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July 29, 2024

**Via eCourts**

Heather Joy Baker, Clerk  
Supreme Court of New Jersey  
Richard J. Hughes Justice Complex  
25 Market Street  
PO Box 970  
Trenton, New Jersey 08625

Re: In the Matter of Petition for Rulemaking to Amend N.J.A.C.  
10A:71-3.11 & In the Matter of 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  
Docket No. 089529  
Appellate Division Docket Nos. A-0494-22T4 & A-1180-  
22T4 (Consolidated)

On Petition for Certification to the Superior Court, Appellate  
Division

Sat Below:

Hon. Heidi Willis Currier, P.J.A.D.

Hon. Lisa A. Firko, J.A.D.

Hon. Ronald Susswein, J.A.D.

Letter Brief on Behalf of Respondent New Jersey State Parole  
Board in Opposition to Petition for Certification

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Dear Ms. Baker:

Please accept this letter brief on behalf of Respondent, New Jersey State Parole Board, in opposition to the petition for certification filed by petitioners Ronald Robbins, former Public Defender Joseph E. Krakora and the New Jersey Office of Public Defender (OPD).

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### **PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS<sup>1</sup>**

The Board relies primarily on its brief and appendix filed in the Appellate Division, and adds the following.

Petitioners seek certification of the Appellate Division's May 13, 2024 decision affirming the Board's decision to deny three petitions for rulemaking

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<sup>1</sup> Because the Procedural History and Counterstatement of Facts are closely related, they are combined to avoid repetition and for the Court's convenience.

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that sought several changes to the Board's administrative code. (Pca5-6).<sup>2</sup>

Robbins filed the initial petition for rulemaking, seeking to amend N.J.A.C. 10A:71-3.11(b) to include consideration of age-based recidivism statistics as an enumerated factor in making a parole release decision, citing the Court's decision in Acoli v. N.J. State Parole Bd., 250 N.J. 432 (2022). (Pca7-8). Krakora and the OPD filed a separate rulemaking petition seeking: 1) modification of N.J.A.C. 10A:71-3.11(b)(24) to preclude the Board from considering an inmate's youthful misconduct or otherwise treat youth as an aggravating factor in a parole release decision, citing State v. Rivera, 249 N.J. 285 (2021), which found that youth may be considered only as a mitigating factor in sentencing and cannot support an aggravating factor. (Pca9-10); 2) an amendment to N.J.A.C. 10A:71-3.11(b) requiring consideration of an inmate's advanced age in making a parole release decision, citing Acoli and Berta v. N.J. State Parole Bd., 473 N.J. Super. 284 (App. Div. 2022) (Pca10-11); and 3) modification of N.J.A.C. 10A:71-2.2 and N.J.A.C. 10A:71-3.20 to permit inmates seeking parole to have greater access to confidential psychological evaluations that the Board relies upon in making release decisions, citing

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<sup>2</sup> "Pc" refers to the petition for certification, and "Pca" refers to the appendix to the petition. "Rb" refers to the Board's Appellate Division brief, and "Ra" refers to the Board's Appellate Division appendix.

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Thompson v. N.J. State Parole Bd., 210 N.J. Super. 107 (App. Div. 1986). (Pca11-12).

On August 31, 2022, the Board denied Robbins' petition for rulemaking. (Pca8-9). The Board did not interpret Acoli to require amendment of its administrative code to include age-based recidivism statistics as a factor to be considered at a parole hearing. (Pca8). Rather, the Board interpreted Acoli to hold that, when applicable, it "shall consider an incarcerated person's advanced age as a factor in making a parole release decision." Ibid. The Board concluded that, "[t]he parole release decision remains an individualized assessment and an incarcerated person's age is not necessarily a conclusive factor in a parole release decision, but shall be considered when applicable." (Pca8-9).

On October 26, 2022, the Board denied the OPD's petition. In rejecting the request to modify N.J.A.C. 10A:71-3.11(b)(24), the Board noted that Rivera is a criminal case and does not govern parole decisions. (Pca12). The Board explained that its "determination of subsequent growth and maturity under N.J.A.C. 10A:71-3.11(b)(24) is based upon factors including the incarcerated person's prison record, including disciplinary record and program participation during incarceration following their conviction, professional evaluations, and the incarcerated person's presentation at parole hearings." Ibid.

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In rejecting the OPD's petition related to consideration of advanced age, the Board found that Acoli and Berta did not require amendment of N.J.A.C. 10A:71-3.11(b) to include advanced age as a mitigating factor in making a parole release decision, because the Board's regulations provide for a "catch-all" factor that reflects that the Board must consider all relevant factors, including those not listed among the enumerated factors. (Pca13). The Board acknowledged that, under Acoli and Berta, the Board must consider an incarcerated person's advanced age when making a parole release decision in certain cases, but also noted that these decisions do not mandate a particular age when "advanced age" must be considered. (Pca13-14).

