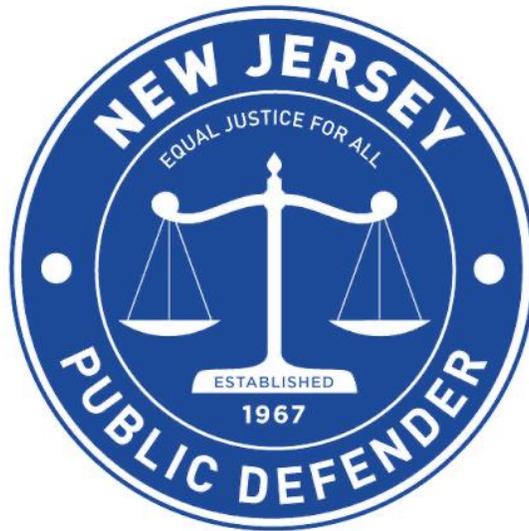


OFFICE OF THE PUBLIC DEFENDER PAROLE PROJECT



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Co-Chairs

Joseph J. Russo, Esq.
Appellate Deputy / Assistant Public Defender

Alison Perrone, Esq.
First Assistant Deputy Public Defender

Report Editor

Morgan Birck, Esq.
Assistant Deputy Public Defender

Committee Members

Morgan Birck
Appellate Section

Roberto Espinosa
Union Region

Jessica Frisina
Essex Region

Claude Heffron
Hudson Region

Alicia Hubbard
Appellate Section

Liz Jarit
Appellate Section

Ian Liberty
Passaic Region

Christine Long
Cumberland Region

Kathryn Sylvester
Conviction Integrity Unit

Lisa Waters
Union Region

Laura Yaede
Mercer Region

Committee Consultants

First Assistant Public Defender Kevin Walker
Director of Training and Communications Jennifer Sellitti

Contents

EXECUTIVE SUMMARY	1
Part I: An Overview of Parole Release in New Jersey	4
A. Parole Release Decisions	4
1. Preparation for the Hearing.....	4
2. Initial Review by a Hearing Officer.....	6
3. The Panel Hearing.....	7
4. Parole Factors.....	9
5. Future Eligibility Terms (“FETs”).....	10
6. Appeals	12
B. Data on Release Decisions	16
1. Data on All Offenses.....	16
2. Data on Pre-NERA Life Sentences.....	17
C. History of OPD Involvement in Parole Release	18
Part II: Challenges to Current Parole Practices	20
A. Confidentiality Issues.....	20
1. Background	20
2. OPD Litigation.....	23
B. Right to Counsel	25
1. Background	25
2. OPD Litigation.....	27
C. Non-Code Factors	29
1. Background	29
2. OPD Litigation.....	30
D. Age-Related Issues.....	34
1. Background	34
2. OPD Litigation.....	35
E. Ex Post Facto Claims	36
1. Background	36
2. OPD Litigation.....	38
F. Excessive Future Eligibility Terms.....	38
1. Background	38

2. OPD Litigation.....	40
Note.....	41
Part III: Additional Action Steps to Improve the System of Parole	42
A. Administrative Actions	42
1. Propose amendments to limit the length of FET extensions.....	42
2. Propose amendments to limit the use of non-Code factors not based in science or law	42
3. Propose Amendments to Remove the Use of Risk Assessment Tools	43
4. Propose the creation of a “Racial Impact” committee	44
B. Legislative Actions	45
1. Guarantee Applicants’ Rights to Counsel.....	45
2. Expand the OPD Enabling Statute.....	46
3. Guarantee Applicants’ Rights to Confidential Materials.....	47
4. Provide Notification to the Applicant’s Attorney and Family.....	49
CONCLUSION	50

INDEX OF EXHIBITS

- Exhibit A – Certification of Joseph J. Russo and Parole Data
- Exhibit B – Initial Parole Hearing Process Chart
- Exhibit C – Parole Data regarding Parole Release
- Exhibit D – Mitchell v. New Jersey State Parole Board
- Exhibit E – Pujols v. New Jersey State Parole Board
- Exhibit F – Farrell v. New Jersey State Parole Board

EXECUTIVE SUMMARY

The parole release process in New Jersey is fatally flawed. After years, sometimes decades, in prison, parole applicants are thrust in front of the Parole Board to advocate for themselves with no representative. Often, the applicant has no idea that they have the right to a parole counselor or representative from the Board to help them prepare for the hearing. The applicant is confronted with only some of the evidence that is used against him; anything the Board deems “confidential” is withheld, and the applicant is unable to rebut this evidence. Even if the applicant hires an attorney for his appeal, he is still unable to see the evidence or talk about it with his attorney. If the applicant is indigent, he will not get an attorney at any stage of the process, including his appeals.

