WILLIE MITCHELL,

Appellant-Movant,

v.

NEW JERSEY STATE PAROLE BOARD,

Respondent.

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-000072-19T3

CIVIL ACTION

ON APPEAL FROM A FINAL DECISION OF THE NEW JERSEY STATE PAROLE BOARD

BRIEF AND APPENDIX OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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TABLE OF CONTENTS

TABLE OF APPENDIX

TABLE OF AUTHORITIES

CASES

RULES, STATUTES, & REGULATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Willie Mitchell has been diagnosed with paranoid schizophrenia, filed a noticed of diminished capacity prior to trial, and required "psychiatric intervention" shortly after sentencing. His most recent evaluation shows his reading and language skills are at a second-grade level. The Parole Board recognizes his developmental disabilities and what it has called his "special needs" status, knows he takes medication for schizophrenia, and was told he hears voices. Yet after 37 years of incarceration, in November 2018 the Board denied Mitchell release because his "M[ental] H[ealth] issues, coupled with his sense that people want to hurt him and he becomes assaultive, raise concerns that he would commit a crime."

By all appearances, the Parole Board has denied parole to a man with paranoid schizophrenia precisely because of his mental illness – indeed, because of the very symptoms of his diagnosis. If this is so, it is clearly unconstitutional: parole is not a substitute for civil commitment, in which the State is required to prove much more and the individual is provided robust due process protections. Yet *amicus* and indeed Mitchell himself cannot effectively challenge the Board's conclusions because the Board has deemed confidential the very materials on which it relied, including all of Mitchell's mental health evaluations. Accordingly,

before this Court can reach the merits of Mitchell's parole denial, it must remedy the due process violation the Board has committed in withholding the record.

Thompson v. Parole Board, 210 N.J. Super. 107 (App. Div. 1986), provides this Court with established procedures for reviewing the propriety of withholding documents from prisoners in parole proceedings. If, as it appears from the public record, the Board failed to justify its non-disclosure, this Court can order a remand on that failure alone. (Point I, A). But even if the Board did provide reasons, this Court must still assess their sufficiency: it is not clear why Mitchell should not be permitted to review his own mental health records as the subject of those records, especially where his "mental health issues" are cause for the parole denial. (Point I, B). Finally, that the Board will now turn over the confidential materials to appellate counsel with an attorneys-eyes-only provision does not remedy a due process violation at the agency level; it also impermissibly constrains attorney-client communications, especially as the relevant materials formed a substantial basis for the Board's decision. (Point I, C).

Separately and together, these errors warrant a remand under *Thompson*, or the exercise of this Court's original jurisdiction. Given Mitchell's "mental health issues," if the Court does order a remand, it should include instruction to the Board to permit available counsel to appear at the panel hearing as a requirement of due

process, to protect Mitchell's extraordinary liberty interest and in light of the substantial risk of error. (Point II).

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Amicus relies on the facts and procedural history set forth by appellant Willie Mitchell in his February 9, 2021 brief and appendix in support of the order to show cause and recalls the following facts for clarity:

Willie Mitchell is a 67-year-old man who has been incarcerated for 39 years. Db2.[2] Mitchell has developmental disabilities and a diagnosis of chronic schizophrenia, paranoid type, and anti-social personality disorder. Dma63, Dma65, Db5. After he committed the murder for which he is incarcerated, he turned himself in to the police immediately. Dma31. He put forward a notice of diminished capacity prior to trial and, shortly after he was sentenced, required "psychiatric intervention." Dma1, Dma65, Dma71. His most recent TABE test showed he has a second-grade level of reading, applied math, and language comprehension. Dma63.

[1] The statement of facts and procedural history have been combined for the Court's convenience.

[2] "Db" refers to Mitchell's brief in support of the Order to Show Cause, filed February 9, 2021. "Dma" refers to the appendix accompanying that brief. "1T" refers to the transcript of the two-member Panel Hearing on November 5, 2018, which Mitchell filed before this Court.

The Parole Board was well aware of Mitchell's developmental disabilities and diagnoses. The Board's 2018 Case Assessment form, prepared in advance of Mitchell's last parole hearing, states: "offender had psychiatric intervention soon after being sentenced. Offender currently on the s[pecial] n[eeds] mental health roster with prescribed medication. Diagnosed with chronic schizophrenia, paranoid type and anti-social personality d/o." Dma65.

