the Appellate Division’s opinion would make sense. But the very reason that the OPD filed a rulemaking petition is because the SPB’s rules do not comply with *Thompson*.”). To whatever extent a review of the SPB’s practices is necessary, the record fully supports Petitioners’ claims. The SPB itself stated that it

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Petitioners cited two recent cases in which the Appellate Division ordered release of allegedly confidential psychological reports to people appealing the denial of parole. *See W.M. v. N.J. State Parole Bd.*, Docket No. A-0072-19, 2022 N.J. Super. Unpub. LEXIS 2428, at \*4-7 (App. Div. Dec. 6, 2022); *R.M. v. N.J. State Parole Bd.*, Docket No. A-0493-20, 2022 N.J. Super. Unpub. LEXIS 2071, at \*14-15 (Nov. 9, 2022). The unpublished opinions are reproduced in Petitioners’ Appellate Division appendix, Pa52-69, and no contrary unpublished decisions are known to counsel. R. 1:36-3.

“withhold[s] mental health evaluations” from people seeking parole and releases them only if “directed pursuant to a court order” (*i.e.*, on appeal). Pa11. The OPD, and the Seton Hall Law School Center for Social Justice as amicus, have represented to the Court that in their experiences representing people appealing the denial of parole, the SPB has categorically failed to disclose psychological evaluations to the person seeking parole.<sup>4</sup> And counsel for the SPB conceded at oral argument that he is not aware of “a single instance where disclosure was granted by the Board.” Pca35.

Even now, in the SPB’s opposition brief, counsel makes no effort to represent to the Court that the SPB ever releases psychological evaluations in parole proceedings. That silence, combined with the *per se* nature of the plain language of the current rule, demonstrates that the SPB is not complying with the due process requirements set forth in *Thompson*. The SPB’s rules instead embody “the polar opposite of the document-by-document ‘good faith

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<sup>4</sup> As the SPB has explained, it provides psychological evaluations to counsel only by insisting upon “a consent protective order/agreement” that permits counsel to obtain confidential psychological evaluations only if the attorney agrees not to share, or even discuss, the contents of the document with the client. Pa11; *see also* Pb49 (citing cases). This procedure is also inconsistent with *Thompson*, which squarely rejected a proposed rule that allowed sharing confidential documents with attorneys but not their clients because “counsel cannot effectively evaluate materials purporting to report on the client without consulting the client about them.” 210 N.J. Super. at 125.

determinations’ required by *Thompson*.” Pc16 (quoting *Thompson*, 210 N.J. Super. at 124).

For the reasons described above, as well as in the Petition for Certification, the SPB’s current regulations fail to comply with the law. These deficient rules affect thousands of parole release hearings every year—matters that involve the “[l]iberty from bodily restraint [that] always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” *N.J. State Parole Bd. v. Byrne*, 93 N.J. 192, 208 (1983) (quoting *Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part))). This Petition therefore “presents a question general public importance” that calls for “an exercise of the Supreme Court’s supervision” and warrants a grant of certification. *R.* 2:12-4.

### **CONCLUSION**

For the reasons described above, as well as the reasons discussed in the Petition for Certification, Petitioners respectfully submit that the Court should grant certification in this matter.

Respectfully Submitted,

JENNIFER N. SELLITTI, Public Defender  
Attorney for Petitioners

BY: s/ Michael R. Noveck  
MICHAEL R. NOVECK  
Deputy Public Defender

Dated: August 8, 2024