At the hearing, the Board may claim the applicant “lacks insight into his criminal thinking.” The Board is not required to explain what insight means or what it means to lack it. Nor must the Board explain how this insight is relevant to whether the applicant is likely to recidivate. The Board may use a risk assessment tool that lacks validity to support its denial of parole. It may use psychological reports hidden from all but the Board, and victim impact statements the applicant cannot see. And then, once it has denied parole, the Board can decide to keep the applicant in prison for as long as it wishes, without limit. The essentially unrestricted discretion the Board has been given—and takes full advantage of—is rarely questioned by New Jersey courts. This has created a system with little oversight, little due process, and manifest injustice. Essentially, “when it comes to the due process protections afforded to defendants at sentencing and to prisoners at parole, defendants at

sentencing get modern due process rights, while prisoners at parole get barely a horse-and-buggy.”¹

A public defender’s duty to present mitigation and zealously advocate for her clients does not end at sentencing. The Office of the Public Defender (OPD), in recognition of this duty, has for thirty years occasionally assisted current and former clients in the parole release process. In large part due to serious concerns expressed for years by OPD attorneys over parole denials occurring without broader OPD input and representation, and Appellate Division opinions affirming, with de minimus analysis, the parole denials of pro-se litigants, a committee of attorneys within the OPD created the Parole Project in 2020.

Through Open Public Records Act (OPRA) requests by the Project, we now know with certainty some of the harshest consequences imposed on our clients due to the lack of representation at all stages of the parole process. The Parole Board consistently fails to uphold its mandate to release parole-eligible applicants. The result is that our clients remain behind bars beyond what the sentencing judge in their case anticipated, sometimes exceeding the initial sentence itself.²

This 2021 Parole Project Report updates the 2020 report with new developments including OPD challenges to the parole system and representation of clients in parole release appeals, additional information gathered regarding the parole process, and further

¹ Kimberly Thomas & Paul Reingold, From Grace to Grids: Rethinking Due Process Protection for Parole, 107 J. Crim. L. & Criminology 213, 214 (2017).

² Exhibit A, Parole Data.

data collected as part of the Parole Project.³ Part I of this report provides an overview of the parole release process. Part II details glaring problems in the parole release process and current OPD litigation challenging those problems. Finally, Part III provides the Committee's renewed conclusions for legislative and administrative actions the OPD should pursue to ensure meaningful change in the parole process.

³ This report focuses exclusively on the parole release process because the OPD, under current legislation, is unable to represent parolees in the parole revocation process.

Part I: An Overview of Parole Release in New Jersey

This section provides an overview of the parole release process in New Jersey, from preparation to appealing Parole Board decisions.⁴ This section also provides data concerning parole release decisions collected as part of the Parole Project’s Open Public Records Act (“OPRA”) subcommittee, as well as an overview of the OPD’s involvement in parole.

A. Parole Release Decisions

1. Preparation for the Hearing

About four to six months before an applicant’s parole eligibility date (“PED”), the parole applicant must meet with a parole counselor to discuss his or her parole plan, including housing, employment, etc.⁵ The counselor then prepares a report, which must contain: (a) pre-incarceration records of the applicant; (b) any charges suspended due to the individual’s lack of competency and any acquittals by reason of insanity; (c) records of the applicant’s conduct during the current period of confinement; (d) a complete report on the applicant’s social and physical condition; (e) the individual’s parole plans; and (f) any other information bearing upon the likelihood that the applicant will commit another crime

⁴ See Exhibit B for a graphic illustration of the process.

⁵ N.J.S.A. 30:4-123.54(a).

upon release.⁶ The report must be filed 120 to 180 days prior to the parole hearing.⁷ The applicant receives a copy of that report, but any information classified as “confidential” is redacted or removed.⁸

In addition, an objective risk assessment must be completed by parole staff or some other “appropriate agent.”⁹ The purpose of the objective risk assessment is to “assist the Board panel in determining whether the inmate shall be certified for parole and, if paroled, the level of supervision the parolee may require.”¹⁰ The risk assessment must take into account static and dynamic factors using the information provided in the counselor’s report, as well as the following: (a) evaluations of the applicant’s ability to function independently; (b) the applicant’s educational and employment background; (c) the applicant’s family and marital history; and (d) “such other information and factors as the board may deem appropriate and necessary.”¹¹

⁶ New Jersey State Parole Board, The Parole Book 13 (2012), available at: <https://www.state.nj.us/parole/docs/AdultParoleHandbook.pdf>; N.J.S.A. 30:4-123.54(b).