In November 2018, a two-member panel of the Parole Board conducted a hearing in which Mitchell stated "I'm on the psychiatric care." 1T 12:6. The Board members asked only a few follow-up questions about his diagnosis and psychiatric needs:

> MS. ERDOS: Okay. So why are you taking mental health medications?
> MR. MITCHELL: Oh, like the -- the -- the psycho put me on, or what you call that doctor (indiscernible)?
> MR. JONES: Yeah.
> MS. ERDOS: Do you know why? Do you know what your diagnosis is?
> MR. MITCHELL: My di -- my diagnosis?
> MR. JONES: Yes.
> MR. MITCHELL: So what are you saying?
> MR. JONES: Do you know what they are?
> MS. ERDOS: Do you know what the mental health diagnosis is that they give you the medications for?
> MR. MITCHELL: Oh, no. I think it was -- one was some -- like Risperdal.
> MS. ERDOS: Okay, good. Yeah, that's -- that's a mental health medication.
> MR. MITCHELL: Right, Risperdal. So that -- that was like -- something like I says that I was hearing voices or something.

> MS. ERDOS: I don't know. All right, well let me ask you something. I notice that you have lots and lots of infractions.
>
> [1T 13:2-14:1.]

As should have been clear from Mitchell's medical records, Risperdal is used to treat schizophrenia, whose symptoms include "Hallucinations — imagined voices or images that seem real." National Alliance of Mental Illness, *Risperidone (Risperdal)*, https://www.nami.org/About-Mental-Illness/Treatments/Mental-Health-Medications/Types-of-Medication/Risperidone-(Risperdal) (last visited Feb. 8, 2021). Several minutes later, the Board members returned briefly to this issue:

> MS. ERDOS: Have you ever been in a psychiatric hospital?
> MR. MITCHELL: Yeah, the (indiscernible).
> MS. ERDOS: Which one?
> MR. MITCHELL: The one -- the one that Trenton Psychiatric took over, next to CRAF.
> MS. ERDOS: Oh, okay. And was that the hospital where your girlfriend worked?
> MR. MITCHELL: No, no, no, no. That's -- that's the hospital where -- where (indiscernible) and it was re -- it was a (indiscernible) and a readjustment unit.
> MS. ERDOS: Oh, okay.
> MR. MITCHELL: That's when Trenton Psychiatric took over and before -- before CRAF took over.
> MS. ERDOS: All right. So what is your plan?
>
> [1T 20:7-23.]

The hearing lasted fewer than 20 minutes. Mitchell did not have the assistance of counsel, or even of a Board representative, despite his stated mental health needs and developmental disabilities. *See generally* 1T.[3]

At the conclusion of the hearing, the panel denied Mitchell parole, concluding his "M[ental] H[ealth] issues, coupled with his sense that people want to hurt him and he becomes assaultive, raise concerns that he would commit a crime." Dma24, Dma29. They relied on "confidential material/professional report," of which neither Mitchell nor his appellate counsel have been provided even a basic summary. *Id.*; Db4, Dma58.

Upon referral for consideration of a future eligibility term (FET) beyond the presumptive 27-months for his conviction, on January 16, 2019, based on a paper review,[4] a three-member panel set a 10-year FET, nearly five times the presumptive term. Dma31, Dma35. The three-member panel faulted Mitchell for "lacking insight into your negative behavior and decision-making[,] . . . find[ing] that you distance yourself from your actions and do not acknowledge any weaknesses or deficiencies that you need to work on to improve. . . [and] that you

[3] Undersigned counsel understands Mitchell's counsel is in possession of the audio file from which the transcript was made and that the entire recording is approximately 20 minutes.

[4] To *amicus*' knowledge, the three-member panel's imposition of an FET that deviates from the presumption and the Full Board's review of appeals occur only through paper reviews. There is no opportunity for the prisoner (or counsel) to appear or make oral presentations.

do not understand the gravity or consequences of your actions." Dma35. The panel also noted that a "document classified as confidential did play a significant role in the three-member Board Panel's decision to establish a 120-month eligibility term." *Id.* The panel's written decision contains no notation of what that document was or how it impacted the decision. *Id.*

On July 31, 2019, the full Board denied Mitchell's agency appeal. Dma44. He filed a notice of appeal with this Court *pro se* and is now represented by the Office of the Public Defender. Dma39, Dma51. Before this Court, for the first time, the Board has noted in its Statement of Items Comprising the Record that four categories of material were designated "confidential to inmate and third parties": "Confidential Mental Health Records for Willie Mitchell, dated 1983-1993;" "Confidential In-Depth Psychological Evaluation, dated August 23, 2018;" "Confidential Reports Considered, dated November 5, 2018;" and "Confidential Addendum, un-dated."[5] The Board provided no further statement as to those categories or the constituent items.

[5] The Board also designated as "confidential to third parties" the adult pre-sentence report and pre-parole medical report. Mitchell does not challenge those designations before this Court and so *amicus* does not address here the propriety of confidentiality designations vis-à-vis third parties. Of course, as a general matter and under this Court's Rules, certain personal or medical information is appropriately withheld from the public record.

The ACLU-NJ filed a Motion for Leave to Appear as *Amicus Curiae* simultaneously with this brief. *R.* 1:13-9.