The Board also rejected OPD's request to modify N.J.A.C. 10A:71-2.2 and N.J.A.C. 10A:71-3.20 to permit incarcerated persons seeking parole to access confidential psychological evaluations, finding that the current process of withholding mental health evaluations from an incarcerated person is consistent with Thompson and does not violate due process. (Pca14). As Thompson requires, the Board provides a basis for the withholding of a mental-health evaluation from the incarcerated person, which is part of the incarcerated person's parole file and available for the court's review. Ibid. The Board also explained that it releases mental-health evaluations as directed by court order or

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through a consent protective order or agreement as contemplated by Thompson.  
Ibid.

After the Board denied the respective petitions, Robbins and the OPD filed separate notices of appeal, which the court consolidated at the OPD's request. (Pca14).

On May 13, 2024, the Appellate Division affirmed the Board's decision denying the petitions for rulemaking. The court noted the substantial deference that it must accord to the Board in reviewing administrative rules, regulations or policy, and in reviewing the Board's interpretation of statutes and regulations "within its scope of authority and its adoption of rules implementing the laws for which it is responsible." (Citations omitted). (Pca19). The court also noted that this was not a case in which it was reviewing the text of a challenged regulation to determine "whether it properly implements legislative policy," but rather, was reviewing "an agency's decision to leave its existing regulatory text in place." (Pca20). The court found that this case also did not involve "a situation where the Board was obliged to promulgate regulations to implement a new or amended statute." Ibid. Instead, petitioners' request for revised regulations was based upon "social science research compiled by petitioners." Ibid. As the court recognized, "the narrow issue framed in this litigation is

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whether the Board acted arbitrarily, capriciously, or unreasonably in exercising its rulemaking authority by declining to incorporate social science research findings into the text of the administrative code.” (Pca20-21).

The court cited two factors supporting the Board’s denial of the age-related petitions. First, the court found that, “[a]s a general principle, policymaking based on developments in social and neurological science is best left to the legislative and executive branches.” (Pca21). The court further found that petitioners sought “to build upon a foundation of recent sentencing reforms that were predicated on scientific research on juvenile and young adult brain development.” Ibid. Noting the fundamental distinctions between sentencing and parole, the court concluded that, “[i]t is by no means certain, however, that recent changes in sentencing laws based on brain science compel analogous changes to the parole system.” (Pca21). As the court explained, there are inherent differences between imposing an initial sentence and a subsequent parole release decision, noting “the paramount goal of uniformity in sentencing is ensuring that similarly situated defendants receive comparable sentences.” (Pca22-23). In contrast, parole release decisions “do not further the goal of uniformity; rather, they entail highly individualized assessments based largely on an inmate’s personal behavior and attitude while incarcerated.” (Citations

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omitted). (Pca23). The court concluded that “given the inherent differences between sentencing and parole, petitioners’ reliance on penological differences established in sentencing cases may be misplaced, or at least overstated.” Ibid.

The court also found that Acoli and Berta did not require amendment of N.J.A.C. 10A:71-3.11(b). (Pca24-25). As the court observed, “the Acoli Court did not direct the Board to engage in rulemaking to amend the administrative code to add a factor accounting for age” and that “nothing in Berta suggests the age-recidivism correlation must be accounted for in the text of the administrative code.” (Pca25). In addition, the court emphasized that the current version of N.J.A.C. 10A:71-3.11(b) provides that the Board must consider all relevant factors, including those not listed among the enumerated factors, which would include consideration of age when relevant. (Pca26).

Regarding the OPD’s petition seeking modification of N.J.A.C. 10A:71-3.11(b)(24), the court found that the OPD’s reliance upon Rivera, which held that youth may be considered only as a mitigating factor in sentencing and cannot support an aggravating factor, was misguided due to the significant differences between sentencing and parole decisions. (Pca26-30). The court noted that the Board’s administrative code was amended in 2021 to include factor twenty-four, “which recognizes as relevant the ‘[s]ubsequent growth and



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increased maturity of the inmate during incarceration.” (Pca29). Thus, the court was “unpersuaded by petitioners’ argument that this parole factor will be misused unless it is amended to expressly and categorically preclude the Board from considering youth as an aggravating circumstance.” (Pca30). The court further noted that the OPD and amici could not “identify a single case where the Board considered an inmate’s youth inappropriately” but that if such a case ever occurred, the inmate had an available remedy of a right to appeal the Board’s decision. Ibid.