⁷ N.J.S.A. 30:4-123.54(a).

⁸ N.J.S.A. 30:4-123.54(c).

⁹ N.J.S.A. 30:4-123.52(e); see also A Brief Overview of the Parole Process in New Jersey, at 1 (Feb. 2002), available at: <https://www.state.nj.us/parole/docs/ParoleProcess.pdf>.

¹⁰ N.J.S.A. 30:4-123.52(e).

¹¹ Id.

2. Initial Review by a Hearing Officer

Once the parole report is prepared and the risk assessment completed, a hearing officer (who is a member of the Board) conducts a review of the applicant's case.¹² The hearing officer may meet with the applicant or may simply review the written materials.¹³ The hearing officer considers the pre-parole report, the risk assessment, and the applicant's statement.¹⁴

If the hearing officer determines that there is no reason to deny parole, the officer will recommend release and send this recommendation to a panel of two Board members for a recommendation review. If the hearing officer determines that there is a basis for denial or that additional information needs to be developed at a hearing, the officer will refer the case to a panel of two Board members for a panel hearing.¹⁵

When parole is recommended, one or two Board members will review that decision on the papers. If the Board member(s) agree with the hearing officer, no further hearing is necessary and the member(s) will "certify parole release . . . as soon as practicable after the eligibility date and so notify the applicant and the board."¹⁶ If the Board member(s)

¹² N.J.S.A. 30:4-123.55(a); A Brief Overview of the Parole Process in New Jersey, *supra* note 9, at 2; The Parole Book, *supra* note 5, at 13.

¹³ The Parole Book, *supra* note 6, at 13-14.

¹⁴ N.J.S.A. 30:4-123.55(a).

¹⁵ Id.

¹⁶ N.J.S.A. 30:4-123.55(b).

disagree with the hearing officer’s recommendation of release, the member(s) will refer the case to a panel of two Board members for a panel hearing.

If the applicant is serving time for certain violent offenses, the case must be referred to a panel hearing, even if the hearing officer recommends release.¹⁷

3. The Panel Hearing

The panel hearing occurs no less than 30 days prior to the PED.¹⁸ Typically, two members of the Parole Board form a panel. Panels hear an average of ten or 12 cases a day inside the prisons. The parole applicant appears before the panel, but counsel is neither provided nor permitted to be present.¹⁹ However, the Code does give applicants the right to a “parole counselor or other Board representative . . . to assist inmates on all parole procedures, including any appearances before a hearing officer, Board panel, or the

¹⁷ N.J.S.A. 30:4-123.55(c).

¹⁸ N.J.S.A. 30:4-123.55(c).

¹⁹ The Parole Book, *supra* note 6, at 15; Puchalski v. New Jersey State Parole Board, 55 N.J. 113, 115 (1969). Note, however, that Puchalski was decided ten years prior to the 1979 Parole Act, under which our Supreme Court has held there is a protected liberty interest. There are no published cases this Committee has found that contain an in-depth discussion of the right to counsel under the 1979 Parole Act, but subsequent cases have simply held that counsel is not required. See, e.g., In re Request to Modify Prison Sentences, Expedite Parole Hearings, & Identify Vulnerable Prisoners, 242 N.J. 357, 387 (2020) (“In re Request to Modify”) (“Under the circumstances, a full-blown set of procedural protections—an adversarial hearing with counsel and a detailed statement of reasons—is not required.”).

Board.”²⁰ The panel hearings can be in person, although they are generally held through video conferencing.²¹

At the hearing, the Board panel makes their decision under two applicable standards. For offenses committed prior to August 19, 1997, to deny parole, the Board panel must find by a preponderance of the evidence that there is a substantial likelihood the individual will commit a crime if released on parole. For offenses committed on or after August 19, 1997, to deny parole, the Board panel must find by a preponderance of the evidence that the individual has failed to cooperate in their rehabilitation, or that there is a reasonable expectation that the individual will violate conditions of parole if released.²²

Following the panel hearing, the Board panel has the option to: (1) grant parole and set a parole release date; (2) establish a “no earlier than” release date, requiring the applicant to meet certain pre-release conditions in the interim; (3) deny parole and set a