ARGUMENT

I. Applying *Thompson*'s procedures, this Court should order a remand or exercise its original jurisdiction because the Board failed to justify its non-disclosure of confidential documents and/or because its confidentiality designations appear to be overbroad.

Although there may be no constitutional right to parole, it is undisputed that parole release decisions must pass constitutional muster: New Jersey's statutory scheme contains an "expectancy of parole," which creates a protected liberty interest in parole release decisions and a corresponding right to due process of law. *Matter of Request to Modify Prison Sentences*, 242 N.J. 357, 385 (2020); *N.J. Parole Bd. v. Byrne*, 93 N.J. 192, 203 (1983). Thirty-five years ago, this Court recognized that among the procedural rights required to protect this liberty interest "is a limited right to disclosure of prison records in parole proceedings." *Thompson v. N.J. State Parole Bd.*, 210 N.J. Super. 107, 121 (App. Div. 1986).

In *Thompson*, the Court considered a constitutional challenge to the withholding of confidential documents from a prisoner in a parole release decision. Recognizing that the Parole Board may have legitimate reasons to withhold certain information,[6] the Court nevertheless cautioned that "prisoners are entitled not only

[6] The Court acknowledged that "[d]ecisions to withhold are made administratively in the institutions of incarceration[, not] by the Parole Board or by personnel

to reasonable standards implementing a confidentiality exception which is no broader than its lawful purpose requires, but also to good faith determinations, made pursuant to those standards, whether file materials are to be withheld." *Id.* at 123–24. Accordingly, the Court created a set of minimum procedures that the Board must undertake to comply with due process:

> When any document in a parole file is administratively removed from the prisoner's copy of the file, [the regulations] require[ ] the document to be identified as confidential and the reason for nondisclosure to be noted in the Board's file. We will require the Board, after making a parole decision adverse to the prisoner, to state in its decision whether any document marked confidential played any substantial role in producing the adverse decision, and, if so, to record in its file which of them did so. In the event of an appeal, the Attorney General will include in the Statement of Items Comprising the Record [SICR] the Board's statement on the matter, which may be worded in such a way as to effectively preserve the confidentiality of the withheld materials.
>
> If the Board states that none of the confidential materials has played any substantial role in producing the adverse decision, that will be the end of it. . . .
>
> If the Board states that confidential materials played a substantial role in producing the adverse decision in a case appealed to this court, we will undertake to review the materials and determine the propriety of the decision to withhold them. If we conclude that nondisclosure was

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directly responsible to it." *Thompson*, 210 N.J. Super. at 124. Nevertheless, the Court recognized that it could consider "the propriety of the decision to withhold" in an appeal of the Board's final agency action and could remand to the Parole Board with appropriate instruction. *Id.* at 126.

> improper, the remedy might be a remand for reconsideration without the withheld materials, a remand for reconsideration after disclosure to the prisoner of the withheld materials, or, perhaps, an exercise of our original jurisdiction. The remedy will fit the needs of the individual case.
>
> [*Id.* at 126.]

In the instant case, Mitchell challenges the Parole Board's withholding of confidential materials that played a substantial role in his parole denial. His challenge relates to two levels of withholding: from Mitchell as a *pro se* prisoner at the agency level and from appellate counsel before this Court absent his acquiescence to an attorneys-eyes-only provision. *Thompson* provides a roadmap for the Court to review that challenge. If the Board failed to follow *Thompson*'s clear procedures regarding the identification of confidential documents, and/or if the Board withheld documents that should have been disclosed, this Court must find the Board violated Mitchell's right to due process and remedy that violation before it can reach the merits of his appeal.

A. As a preliminary matter, the Board has not shown that it complied with *Thompson*'s procedures by identifying, justifying, and providing a statement of the documents withheld.

Even before this Court reviews the propriety of withholding a certain document based on its content, it must confirm the Board followed *Thompson*'s three-fold identification procedures. First, as the current regulations mandate, the

Board must identify the confidential material and note in the Board's file the reason for non-disclosure. N.J.A.C. 10A:71-2.2(c); *Thompson*, 210 N.J. Super. at 126. Second, the Board must separately record in its file which, if any, confidential documents played a substantial role in producing the adverse decision, in addition to noting that fact in its decision. *Thompson*, 210 N.J. Super. at 126. Finally, in an appeal before this Court, the SICR must include "the Board's statement on the matter." *Id.*

It is not clear the Board has complied with any of these requirements, and certainly not with the third. The SICR, filed by the Attorney General in April 2020, was the first time Mitchell was provided the slightest information about the documents used against him in the hearing a year and a half earlier. The Board has provided this Court no information that its own files include statements of reasons for non-disclosure for *each* of the documents in the four categories enumerated in the SICR, let alone a record of which of them played a substantial role in the adverse decision. *Thompson*, 210 N.J. Super at 126. Moreover, the SICR does not contain "the Board's statement on the matter." *Id.* Indeed, it does not provide even a basic summary of what the ten years of mental health records entail ("Confidential Mental Health Records for Willie Mitchell, dated 1983-1993"), nor any information about the nature of the "Confidential Reports Considered" and the

