M.R., Plaintiff-Appellant, v. NEW JERSEY DEPARTMENT OF CORRECTIONS, Defendant-Respondent.	SUPREME COURT OF NEW JERSEY, Docket No. 089371 CRIMINAL ACTION On Petition Granted from a Final Judgment of the Superior Court of New Jersey, Appellate Division Sat Below: Hon. Allison Accurso, P.J.A.D. Hon. Francis J. Vernoia, J.A.D. Hon. Katie A. Gummer, J.A.D.

BRIEF OF PROPOSED AMICUS CURIAE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY

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PRELIMINARY STATEMENT

ACDL-NJ joins in the arguments made by the Office of the Public Defender, but writes separately to further underscore that the underlying legislative purposes of the Compassionate Release Act, N.J.S.A. 30:4-123.51e (CRA) have been undermined by the practices present in the decision made by the Department of Corrections (DOC).

The CRA uses the term "medical diagnosis" and its variants nine times throughout the statute as a general litmus test to determine a petitioner's eligibility for compassionate release. Thus, a petitioner's eligibility—as determined by the DOC—is invariably tied to the designated physicians' medical diagnoses, based on the medical evidence available to them, as to whether the petitioner either suffers from a "terminal condition" or is "permanently physically incapacitated." Though the Appellate Division accepted the DOC's argument that a medical diagnosis does not require physical examination simply because the word "physical examination" does not appear in the statute, this position neglects to engage in a plain reading of the statute. As written by the Legislature, subsection (i) of the CRA requires a petitioner to "submit to" a medical diagnosis, while subsection (j) requires the State Parole Board to "review" the medical diagnosis made under subsection (i). Neither of these subsections lend themselves to a reading of "medical diagnosis" that

permits mere "physician's review of a petitioner's already-existing medical records," nor is such a reading congruent with the overarching legislative intent expressed in the CRA. And though the Legislature could have been clearer, it is apparent that it meant that a petitioner must submit to a physical examination so that a medical diagnosis—a conclusion--can be made.

Moreover, given the CRA's clear intent to provide a more robust way to release terminally ill and permanently physically disabled people from prison, if the physicians making the medical diagnoses are allowed to base their statutory assessment on medical records alone, those medical records must (1) be in turn based on a physical examination by other licensed physicians; and (2) state with specificity the examining physicians' observations of the CRA's statutorily-listed considerations. Here, the medical records that Drs. Pomerantz and Hawes reviewed made no mention of the CRA's statutory considerations, and the designated physicians' reports further failed to document their respective rationales, methodologies, and which documents they reviewed in reaching their conclusions or "medical diagnoses." Thus, the DOC's decision to deny compassionate release to M.R., which was based on these deficient reports, was arbitrary, capricious, and unreasonable.

Indeed, it violates the very purpose of the CRA to permit two physicians, who have never seen or observed the patient, to simply "rubber-stamp" their

denial of the petition based on their cold review of the same recorded observations of a *third* examining medical professional, who was not specifically asked to document their own observations of how the petitioner's physical condition might be analyzed under the statute.

With respect, the Appellate Division's opinion below did not appreciate this point. And because that opinion is published, its well-meaning but erroneous application of the CRA will remain binding on lower courts and agencies without the Court's intervention. Accordingly, the Court should reverse the Appellate Division's opinion.

STATEMENT OF INTEREST OF AMICUS CURIAE

Proposed amicus curiae Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ) is a non-profit corporation organized under the laws of New Jersey to, among other purposes, "protect and insure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitutions; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good." Founded in 1985, ACDL-NJ has more than 500 members across New Jersey.

Our courts have found that ACDL-NJ has the special interest and expertise to serve as an amicus curiae per Rule 1:13-9 in numerous cases throughout the years, including cases related to the Compassionate Release Act. See, e.g., State v. A.M., 252 N.J. 423 (2023); State v. F.E.D., 251 N.J. 505 (2022).

Thus, ACDL-NJ has the requisite interest to participate as amicus curiae, it has complied with all deadlines, and its participation will be helpful to this Court. Accordingly, ACDL-NJ asks that its motion for leave to participate as amicus curiae be granted.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

ACDL-NJ adopts the procedural history and statement of facts as detailed in the Appellate Division's opinion, M.R. v. New Jersey Dep't of Corr., 478 N.J. Super. 377 (App. Div. 2024), as well as in the briefs filed by the Office of the Public Defender. ACDL-NJ further highlights that in the initial reports submitted by Drs. Pomerantz and Hawes, both physicians provided virtually no explanation of their respective rationales, methodology, or documents reviewed in reaching their conclusions. (Pca6-7). On remand, both physicians' reports appeared to have listed some of the symptoms that M.R. was currently suffering from, but again provided virtually no explanation of their respective rationales, methodology, or documents reviewed in reaching their conclusions. (Psca4-5).