²⁰ N.J.A.C. 10A:71-2.11. There is no published case law that discusses whether the applicant is entitled to have this counselor or representative be present at the initial hearing. Cf. Madrigal v. New Jersey State Parole Board, No. A-3359-18T4, 2021 N.J. Super. Unpub. LEXIS 144, at *8 (App. Div. Jan. 27, 2021) (“[T]he applicable regulation requires appellant to be provided with assistance from a Board representative, N.J.A.C. 10A:71-3.13(g), but it does not specify that assistance be provided at the hearing. It is only required that general assistance and advice be provided during the parole process, which occurred here.”); Matos v. New Jersey State Parole Board, No. A-2179-17T2, 2019 N.J. Super. Unpub. LEXIS 349, at *10 (App. Div. Feb. 1, 2019) (“[N]either the regulations nor the Federal or State Constitutions require the Board to provide a representative to appear on the inmate’s behalf at an initial parole eligibility hearing.”).

²¹ New Jersey Department of Corrections, “Video Teleconferencing Program Overview,” available at: https://www.state.nj.us/corrections/pdf/vtc_information/VTC_Overview.pdf; New Jersey Department of Corrections, “Videoconference Uses,” available at: https://www.state.nj.us/corrections/pdf/vtc_information/VTC_Uses.pdf.

²² N.J.A.C. 10A:71-4.1.

future eligibility term (“FET”); (4) deny parole and refer the case to a three-member Board panel to establish a FET beyond the presumptive term; (5) refer the case to a third Board member if the two-member panel cannot agree; or (6) defer for future information.²³

4. Parole Factors

To evaluate parole eligibility under either the 1979 or 1997 standard, the Administrative Code requires the Board to consider 24 regulatory factors and “any other factors deemed relevant” (“release factors”).²⁴ Among the release factors are whether the

²³ The Parole Book, *supra* note 6, at 16.

²⁴ See N.J.A.C. 10A:71-3.11; The Parole Book, *supra* note 6, at 4. The 24 factors the Board may consider are as follows:

- (1) commission of a crime while incarcerated;
- (2) commission of serious institutional disciplinary infractions;
- (3) nature and pattern of previous convictions;
- (4) adjustment to previous probation, parole and incarceration;
- (5) facts and circumstances of current offense;
- (6) aggravating and mitigating factors of the offense;
- (7) pattern of less serious institutional disciplinary infractions;
- (8) participation in institutional programs which could have led to the improvement of problems diagnosed at admission or during incarceration. This includes, but is not limited to, participation in substance abuse programs, academic or vocational education programs, work assignments that provide on-the-job training and individual or group counseling;
- (9) statements by institutional staff, with supporting documentation, that the inmate is likely to commit a crime if released; that the inmate has failed to cooperate in his or her own rehabilitation; or that there is a reasonable expectation that the inmate will violate conditions of parole;
- (10) documented pattern of relationships with institutional staff or inmates;
- (11) documented changes in attitude toward self or others;
- (12) documentation reflecting personal goals, personal strengths, or motivation for law-abiding behavior;
- (13) mental and emotional health;
- (14) parole plans and the investigation thereof;
- (15) status of family and marital relationships at the time of eligibility;
- (16) availability of community resources or support services for inmates who have a demonstrated need for same;

applicant has committed a crime or received disciplinary infractions while incarcerated, the nature and pattern of his prior convictions, and whether the applicant has previously responded well to probation, parole, or incarceration. In practice, the Board often denies parole in reliance on non-Code factors, commonly: (a) lack of insight and/or remorse; (b) insufficient problem resolution; and (c) incarceration on multiple offenses.

5. Future Eligibility Terms (“FETs”)

The Administrative Code provides guidelines for the Parole Board to follow when determining a FET,²⁵ also referred to as a “hit.”²⁶ The Code establishes presumptive terms,²⁷ which extend how much time the applicant must serve until he or she is reconsidered for parole release.²⁸ The presumptive terms may be increased or decreased by

(17) statements by an adult inmate reflecting on the likelihood that he or she would commit a crime if released; the failure to cooperate in his or her own rehabilitation; or the reasonable expectation that he or she will violate conditions of parole;

(18) history of employment, education and military service;

(19) Family and marital history;

(20) statement by the court reflecting the reasons for the sentence imposed;

(21) statements or evidence presented by the appropriate Prosecutor's Office, the Office of the Attorney General or any other criminal justice agency;

(22) statements or testimony of any victim or the nearest relative of a murder/manslaughter victim;

(23) the results of the objective risk assessment instrument; and

(24) subsequent growth and increased maturity of the inmate during incarceration.