"Confidential Addendum," all of which could easily be "worded in such a way as to effectively preserve the confidentiality of the withheld materials." *Id.*

This Court has previously ordered remand under *Thompson* based on these shortcomings. In *Spillane v. N.J. State Parole Bd.*, the Court considered a "psychological evaluation," presumably akin to the "Confidential In-Depth Psychological Evaluation" at issue here. No. A-0880-15T2, 2019 WL 3194274, at *3 (App. Div. July 16, 2019).[7] The Court remanded because "[a]lthough it identified the report as confidential, the Board failed to note the reasons for nondisclosure in its decision denying appellant parole. . . [and] has not proffered any reason to justify withholding the report." *Id.* at *3–4. Similarly, the Court ordered remand in *Vasquez v. N.J. State Parole Bd.*, concluding:

> we are troubled that the Board did not articulate a reason in its files for withholding from Vasquez the confidential document on which it significantly relied in establishing the FET. When the Board declines to disclose confidential documents to an inmate, it must identify the document as confidential and also note the reason for nondisclosure in its files. N.J.A.C. 10A:71-2.2(c); *Thompson v. N.J. State Parole Bd*., 210 N.J. Super. 107, 126 (App. Div. 1986). We discern no notation in the Board's files explaining [why] it withheld the document. . . . Because the Board did not justify the

[7] Pursuant to *R.* 1:36-3, counsel includes the unpublished opinions in *Spillane* and *Vasquez* in the appendix. Counsel offers these opinions for the limited purpose of showing that panels of this Court have previously ordered remand where the Parole Board has failed to comply with *Thompso*n's procedures. Counsel is aware of no cases that are "contrary" to that limited proposition in the sense contemplated by *R.* 1:36-3.

> nondisclosure in its files, we remand the matter to the Board to comply with this requirement. Should the Board determine that disclosure is appropriate, Vasquez may review the withheld document, and the Board shall reconsider the FET.
>
> [No. A-5364-17T4, 2020 WL 5406139, at *3 (N.J. Super. Ct. App. Div. Sept. 9, 2020).][8]

If, as it appears from the limited information available to Mitchell and *amicus*, the Board (1) failed to identify each of the underlying documents withheld, including which of them played a substantial role in producing the adverse decision, (2) failed to provide a statement of reasons for non-disclosure as to each document, and/or (3) failed to provide the Board's statement on the matter in the SICR, under *Thompson* this Court should reverse on that basis alone and either remand or exercise its original jurisdiction.

B. Even if the Board did note its reasons, this Court must examine their sufficiency; in particular, the Board has not shown why Mitchell cannot review his own mental health records.

Amicus recognizes that the Board may have provided some justification for the withholding, paradoxically, in the very items that have been withheld. However, even if the Board has provided a statement of reasons, this Court must still examine their sufficiency.[9] For example, in a case in which the Board refused

[8] *See supra* note 7.

[9] Moreover, the Court must look to the proffered reasons for confidentiality provided at the agency level – *i.e.* whatever may have been "noted in the Board's

to disclose the Division of Parole Administrative Manual, the Court noted that the "cursory reasoning" justifying non-disclosure was insufficient and "the Board should have provided further explanation as to how the release of the manual would jeopardize safety or compromise investigations." *Thomas v. N.J. State Parole Bd.*, No. A-3726-16T2, 2018 WL 1748262, at *3 (App. Div. Apr. 12, 2018).[10] Where, as here, the materials played a substantial role in the adverse decision, *Thompson* suggests the Court reviews the withholding decision *de novo* inasmuch as it must examine the documents themselves. 210 N.J. Super. at 126.

Although *Thompson* recognized, as a matter of due process, "prisoners are entitled. . . to reasonable standards implementing a confidentiality exception which is no broader than its lawful purpose requires," 210 N.J. Super. at 123–24, neither *Thompson* nor subsequent case law provides a definite set of standards or criteria. In 1986, when *Thompson* was decided, N.J.A.C. 10A:71-2.1(c) required material to be disclosed "provided disclosure would not threaten the life or physical safety of

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file" back in November 2018, *Thompson*, 210 N.J. Super at 126 – regardless of how persuasive an argument for withholding counsel for the Board might make before this Court now.