LEGAL ARGUMENT

I. THE COMPASSIONATE RELEASE ACT'S USE OF THE TERM "MEDICAL DIAGNOSIS" POSITS THE NEED FOR A PHYSICAL EXAMINATION

Where an incarcerated person has petitioned for compassionate release, the statutory language of the CRA requires that a medical diagnosis be performed by two licensed physicians necessarily mandates that those physicians physically examine the petitioner to assess whether he or she suffers from a "terminal condition, disease, or syndrome" or "permanent physical incapacity." The specific phrasing used in subsections (i) and (j) of the CRA underscore that a petitioner is "***to submit to*** periodic medical diagnoses by a licensed physician" as required by the State Parole Board, and that the State Parole Board may request the prosecutor to return a compassionately released person to custody "***after review of*** a medical diagnosis required in subsection (i)." (emphasis added).

A plain reading of this phrasing does not permit the term "medical diagnosis" to be readily replaced by mere "review of the petitioner's medical records without further examination"; otherwise, there would be no point in requiring the petitioner's "submission" thereto, or requiring the State Parole Board to "review" this diagnosis. Though the Appellate Division briefly addressed this point in its opinion, it neglected to appreciate the full import of

this phrasing, and stopped its analysis short in simply holding that "the Legislature expressly used the phrase 'medical diagnosis,' but not 'physical examination.'" M.R., 478 N.J. Super. at 388-89.

"The goal of all statutory interpretation is 'to determine and give effect to the Legislature's intent.'" State v. Lopez-Carrera, 245 N.J. 596, 612 (2021). It is "elementary that legislation must be construed consistently with its motivating policy objectives." New Jersey Land Title Ins. Rating Bureau v. Sheeran, 151 N.J. Super. 45, 51 (App. Div. 1977) (citing State v. Gill, 47 N.J. 441, 444 (1966)). "If statutory expression is susceptible of two meanings, that meaning will be adopted which comports with the general public policy of the State as manifested by its legislation rather than that which runs counter to such policy." Houman v. Mayor and Council of Borough of Pompton Lakes, 155 N.J. Super. 129, 152 (Law Div. 1977) (citing Civ. Serv. Dep't. v. Clark, 15 N.J. 334 (1954)). This is because "public policy, once established, carries the credentials of that which is right, and in the doubtful or questionable expression, or in the imperfect statement, [courts] will presume the Legislature intended to do that which is right." Ayres v. Dauchert, 130 N.J. Super. 522, 532 (App. Div. 1974).

As the Court recognized in A.M., the Legislature's intent in passing the CRA was clear:

> With [the elimination of the statutory bar for certain crimes], ***the Legislature signaled its intent to broaden the***

> ***number of inmates who could apply for and be granted compassionate release***.
>
> Governor Phil Murphy signed the bill into law on October 19, 2020. An accompanying press release included statements from the Act's sponsors about the law's purpose. They explained that "***[b]y expanding upon what already exists we can show true compassion to those with profound medical needs***." Gov. Phil Murphy, Press Release, Governor Murphy Signs Sentencing Reform Legislation (Oct. 19, 2020) (joint statement of Assemblypersons Gary Schaer and Verlina Reynolds-Jackson). The sponsors also echoed goals the Sentencing Commission had espoused, noting that the program's "clear guidelines . . . will allow us ***to reduce [prison] capacity, and alleviate financial strains" on an "already overcrowded prison system" "while getting medically vulnerable residents the care they need outside of prison***." Ibid.
>
> Those measures and the reasons underlying them reveal that the ***CRA was designed to make greater use of compassionate release***.
>
> [A.M., 252 N.J. at 458 (emphases added)].

The State's proposed interpretation of "medical diagnosis" would permit the DOC's designated physicians to rubberstamp a denial or revocation of a petitioner's compassionate release simply by reviewing already-existing medical records that do not specifically address the considerations enumerated in the CRA, without having conducted any independent examination of their own.

But though ACDL-NJ has reviewed the State's briefs as well as the Appellate Division's opinion below, amicus can find no instance where either the State or the

panel attempted to reconcile the use of the term "medical diagnosis" elsewhere in the statute with the State's proposed interpretation. Rather, a careful review of the CRA's other uses of this term reveals that the Legislature's clear intent to require at least some sort of independent creation of new medical records (i.e., physical examinations) within the ambit of "medical diagnosis."