²⁵ N.J.A.C. 10A:71-3.21.

²⁶ The Parole Book, supra note 6, at 16. There is a different FET schedule for offenses committed while paroled. See id. at 52.

²⁷ Id. at 49.

²⁸ N.J.A.C. 10A:71-3.21(a) (“Upon determining to deny parole to a prison inmate, a two-member adult Board panel shall, based upon the following schedule, establish a future parole eligibility date upon which the inmate shall be primarily eligible for parole.”).

nine months if it is the panel's opinion that "the severity of the crime for which the applicant was denied parole and the prior criminal record or other characteristics of the applicant warrant such adjustment."²⁹

If a two-member Board panel wishes to set a FET beyond the presumptive term, then it must refer the case to a third panel member for consideration.³⁰ A three-member Board panel can reject the presumptive terms and extend parole eligibility for however long it deems appropriate if it believes that such terms are "clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior."³¹ The three-member Board panel must make such decision unanimously.³² When Board panels cannot decide how long the FET should be, the case is referred to the full Board.³³

²⁹ N.J.A.C. 10A:71-3.21(c).

³⁰ N.J.A.C. 10A:71-3.21(d)(1). This does not include the nine-month increase under N.J.A.C. 10A:71-3.21(c), which a two-member panel can impose.

³¹ See N.J.S.A. 30:4-123.56(b); N.J.A.C. 10A:71-3.21(d). The statute merely says that the FET can "differ" from the presumptive terms and sets no length guidelines for the board panel in these circumstances. Although there is no statutory outer limit, data collected by the Committee found the longest FET imposed was thirty years.

The Code provides a different process for individuals sentenced to life imprisonment under the 2A statutes (repealed in 1979). See N.J.A.C. 10A:71-3.21(f). The process involves scheduling the applicant "for an annual review hearing. The first annual review hearing shall be scheduled within 18 months from the month in which the decision to deny parole was rendered. Thereafter, annual review hearings shall be scheduled every 12 months until the inmate is within seven months of the actual parole eligibility date." Id.

³² N.J.A.C. 10A:71-3.21(d)(5).

³³ N.J.A.C. 10A:71-3.21(d)(6).

To determine whether the “clearly inappropriate” standard is met, the Board is instructed to rely on the release factors.³⁴ In setting a term beyond the established guidelines, the Board is given sole discretion, but must provide the applicant with a statement of reasons for the decision.³⁵ This provision of the Code has resulted in the Board imposing FETs as long as 30 years,³⁶ regardless of the applicable presumptive term. Parole applicants who have challenged the “clearly inappropriate” standard as unconstitutionally vague for granting the Board unbridled discretion have failed.³⁷

6. Appeals

a. Administrative Appeal to the Full Board

A parole denial and/or imposition of a FET above the presumptive term can be appealed to the full Board.³⁸ The Code lays out specific criteria the applicant must meet in

³⁴ N.J.A.C. 10A:71-3.21(d) (“In making the determination that the establishment of a future parole eligibility date pursuant to (a) or (b) and (c) above is clearly inappropriate, the three-member panel shall consider the factors enumerated in N.J.A.C. 10A:71-3.11.”).

³⁵ N.J.S.A. 30:4-123.53(a)(2); N.J.S.A. 30:4-123.56(b); N.J.A.C. 10A:71-3.21(d)(8); see In re Hawley Parole Application, 98 N.J. 108, 115 (1984) (“[O]ne of the best protections against arbitrary exercise of discretionary power lies in the requirement of findings and reasons that appear to reviewing judges to be rational.”).

³⁶ McGowan v. New Jersey State Parole Bd., 347 N.J. Super. 544, 549, 565 (App. Div. 2002).

³⁷ See, e.g., Abdel-Aziz v. New Jersey State Parole Board, No. A-5790-12T1, 2015 N.J. Super. Unpub. LEXIS 1090, at *7 (App. Div. May 12, 2015) (upholding a 144-month FET); Williams v. New Jersey State Parole Board, No. A-1201-09T2, 2011 N.J. Super. Unpub. LEXIS 241, at *8-9 (App. Div. Feb. 2, 2011) (upholding a 60-month FET); Goodwyn v. New Jersey State Parole Board, No. A-5583-06T3, 2008 N.J. Super. Unpub. LEXIS 2117, at *13-14 (App. Div. Nov. 17, 2008) (upholding a 108-month FET).