[10] However, the Court concluded this was harmless error because of the "overwhelming reasons" for parole denial addressed in the rest of the opinion. *Thomas*, 2018 WL 1748262, at *3. Pursuant to *R.* 1:36-3, counsel includes this unpublished opinion in the appendix. Counsel offers this opinions for the limited purpose of showing that a panel of this Court has previously found the Parole Board's justification for non-disclosure insufficiently detailed. Counsel is aware of no cases that are "contrary" to that limited proposition in the sense contemplated by *R.* 1:36-3.

any person, interfere with law enforcement proceedings or result in the disclosure of professional diagnostic evaluations which would adversely affect the inmate's rehabilitation or the future delivery of rehabilitative services." *Thompson*, 210 N.J. Super. at 118.[11] That language was removed from the regulations thereafter. 20 N.J.R. 2129(a) (Sept. 6, 1988). Today, recodified at N.J.A.C. 10A:71-2.2, the regulations are silent as to which confidential documents may and may not be disclosed to the individual prisoner, as opposed to third parties.[12] The criteria outlined in *Thompson* are instructive, albeit subject to challenge as applied.

Because Mitchell and *amicus* do not know what the generic titles "Confidential Reports Considered" and the "Confidential Addendum" refer to,

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[11] Although the *Thompson* Court approved of those reasons, it is not clear it treated them as a required showing. In a challenge by a newspaper to the Parole Board's refusal to disclose certain records, this Court noted: "Standing alone, it is certainly less than clear that N.J.A.C. 10A:71–2.1 'define[s] a reasonable confidentiality exception no broader than the legitimate needs require.'" *Home News Pub. Co. v. State*, 224 N.J. Super. 7, 15 (App. Div. 1988) (quoting *Thompson,* 210 N.J. Super. at 124). However, it also noted in a footnote: "Interestingly, in *Thompson* [ ], we stated that N.J.A.C. 10A:71–2.1c and DOC Standard 281.8, 'considered together, create and define a reasonable confidentiality exception no broader than the legitimate needs require.'" *Id.* 15 n.6. *Home News* is one of the few published opinions discussing *Thompson* and no other has addressed the question of standards.

[12] The regulations include a list of items that must be confidential, but these clearly are broader than what must be confidential to the prisoner as opposed to third parties. For example, the regulations cite the provisions of the Open Public Records Act (OPRA). N.J.A.C. 10A:71-2.2(a). Although a document might not be subject to disclosure under OPRA *e.g.* because it includes HIPAA-protected health information, prisoners are still entitled to their medical records as the subject of those records.

they cannot effectively argue that the withholding fails these criteria. Lest the Board's decisions evade appellate challenge with such generalities, this Court must require the Board to provide further description.[13] As to the two other categories of confidential materials – "Confidential Mental Health Records for Willie Mitchell, dated 1983-1993" and "Confidential In-Depth Psychological Evaluation, dated August 23, 2018" – the public record in this case does not establish why Mitchell should not be entitled to review them. Where Mitchell's mental health was a precise reason for parole denial, it is not clear how his liberty interest can be protected without allowing him to review and address these materials. Nothing in

[13] In his brief, Mitchell notes the absence of a privilege log in this case. Db9 (quoting *Seacoast Builders Corp. v. Rutgers*, 358 N.J. Super. 524, 541 (App. Div. 2003); *R.* 4:10-2(e)). A similar tool is used in litigation under the Open Public Records Act, where the agency may be required to produce a "*Vaughn* Index . . . not only to facilitate the decision-maker's review of governmental records to determine whether they contain privileged material but also to provide the party seeking disclosure with as much information as possible to use in presenting his case." *Fisher v. Div. of Law*, 400 N.J. Super. 61, 76 (App. Div. 2008) (cautioning *in camera* review "is not ordinarily an adequate substitute for production of a proper *Vaughn* index"). To ensure *pro se* litigants can effectively challenge withheld documents, this Court should read *Thompson*'s SICR requirement to include a summary of each item along the lines of a privilege log or *Vaughn* index, "worded in such a way as to effectively preserve the confidentiality of the withheld materials." *Thompson*, 210 N.J. Super at 126. If this Court undertakes an *in camera* review in which appellate counsel is able to fully participle subject to an attorneys-eyes-only provision, *amicus* urges the Court to consider that in most appeals of the Board's decisions, prisoners must proceed *pro se*. Any broader remedy this Court might create should ensure that the process "afford[s] the party seeking disclosure the opportunity to effectively advocate its position[,]" including when that party is *pro se*. *Fisher*, 400 N.J. Super. at 76.

the present record suggests disclosure of these records to Mitchell would "threaten the life or safety of any person" or "adversely affect the inmate's rehabilitation or the future delivery of rehabilitative services." *Thompson*, 210 N.J. Super. at 118. Indeed, the first set of records is three to four decades old and the latter was prepared specifically for the purpose of parole eligibility and not as part of any ongoing therapeutic treatment.

Far from being grounded in Mitchell's individualized circumstances, the Board's withholding of mental health records and evaluations appears to be a rote practice. As undersigned counsel averred in the certification accompanying the *amicus* motion, in the ACLU-NJ's experience as direct counsel, the Department of Corrections and Parole Board appear to apply a blanket policy or practice of marking as confidential from the prisoner, *i.e.*, attorneys-eyes-only, any mental health records or evaluations.[14] That talismanic invocation of confidentiality is concerning given the liberty interest at stake.