N.J.S.A. 30:4-123.51e(i) provides in relevant part that "as a condition of compassionate release, the State Parole Board may require an inmate ***to submit to*** periodic medical diagnoses by a licensed physician." (emphasis added). In turn, N.J.S.A. 30:4-123.51e(j) provides that the State Parole Board may request that the prosecutor initiate proceedings to return the person to confinement "[i]f, ***after review of*** a medical diagnosis required under subsection (i) of this section," the Board determines the person no longer suffers from a terminal condition or permanent physical incapacity. (emphasis added).

If the Court is to accept the State's proposed application of "medical diagnosis," it must first fundamentally ignore its own presumption that "every word in [the] statute has meaning and is not mere surplusage." Cast Art Indus., LLC v. KPMG LLP, 209 N.J. 208, 222 (2012). To wit, the Legislature's carefully-phrased instructions in subsection (i) that the incarcerated petitioner is "to submit to periodic medical diagnoses" and in subsection (j) that the State Parole Board may take action only "after review of a medical diagnosis required under subsection (i)" would have

no import if the State is correct that "medical diagnosis" can be limited to a mere review "on the papers" of the person's already-existing medical records as of the time of petition. C.f. N.J.S.A. 34:15-19 (requiring that an employee seeking a workman's compensation claim, if requested, "must ***submit himself*** for physical examination and X-ray at some reasonable time"); R. 4:19-1 (noting that an adverse party may require a plaintiff to "***submit to*** a physical or mental examination by a medical or other expert").

Indeed, the only phrases that could be substituted in for "medical diagnosis" as used throughout the CRA are "physical examination" and/or "medical testing." It would hardly make sense if subsection (i) were to require an inmate to "submit to 'a designated physician's review of the inmate's pre-existing medical records." Although the Legislature could have been clearer, a "medical diagnosis" is typically understood to be a conclusion drawn from such a study, rather than something that a petitioner could submit him or herself to. See DIAGNOSIS, Black's Law Dictionary (12th ed. 2024) ("1. The determination of a medical condition (such as a disease) by physical examination or by study of its symptoms. 2. The result of such an examination or study."). Thus, the Legislature must have intended that a petitioner "submit to" the process by which a medical diagnosis is reached, i.e. a physical examination. And "submitting to" a "medical

diagnosis" means more than a mere "review" of files, which is distinct language the Legislature used in subsection (j).

In order for a designated physician to complete the sort of holistic medical diagnosis necessary to determine whether a petitioner is eligible for compassionate release, a physical examination is necessary. This ensures that the medical diagnosis reached by the designated physicians is accurate and most advances the CRA's purposes.

II. THE COMPASSIONATE RELEASE ACT'S MEDICAL DIAGNOSIS REQUIREMENT CANNOT BE FULFILLED BY TWO PHYSICIANS SIMPLY REVIEWING THE SAME MEDICAL DIAGNOSIS ALREADY MADE BY A THIRD EXAMINING MEDICAL PROFESSIONAL.

It is plain here: the purpose of requiring the Commissioner to designate ***two*** licensed physicians rather than a single examiner is to afford the Commissioner the benefit of having two separate independent examinations and opinions based thereon when making the determination of whether to grant compassionate release to a petitioner. It would hardly serve the CRA's broader humanitarian purpose to simply have those two designated physicians review the same set of notes and observations made by other medical professionals or paraprofessionals (many of whom may not even be licensed physicians) whose observations are routinely made without consideration or knowledge of the specific considerations listed in the CRA.

Here, there is no question that Drs. Pomerantz and Hawes based their "diagnoses" based on their respective reviews of the same set of medical records that were created by third parties. Where the two designated physicians rely solely upon the same set of medical records written by the same person for diagnosing a petitioner's medical condition, this has the effect of undermining the CRA's statutory purpose of obtaining two wholly independent opinions to determine the petitioner's eligibility—in many instances, the medical records may be written in such a way that the designated physicians are unduly influenced to reach conclusions that they would otherwise be able to avoid when conducting their own medical examinations.

In the criminal prosecution context, courts often consider independent physical examinations by experts to be important tools for opposing medical records made by other expert witnesses, but continue to balance the need for such examinations with the victim's own rights to privacy and to avoid intimidation, harassment, or embarrassment.[1] C.f. State v. D.R.H., 127 N.J. 249, 256 (1992) ("In general, a defendant in a criminal case is entitled to broad discovery. R. 3:13-3. Additionally, this Court has confirmed the judiciary's inherent power to order discovery in the context of a criminal prosecution "when justice so requires.").