³⁸ N.J.A.C. 10A:71-4.1(a), (f), and (j).

order to be eligible for an appeal.³⁹ Appeals to the full Parole Board should be filed in writing within 90 days of receipt of a written notice of action or decision, describing the reasons for the appeal.⁴⁰ Late appeals will be considered for good cause.⁴¹ The Board

³⁹ N.J.A.C. 10A:71-4.1(a) and (f). For appeals of parole denials, one of the following criteria must be met:

- (1) The Board panel failed to consider material facts.
- (2) In the case of an inmate serving a sentence for an offense committed prior to August 19, 1997, the Board panel failed to document that a preponderance of the evidence indicates a substantial likelihood that the inmate will commit a crime if released on parole.
- (3) In the case of an inmate serving a sentence for an offense committed on or after August 19, 1997, the Board panel failed to document that a preponderance of the evidence indicates that:
 - i. The inmate has failed to cooperate in his or her own rehabilitation; or
 - ii. There is a reasonable expectation that the inmate will violate conditions of parole established pursuant to N.J.A.C. 10A:71-6.4(a) if released on parole.
- (4) The Board panel's decision is contrary to written Board policy or procedure.
- (5) A Board member participating in the deliberations or disposition of the case has a demonstrable personal interest or demonstrated prejudice or bias in the case which affected the decision.
- (6) A Board member participating in the deliberations or disposition of the case has failed to comply with the Board's professional code of conduct.

For appeals of FETs above the presumptive term, one of the following criteria must be met:

- (1) The specific application is contrary to written Board policy or procedure or established Board practice.
- (2) The specific application violates statutory restrictions pursuant to N.J.S.A. 30:4-123.51 or N.J.S.A. 30:4-123.64.
- (3) The Board panel or hearing officer failed to provide adequate reasons for a decision outside established guidelines.
- (4) In the case of an institutional infraction considered pursuant to N.J.A.C. 10A:71-3.4, the inmate has been convicted and sentenced or adjudicated delinquent and committed for the specific incident which resulted in the institutional infraction.
- (5) A hearing officer or Board member has failed to comply with the Board's professional code of conduct.

⁴⁰ N.J.A.C. 10A:71-4.2(a).

⁴¹ N.J.A.C. 10A:71-4.2(b).

generally has 90 days to consider an appeal, and an additional 14 days to provide written notice of its decision.⁴²

b. Appeals to the Appellate Division and Supreme Court

Final state administrative agency decisions can be appealed as of right to the Appellate Division.⁴³ Judicial review of the validity of Parole Board decisions to deny parole “concentrates on three inquiries”: (1) whether the Board followed the law, (2) whether the record contains substantial evidence to support the Board’s findings, and (3) whether the Board clearly erred in applying the law to the facts and reaching its conclusion.⁴⁴ In Trantino IV, the Supreme Court clarified that, for defendants convicted of offenses committed prior to August 19, 1997, the Board should focus exclusively on the likelihood of recidivism and consider rehabilitation only insofar as it bears on the likelihood of recidivism.⁴⁵ That same standard applies to the FET determination.⁴⁶

The Appellate Division and Supreme Court rarely reverse Board decisions denying parole or imposing a FET term longer than the presumptive term. When the courts do, the reviewing court often remands the proceedings to the Board for further explanation or

⁴² N.J.A.C. 10A:71-4.2 (c) and (d).

⁴³ R. 2:2-3 (2020).

⁴⁴ Trantino v. New Jersey State Parole Board (Trantino IV), 154 N.J. 19, 24 (1998).

⁴⁵ Id. at 31.

⁴⁶ McGowan, 347 N.J. Super. at 565.

reconsideration.⁴⁷ However, in Trantino v. New Jersey State Parole Board (Trantino V), the Supreme Court recognized the judiciary’s power to reverse the Parole Board and found that the power to order that parole be granted “may be within the province of judicial review.”⁴⁸ Thus, it is generally within the courts’ power to grant parole if they find that to be the appropriate remedy. However, in the case of applicants serving a term for murder who have not had a full hearing before the Parole Board, and only a “paper review of the record below,” courts cannot grant parole outright.⁴⁹ Instead, if a court finds the Parole Board was arbitrary or capricious, or violated the law in some way in its denial, it must remand for a full hearing in front of the full Board.⁵⁰