[14] As averred in the certification, counsel for *amicus* has received prisoners' mental health records only after agreeing to treat them as attorneys-eyes-only. In counsel's experience, the consent protective agreements proposed by the Attorney General in those matters have generally included a prohibition on discussing the contents of the confidential materials with her client. *See also* Dma59 (email from Deputy Attorney General to counsel for Mitchell stating the terms of the CPO at issue are "standard" for that office). As shown by the exhibits to undersigned counsel's certification, the ACLU-NJ has generally signed consent protective agreements with attorneys-eyes-only provisions under protest, reserving the right of counsel and client to challenge these designations in court.

Published opinions from New Jersey courts undermine such blanket confidentiality assertions as the Board appears to make here: those opinions often discuss prisoners' psychological evaluations in depth and explicitly permit the disclosure of mental health evaluations and reports. For example, in the 2001 *Trantino v. N.J. State Parole Bd.* opinion, the Supreme Court devoted more than twenty-four pages to detailing a prisoner's "psychological profile," including the contents of professional reports, diagnoses, clinical testing, and treatment. 166 N.J. 113, 157-72, 183-92, *modified*, 167 N.J. 619 (2001). In *N.J. State Parole Bd. v. Cestari*, "[u]pon a full review of the case," this Court "determined that there is no current reason for this [psychologist's] report to remain confidential." 224 N.J. Super. 534, 541 n.1 (App. Div. 1988) (citing *Thompson*, 210 N.J. Super. at 116–127). So too in *McGowan v. N.J. Parole Bd.*, this Court concluded:

> While we understand and appreciate the Board's concerns, at this time we find it *more important to disclose the confidential reports so that appellant may appreciate the extent of the evidence considered* by the Board in reaching its determination. In light of the Board's intention in classifying the addenda, we find no basis for not releasing it at this time. In this opinion, we refer to several reports and evaluations contained therein.
>
> [347 N.J. Super. 544, 548 (App. Div. 2002) (emphasis added).][15]

[15] The Board had argued: "because they are evaluative, diagnostic and prognostic in nature and if released to the inmate could adversely affect the inmate's rehabilitation or future delivery of rehabilitative services. Specifically, the Panel is convinced that if these evaluations are released to the inmate, at future evaluations

Moreover, this Court has previously rejected "a blanket policy" of categorical confidentiality designations in the prison disciplinary context. In *Robles v. N.J. Dep't of Corr.*, the DOC attempted to defend a "general claim of confidentiality" regarding security camera footage. While the Court recognized the DOC may have "legitimate concern[s], we cannot approve a blanket policy of keeping confidential security camera videotapes for safety reasons." 388 N.J. Super. 516, 519 (App. Div. 2006) (quotations omitted). As the Court instructed there, if the agency believes that disclosing something would compromise institutional safety – or adversely affect the inmate's rehabilitation here – "it should explain why. In short, the *prison must develop a record regarding the need for confidentiality* of the particular videotape it relies upon and *may not simply assert generally that its disclosure would threaten security*." *Id.* at 520 (emphasis added).

Any statement by the Board that the disclosure of the confidential materials would harm institutional safety or adversely impact rehabilitation, without more, is

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the inmate would be aware of how certain responses given to certain questions presented by the examiner could impact the evaluation. The inmate, who has a history of being less than candid to the Parole Board regarding his motivation behind committing the offense and the facts of the offense, could potentially manipulate the results of the evaluation by reviewing past evaluations." *McGowan*, 347 N.J. Super. at 548. While this Court denied McGowan's initial request for disclosure of the documents, it ultimately concluded disclosure was appropriate in its merits decision.

"broader than its lawful purpose requires." *Thompson*, 210 N.J. Super. at 124. Even if the Parole Board had legitimate safety or rehabilitation concerns individualized to Mitchell, in many if not all of the withheld materials, those concerns could likely be addressed through appropriate redactions, rather than wholesale withholding – a more tailored approach that is already contemplated under the regulations. N.J.A.C. 10A:71-2.2(d).

C. The proposed attorneys-eyes-only provision on appeal does not undo the due process violation at the agency level; it also impermissibly constrains attorney-client communications, especially where the subject material is the crux of the case.

Finally, that appellate counsel can sign a consent protective order with an attorneys-eyes-only provision now to access the confidential materials, and therefore challenge their non-disclosure, does not remedy the violation at the agency level. Such an argument would be akin to saying critical errors in a suppression hearing are harmless because they can be collaterally attacked by counsel post-conviction. If the agency failed to follow *Thompson*'s procedures in its initial decision, this Court must order remand, or exercise original jurisdiction, to address those due process errors now.