Regarding the OPD’s petition to amend N.J.A.C. 10A:71-2.2(c), which governs the Board’s release of confidential information, the OPD argued that “the Board has adopted a de facto policy to deny disclosure of confidential information in all cases” in violation of Thompson’s due process requirements, while the Board argued that its disclosure decisions comported with those requirements and were made on a case-by-case basis taking into account “whether the materials would compromise safety, security, or the orderly operation of the facility.” (Pca34-35). The court found that “there is no evidence in the sparse record before us to support or contradict either party’s claims as to what happens with respect to disclosure decisions.” (Pca35). Thus, the court concluded that, “there is no credible evidence in the record the Board

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was violating the due process rights of inmates seeking parole by improperly withholding disclosure of relevant confidential information.” (Pca36).

This petition for certification followed.

### **ARGUMENT**

#### **THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS FAIL TO SATISFY ANY OF THE GROUNDS FOR GRANTING CERTIFICATION.**

A petition for certification of a final decision of the Appellate Division will be granted only for special reasons. R. 2:12-4. Certification will be denied where the decision of the Appellate Division is essentially an application of settled principles to the facts of a case, does not present a conflict among judicial decisions requiring clarification or calling for supervision by the Supreme Court, and does not raise issues of general importance. See Fox v. Woodbridge Twp. Bd. of Educ., 98 N.J. 513, 515-16 (1985) (O’Hern, J. concurring); In re Route 280 Contract, 89 N.J. 1, 2 (1982).

Petitioners’ case satisfies none of these requirements. This case simply involves application of well-settled legal principles of agency deference and expertise to the Board’s denial of the petitions for rulemaking. The petition raises no question of general public importance because this appeal relates solely to the Board’s exercise of its considerable discretion in deciding whether to

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amend its own rules. This matter does not present a question similar to a question raised in another appeal, nor does it conflict with other decisions. And an ample record supports the Appellate Division's decision.

Petitioners argue that the Court should grant certification because the Appellate Division "misinterpreted" the Board's regulation governing confidentiality, N.J.A.C. 10A:71-2.2(c). They mistakenly claim that the plain text of the regulation provides that persons seeking parole can never access their psychological evaluations. (Pc6-7). According to petitioners, the Board's rules categorically deny a person seeking parole from accessing all such records. Ibid. Citing Thompson, petitioners argued that this is contrary to Appellate Division precedent requiring a case-by-case analysis and justification for withholding relevant materials from the parole applicant. (Pc8-10). The Appellate Division properly rejected these arguments, and so should this Court.

Petitioners claim that the evolution of N.J.A.C. 10A:71-2.1, in response to OPRA, illustrates that the Board's current regulation was intended to and does evade Thompson because N.J.A.C. 10A:71-2.2 deleted the proviso that had previously applied to limit the circumstances under which a person seeking parole could be restricted from accessing their own records. (Pc8-10). However, as discussed extensively in the Board's Appellate Division brief,

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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. (Rb27-34). For these same reasons, this Court should also reject petitioners' argument that the Board's decision to deny their rulemaking petition was an improper rejection of Thompson. (Pc8-10). As the Board argued below, in practice, cases turning on N.J.A.C. 10A:71-2.2 have followed the procedures outlined in Thompson, and the Appellate Division has consistently affirmed the Board's decisions to withhold confidential documents. (Rb8; Ra3). Notably, in the Holmes case that the Board cited in its brief below, the Appellate Division relied on Thompson and N.J.A.C. 10A:71-2.2(c), and the Board's use of a consent protective order, in denying Holmes' motion to unseal the confidential documents so that his counsel could share them with him. Ibid.

Furthermore, contrary to petitioners' argument (Pc10-12), as the Appellate Division found, there is no "credible evidence in the record the Board was violating the due process rights of inmates seeking parole by improperly withholding disclosure of relevant confidential information." (Pca36). Therefore, the Appellate Division properly affirmed the Board's denial of the petition seeking modification of N.J.A.C. 10A:71-2.2, because it was not

arbitrary, capricious or unreasonable.

Petitioners also argue that the Court should grant certification because the Appellate Division erroneously rejected their age-related petitions. (Pc16-19). However, the Court should reject this argument because the Board's decision is entitled to substantial deference, as this Court has long recognized, and because the Board did not act arbitrarily, capriciously, or unreasonably by declining to incorporate social science research findings into the text of the administrative code. (Pca20-21). In addition, as the Appellate Division held, Acoli and Berta do not require amendment of N.J.A.C. 10A:71-3.11(b) (Pca24-25), and the current version of N.J.A.C. 10A:71-3.11(b) provides that the Board must consider all relevant factors, including those not listed among the enumerated factors, which would include consideration of age when relevant. (Pca26). The court also correctly held that Rivera did not require modification of N.J.A.C. 10A:71-3.11(b)(24) due to the significant differences between sentencing and parole decisions (Pca22-23; Pca26-30), and because there was no evidence in the record to support petitioners' claim that the Board would consider an inmate's youth inappropriately. (Pca30).

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**CONCLUSION**

For these reasons, the Court should deny the petition for certification.

Respectfully submitted,

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