⁴⁷ See, e.g., Trantino IV, 154 N.J. at 22-23 (remanding to the Parole Board to “redetermine Trantino’s parole eligibility); Perry v. New Jersey State Parole Board, 459 N.J. Super. 186, 189 (App. Div. 2019) (reversing and remanding to the Parole Board for reconsideration of parole under the correct standard); Sabatini v. New Jersey State Parole Board, No. A-4935-16T1, 2019 N.J. Super. Unpub. LEXIS 1217 (App. Div. May 28, 2019) (vacating the denial of parole and remanding for reconsideration of parole application); Koger-Hightower v. New Jersey State Parole Board, No. A-4659-15T4, 2018 N.J. Super. Unpub. LEXIS 891, at *1 (App. Div. Apr. 17, 2018) (remanding for a new FET determination).

⁴⁸ 166 N.J. 113, 173 (2001); see also id. at 121 (ordering the Parole Board to “grant Trantino parole subject to the pre-release condition of satisfactory completion of a twelve-month halfway house placement and such other pre- and post-release conditions that it may impose”); Kosmin v. New Jersey State Parole Board, 363 N.J. Super. 28, 44 (App. Div. 2003) (reversing the final decision denying parole and “direct[ing] that [defendant] be released on parole forthwith”); New Jersey State Parole Board v. Cestari, 224 N.J. Super. 534, 551 (App. Div. 1988) (“revers[ing] the decision denying Cestari parole and direct[ing] that he be released on parole forthwith”).

⁴⁹ Acoli v. New Jersey State Parole Board, 224 N.J. 213, 228, 231 (2016).

⁵⁰ Id.

B. Data on Release Decisions

1. Data on All Offenses⁵¹

As part of the Parole Project, members requested information through OPRA regarding parole release statistics. In 2020, 5,250 parole cases were decided. Of those, applicants in 2,769 cases were granted parole.⁵² Thus, despite the presumption of release, only about half (52.74%) of all parole applicants whose cases were decided in 2020 were granted parole. This was an anomalous year, likely due to the pandemic and the Governor's executive order directing parole to be reconsidered in many cases.⁵³ In contrast, in 2019, only 2,197 of 5,379 parole applicants whose cases were decided (40.08%) were granted parole; in 2018, 2,568 of 5,991 parole applicants whose cases were decided (42.86%) were granted parole; and in 2017, 2,759 of 5,825 parole applicants whose cases were decided (47.46%) were granted parole. Thus, across the board, the Parole Board's release rates indicate that there is in reality a less-than-half chance an applicant will be granted parole.

When applicants are denied release, they must be given a FET. In 2020, 58 of the 2,769 parole denials were given a FET of more than 36 months.⁵⁴ Of those, 32, or about

⁵¹ These data represent non-NERA cases.

⁵² See New Jersey State Parole Board, Annual Report July 1, 2019-June 30, 2020 (Nov. 18, 2020) [2020 NJSPB Report], available at: <https://www.nj.gov/parole/docs/reports/AnnualReport2020.pdf>.

⁵³ Exec. Order No. 124 (Apr. 10, 2020), 52 N.J.R. 963(a), available at: <https://nj.gov/infobank/eo/056murphy/pdf/EO-124.pdf>.

⁵⁴ Exhibit C, Parole Data.

55%, were given a FET of ten to 20 years. Twenty-five, or about 43%, were given a FET of between four and ten years. And one person, about 1.7%, was given a FET of more than 20 years. While only about 2% of the total parole applicants were given a FET more than the presumptive term, for those that were, nearly 60% were thus given at least a decade of additional incarceration.

2. Data on Pre-NERA Life Sentences

Data regarding parole release rates for those sentenced to life terms is even more startling.⁵⁵ From January 1, 2012 to December 31, 2019, 445 people who were sentenced to life in prison appeared before the Parole Board either for the first time, or the first time since 2012. Of these, 39 applicants were paroled. The remaining 406 applicants were denied parole. That creates a 91.24% denial rate for these first appearances before the Parole Board; only 8.76% of applicants are granted parole.

Of the 406 applicants described above who were denied parole, only 164, or 40.4%, received a FET of three years or less -- the presumptive term. One hundred and seventeen, or 28.8%, of applicants received a FET between four and ten years; 92, or 22.7% received a FET of ten years; and 26, or 6.4%, received a FET greater than ten years but less than 20. Six applicants, 1.4%, received a 20-year FET. One applicant, 0.3%, received a 30-year FET. Thus, 30.8% of applicants who appeared before the Parole Board between 2012 and 2019 were not only denied parole but had their period of parole ineligibility increased by at least one decade.