Moreover, the attorneys-eyes-only provision the Attorney General has proposed – in particular, a prohibition on appellate counsel *discussing* the content

of the documents with his client – is overly burdensome.[16] Dma58-62, Db8-9, Db11-12. The impermissible constraint on attorney-client communications and counsel's ability effectively to represent his client could hardly be more glaring than in this case. Here, an uncounseled prisoner whom the Board knows has been diagnosed with paranoid schizophrenia has been denied parole, based on confidential materials, because of his "M[ental] H[ealth] issues, coupled with his sense that people want to hurt him" – in other words, because of the very fact and symptoms of his paranoid schizophrenia. Dma29. Requiring counsel to challenge this conclusion without allowing him to discuss the content of the mental health records with his own client, the patient, is fundamentally unfair, is a gag order on both lawyer and client, and deprives Mitchell of effective counsel in this appeal.

II. If this Court orders a remand, it should instruct the Board to permit counsel to appear at the panel hearing as a requirement of due process, to protect Mitchell's extraordinary liberty interest and in light of the substantial risk of error.

As the hearing transcript and Board records reveal, Mitchell is not equipped as a *pro se* prisoner living with mental illness to adequately protect his "liberty interest in freedom at the end of the parole process." *Byrne*, 93 N.J. at 208. If this

[16] In counsel for *amicus*' experience as direct counsel, these provisions are standard in the Attorney General's consent protective agreements regarding Department of Corrections and Parole Board matters. *See supra* note 14; Dma59 (email from Deputy Attorney General to counsel for Mitchell stating "the stipulations contained in the CPO are the standard stipulations, including the prohibition on sharing and discussing the contents with your client.")

Court concludes that the Board violated *Thompson*'s procedures, it is empowered to create a "remedy [that] will fit the needs of the individual case. *Thompson*, 210 N.J. Super. at 126. *Amicus* suggests that if the Court decides remand is appropriate, the needs of this individual case require the assistance of available counsel as part of that remedy, as an imperative of due process.

Byrne and its progeny establish without a doubt that Mitchell has a valid liberty interest in his parole proceedings. Where a claimant establishes a valid liberty interest, the next question is whether the challenged proceedings violate due process. At present, the Board's proceedings prohibit prisoners from having the assistance of an attorney in their panel hearing. *See* N.J. State Parole Bd., *The Parole Book* 15 (2012).[17] The Board's position appears to be that counsel can assist a prisoner only *in preparation* for parole interviews and panel hearings and *in paper filings* to the Board, and that a prisoner may of course retain counsel on appeal to this Court. However, counsel may not appear or assist in presentations at the actual release decision hearings. *See id.*; Db16. Clearly, this limitation does not constitute a right to counsel, any more than allowing counsel to prepare a defendant for trial but not stand beside him in the courtroom would satisfy *Gideon.*[18] Moreover, having counsel on appeal hardly makes the absence of

[17] Available at https://www.state.nj.us/parole/docs/AdultParoleHandbook.pdf
[18] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

counsel at the agency level harmless, especially given the standards of agency deference typically due on appeal and this Court's inability to conduct further fact finding. And if the presence of counsel may have changed the outcome at the parole hearing, resulting in an ultimate release decision, the harm is not even capable of being fully remediated because the prisoner will have remained incarcerated in the intervening time – in Mitchell's case, some 27 months.

"The requirements of due process are, of necessity, flexible, calling for such procedural protections as the situation demands." *State in Interest of D.G.W.*, 70 N.J. 488, 502 (1976). Whether the Board's denial of a right to counsel is acceptable in this situation is evaluated under the familiar three-step balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), which requires courts to weigh:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
>
> [*Id.* at 335.]

Here, the private interest is the "expectancy of parole" under the parole statute – in other words, "freedom at the end of the parole process." *Byrne*, 93 N.J. at 203, 208. Freedom from detention is the weightiest constitutional interest. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (stating that "the most elemental of

liberty interests" is "the interest in being free from physical detention by one's own government"). Moreover, prisoners' generalized "liberty interest in being free from physical restraint," *Byrne*, 93 N.J. at 210, is heightened by the particular facts here. Mitchell's liberty interest in being released from prison is enormous, particularly after more than 38 years of incarceration and given the extraordinarily long FET last imposed. Put otherwise, his interest is especially weighty because the stakes are so high: if he is erroneously denied parole this time, he will not be considered again for close to a decade.

Second, the risk of error without counsel and the value of counsel's assistance are substantial, especially given Mitchell's "mental health issues," which inhibited his ability to represent himself and formed a basis of the denial. As a general matter, counsel clearly decreases risk of error in proceedings. *See, e.g.*, *Faretta v. California*, 422 U.S. 806, 834 (1975) (recognizing "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts."). That is not limited to criminal proceedings. For example, counsel's assistance has been found especially valuable in other settings where expert reports are at issue: "Without the assistance of counsel to prepare for and participate in the hearing, the risk of an erroneous outcome is high. . . . The issues are not simple. They may involve complicated,

expert medical and psychological evidence." *In re Adoption of J.E.V.*, 226 N.J. 90, 109 (2016) (considering counsel in private adoption proceedings).