[1] In the context of the CRA, there is no similar concern about the petitioning examinee's interest in avoiding intimidation, harassment, or embarrassment.

Similarly, in the civil context, our court rules require that a claimant whose mental or physical condition is in controversy to submit to a mental or physical examination by medical experts. See R. 4:19-1.

Although ACDL-NJ appreciates that the cost of having the two designated physicians conduct their own independent examinations of CRA petitioners may be greater than allowing them to simply review the same set of medical records created by third party medical professionals, this misses the forest for the trees, and is incongruent with the Legislature's intent to ensure that the physicians independently and unbiasedly reach the same conclusions as to whether a petitioner is eligible for compassionate release.

Accordingly, the Court should announce a rule explicitly recognizing what was already implicitly appreciated by the Legislature: that when physicians are designated under the CRA, they may not base their conclusions simply on a "cold" review of already-existing medical records but must also supplement this with an independent physical examination of the petitioning inmate to confirm or dispel any previous hypotheses.

III. THE DOC DECISION TO DENY COMPASSIONATE RELEASE WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE INSOFAR AS IT WAS BASED UPON MEDICAL REPORTS THAT LACKED BASIC EXPLANATIONS OF THE DESIGNATED PHYSICIANS' RATIONALE, METHODOLOGY, AND DOCUMENTS REVIEWED IN REACHING THEIR CONCLUSIONS

The medical records reviewed by Drs. Pomerantz and Hawes contained absolutely no observations or estimations of how much longer M.R. had to live, whether M.R. was ambulatory, whether M.R. was able to perform basic activities of basic daily living, or whether he was in need of 24-hour care. (Pca14-39). In short, there is nothing on the face of those records that would appear to support or suggest any determination as to the CRA's statutory considerations. And because the physician reports did not support their conclusions with any specific explanations of their reasoning, review methodology, or reviewed documents, it is impossible to ascertain how and why Drs. Pomerantz and Hawes reached their conclusions for purposes of scrutinizing their decisions (decisions that were initially at odds with one another, until there was a remand). A fortiori, the agency decision based on these deficient reports cannot stand.

Where an agency's findings are "supported by substantial credible evidence in the record as a whole, we must accept them." Outland v. Bd. of Trs. of the Teachers' Pension & Annuity Fund, 326 N.J. Super. 395, 400 (App. Div. 1999). However, an agency's discretion "must be exercised in a manner that will facilitate judicial review." R&R Mktg., LLC v. Brown-Forman Corp., 158 N.J. 170, 178 (1999). As a

result, an agency "must set forth basic findings of fact, supported by the evidence and supporting the ultimate conclusions and final determination . . . ." Application of Howard Sav. Inst. of Newark, 32 N.J. 29, 52 (1960). This allows a reviewing court to "readily determine[ ]" whether the agency's decision is "sufficiently and soundly grounded or derives from arbitrary, capricious, or extralegal considerations." Ibid.

If Drs. Pomerantz and Hawes were nonetheless able to reach their conclusions with some degree of reasonable medical certainty, then they certainly should have explained so, as well as further noted how exactly they reached such conclusions. Without these requisitely specific explanations, it is impossible to determine how they concluded that M.R. did not suffer from a terminal condition or permanent physical disability. Accordingly, any agency determination based on such opaque reports is necessarily arbitrary, capricious, and unreasonable. In re Howard Sav. Inst., 32 N.J. at 52 (holding an agency "must set forth basic findings of fact, supported by the evidence and supporting the ultimate conclusions and final determination . . . ."); c.f. In re Vey, 124 N.J. 534, 543-44 (1991) (recognizing that "[a]lthough administrative agencies are entitled to discretion in making decisions, that discretion is not unbounded and must be exercised in a manner that will facilitate judicial review").

But Drs. Pomerantz and Hawes's respective reports do nothing to clarify this inexplicability. Rather, they blatantly declined or failed to explain their answers to

these important statutory questions. (Psca4-5). While Dr. Hawes appears to have copied verbatim several observations from the medical records to supplement the content of his second report, both reports are devoid of any actual mention of their respective reasoning, methodology, or documents reviewed in reaching their conclusions.

Where petitioners under the CRA are denied the ability to challenge the chains of reasoning in the examining doctors' reports because those physicians have either declined or neglected to explain such reasoning, this also deprives appellate courts of the full benefits of fulsome judicial review. Thus, agency decisions based on such deficient reports should be categorically reversed as arbitrary, capricious, and unreasonable.