To the extent the Board's existing regulations have been found to protect against erroneous liberty deprivations, Mitchell could not avail himself of these procedural protections without the assistance of counsel given his developmental disabilities and the apparent reliance on psychological evidence. For example, the assistance of "any parole counselor or other board representative" at the hearing, N.J.A.C. 10A:71-2.11, even if one had been available (which it was not, Db18-19), would be wholly insufficient given that his mental health was at issue and given the confidentiality designations in the agency record. Analogy to the probation/parole revocation context may be instructive here. Although it found no federal due process right to counsel in all revocation cases,[19] the U.S. Supreme Court has instructed: "In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself." *Gagnon v. Scarpelli*, 411 U.S. 778, 790–91 (1973). These very concerns about capacity for self-advocacy animate Mitchell's appeal to this Court.

[19] Of course, in the revocation context, New Jersey has gone further than the federal constitutional floor and provides a "right to representation by an attorney or such other qualified person as the parolee may retain." N.J.A.C. 10A:71-7.7(c)(2); N.J.A.C. 10A:71-7.14(c)(2).

Without the assistance of counsel in Mitchell's particular case, the risk that his "mental health issues" and "sense that people want to hurt him" will be misunderstood and erroneously relied upon by the Board is all too real. Dma29. If, as it appears from the public record, the Board's basis for denying Mitchell parole and setting a ten-year FET was that his developmental disabilities and diagnoses make him unfit for release, this is an unlawful use of the parole process to obtain civil commitment, without the robust due process protections required in the commitment context. Such *de facto* civil commitment would be unconstitutional and a violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to 14.1, which prohibits discrimination on the basis of disability. *Amicus* recognizes that the Court has not yet reached these merits issues. However, if the Court orders a remand under *Thompson* before it has opportunity to consider them, it should ensure counsel can appear at the hearing to help protect Mitchell from disability discrimination or otherwise unlawful bias.

Finally, as compared to the extraordinary private interest and substantial risk of error, the government's interests here are minimal. The Board has not explained why it prohibits counsel's appearance at the hearings. Allowing the presence of counsel is clearly feasible in the correctional context, as other states permit counsel to appear at parole release hearings. *See, e.g.*, Mont. Admin. R. 20.25.401(12) (providing full right to counsel: "Offenders who appear for parole hearings may

have a representative, including an attorney, present with them."); 120 Code Mass. Reg. 303.12(2), 303.23(7) (providing right to counsel for second degree life sentences); 120 Code. Mass. Reg. 308(2)(b) (in all other cases, providing right to a "qualified individual" when there are issues of competency). Any potential State interest in efficiency or expediency would also not be significantly impeded by allowing available counsel to appear, especially where, as here, counsel is already retained and would not require any delay to become acquainted with the case. To the extent the government interest may concern institutional security or operations in allowing a civilian to enter, such an argument would be unpersuasive: civilians enter prison daily for legal visits and the provision of programming. Moreover, the current regulations allow the hearing to be conducted by videoconferencing. N.J.A.C. 10A:71-3.13(m). Indeed, even Mitchell's November 2018 hearing, before the current pandemic, appears to be virtual since the panel members place him on mute to confer before announcing their decision. 1T 22:23–23:6. To the extent the Board might object that the presence of counsel makes the process more formalized, such an argument must ring hollow where the stakes are as high as they are for Mitchell. To the contrary, the presence of available counsel would arguably further the government interest in ensuring people are not incarcerated beyond the term the Legislature and sentencing judge envisioned. *See also* Db9-11

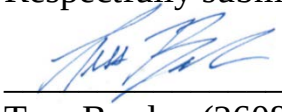
(noting similarities in practice between FETs imposed by the Board and punishment imposed at sentencing).

Given the weighty liberty interest and risk of error at stake in Mitchell's case, and the comparatively minimal government interest in preventing counsel from assisting him, should this Court order a remand, *amicus* urges the Court to instruct the Board to permit available counsel to appear at the hearing as a constitutional imperative.

CONCLUSION

For the foregoing reasons, this Court should grant Mitchell's order to show cause and reverse the decision of the Parole Board because the Board failed to follow the requirements of *State v. Thompson* and violated Mitchell's right to due process in parole proceedings. If the Court orders a remand rather than exercising its original jurisdiction, it should require the Board to permit counsel to represent Mitchell at the new hearing to protect his enormous liberty interest and avoid the otherwise substantial risk of error.

Respectfully submitted,



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Dated: February 11, 2021

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