IV. THE COMPASSIONATE RELEASE ACT IS DESIGNED TO ACHIEVE THE LEGISLATURE'S GOALS OF SHOWING COMPASSION TO TERMINALLY ILL INCARCERATED PERSONS AND REDUCING PRISON MEDICAL COSTS

As this Court has recognized, the CRA serves several legislative purposes by providing an expedited parole decision process for those terminally ill or physically incapacitated persons who meet two threshold requirements: (1) they are incapable of committing another crime; and (2) they may be released on conditions such that they will not pose a threat to public safety. See A.M., 252 at 457. By design, the CRA was intended to allow the State to show compassion

and ensure the dignity of those medically vulnerable incarcerated persons via this expedited process. Ibid.

But another important object of the CRA is to reduce costs to the taxpayers because housing and providing healthcare to terminally ill patients is very costly.

Across the United States, older incarcerated individuals make up the fastest growing demographic in the United States prison system. Kimberly A. Skarupski et al., The Health of America's Aging Prison Population, 40 2018 Epidem. Revs. 157 (2018). This population has grown so quickly that our prison systems have been called maximum-security nursing homes as "prisons increasingly are becoming a critical delivery site for nursing home-level care". Id. at 158. As of January 3, 2023, twenty-two percent of all incarcerated persons in New Jersey were 50 years of age and older, with four percent (514 people) between the ages of 60 and 64 years old, and an additional four percent (475 people) over the age of 65. New Jersey Department of Corrections, Population Characteristics Report, Jan. 2023 Off. of Compliance and Strategic Planning 29 (2023).

In New Jersey, the only segment of the prison population that continues to grow is that of those aged 60 and older, and there are significant problems associated with the growth of this demographic. Dana Difilippo, As New Jersey's Prison Population Grays, Calls Grow for 'Geriatric Parole', (Pa. Cap.

Star May 23, 2023), https://penncapital-star.com/criminal-justice/as-new-jerseys-prison-population-grays-calls-grow-for-geriatric-parole/ (hereinafter As New Jersey's Prison Population Grays, Calls Grow for 'Geriatric Parole'. The "graying" of the prison population places significant financial burdens upon the State. Incarceration, lack of preventative health care, and other environmental factors means that incarcerated people age more quickly, making them medically ten years older than non-incarcerated people. Margaret Holland et al., Access and Utilization of Compassionate Release in State Departments of Corrections, 26 Mortality 49, at 3 (2021).

Unfortunately, Medicare and Medicaid do not reimburse state correctional facilities for medical care,[2] and medical treatment is generally more expensive in prisons. Brie A. Williams, Rebecca L. Sudore, Robert Greifinger & R. Sean Morrison, Balancing Punishment and Compassion for Seriously Ill Prisoners, 155 Annals Internal Med. 122 (2011) ("[C]ommunity-based health care systems that provide care to far larger numbers of individuals with serious illness are generally more cost-efficient and suitable than prison-based systems. This means expanded

[2] Ibid.

compassionate release policies would likely lead to lower healthcare costs not just for prison systems but for taxpayers overall.").[3]

But when an incarcerated person receives a compassionate release, Medicare and Medicaid pays the person's medical costs, thus removing that financial strain from DOC and the taxpayers. The released parolee thus receives better care outside of prison system, while the State saves significant money from not having to provide that person housing and medical care. That money will in turn be re-invested in programs designed to keep the prison population down and thus reduce future prison spending.

Though DOC may understandably have concerns about the cost of having categorical rules where designated physicians must physically examine inmates who make petitions under the CRA or properly document their reasoning and methodology in concluding whether petitioners meet the CRA's statutory considerations, it is more important to appreciate that the lack of such rules would

[3] For example, the average annual costs for health care, transportation, and guards for 21 seriously ill patients in California prisons is $1.97 million per prisoner. Id. at 123. In 2015, state DOCs collectively spent 8.1 billion dollars on health care services, or roughly 20 percent of state prison budgets. Price, Access and Utilization at 4. Incarcerating a person in a prison medical facility is estimated to cost $60,000 per year. Ibid.

undermine the Legislature's cost-savings goals and in fact further burden DOC, who would be required to provide those petitioners around-the-clock care.

CONCLUSION

As argued above, ACDL-NJ respectfully asks the Court to reverse the Appellate Division's decision and conclude that under N.J.S.A. 30:4-123.51e, physicians designated by the DOC to make medical diagnoses of petitioning inmates must (1) conduct independent physical examinations of the petitioning inmates as a necessary supplement to their "cold" review of medical records; and (2) provide sufficient details regarding their rationale, methodology, and documents reviewed in reaching their conclusions in order to permit meaningful judicial review.

Respectfully Submitted,
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