⁵⁵ See Exhibit A, certification of Joseph J. Russo with attached parole data.

C. History of OPD Involvement in Parole Release

The OPD enabling statute of 1974 expressly required the Public Defender to represent indigent parolees during revocation hearings.⁵⁶ Until 1991, the OPD’s Parole Revocation unit represented indigent parolees during revocation proceedings. In 1991, however, the annual appropriations act prohibited state funds from being used for “expenses associated with the legal representation of persons before the State Parole Board or the Parole Bureau.”⁵⁷ As a consequence of the lack of funding, the Public Defender announced that the OPD could no longer represent parolees at revocation hearings.⁵⁸ Three years later, the Public Advocate Restructuring Act of 1994 formally repealed the enacting statute’s parole revocation provisions.⁵⁹ Since 1991, the parole restriction on State funds has been consistently included in the annual appropriations bill.⁶⁰ Although generally the OPD has not had a direct role in representing clients before the Board since 1994, as part of our continuing obligation to provide zealous advocacy to our clients, the OPD has occasionally assisted clients in their parole release proceedings and filed amicus curiae briefs in certain parole appeals.⁶¹ In 2020, in response to the Parole Project Report’s

⁵⁶ N.J.S.A. 2A:158A-5.1 (repealed by L. 1994, c. 58, § 70).

⁵⁷ See L. 1974, c. 33, § 2.

⁵⁸ Bolyard v. Berman, 274 N.J. Super. 565, 569 (App. Div. 1994).

⁵⁹ L. 1994, c. 58 § 70, eff. July 1, 1994.

⁶⁰ See, e.g., L. 2020, c. 97, available at: https://www.njleg.state.nj.us/2018/Bills/S2500/2020_I1.HTM.

⁶¹ See, e.g., State v. Rodriguez, 454 N.J. Super. 214 (App. Div. 2018).

research and recognition of the arbitrary and capricious nature of the parole process, the OPD began taking on a few more cases to more broadly challenge certain parole release procedures and policies.

Part II: Challenges to Current Parole Practices

After the Parole Project submitted its initial report, the OPD took proactive steps to change the parole process through the representation of limited parole applicants who were denied parole, often with lengthy FETs imposed. This section provides an overview of the current OPD litigation addressing some of the problems pointed out by the initial Parole Project report and others discovered during the process of representing these clients.

A. Confidentiality Issues

1. Background

N.J.S.A. 30:4-123.54 directs the Parole Board to prepare a report four to six months prior to a parole applicant's parole eligibility date. The statute also directs the Board to serve the applicant with a copy of the report "excepting those documents which have been classified as confidential pursuant to rules and regulations of the board or the Department of Corrections."⁶² The Board must also disclose to applicants any adverse material or information used at the hearing, except if it is confidential.⁶³ If disclosure is withheld, the Board must identify the document as confidential and give reasons why it was not disclosed.⁶⁴ The Board has designated the following documents as confidential:

- Information, files, documents, reports, records or other written materials concerning an offender's medical, psychiatric or psychological history, diagnosis, treatment or evaluation;

⁶² N.J.S.A. 30:4-123.54(c); see also N.J.A.C. 10A:71-3.9(a) (Administrative Code provision parallel to the statute).

⁶³ N.J.A.C. 10A:71-2.2(c).

⁶⁴ Id.

- Information, files, documents, reports, records or other written materials concerning an offender's alcohol, drug or other substance abuse evaluation, history and/or treatment;
- Information, files, documents, reports, records or other written materials that, if disclosed, would infringe or jeopardize privacy rights of the offender or others or endanger the life or physical safety of any person;
- Investigative reports or information, including those from informants that, if disclosed, would impede ongoing investigations, create a risk of reprisal, or interfere with the security or orderly operation of an institution or a community program;
- Investigative reports or information compiled or intended for law enforcement purposes that, if disclosed, would impede ongoing investigations, interfere with law enforcement proceedings, constitute an unwarranted infringement of personal privacy, reveal the identity of a confidential source or confidential information furnished only by a confidential source, reveal investigative techniques and procedures or endanger the life or physical safety of law enforcement personnel, confidential informants, victims or witnesses;
- Standard operating procedures, manuals, and training materials, that may reveal the Board's surveillance, security, tactical, investigative, or operational techniques, measures, or procedures, which, if disclosed, would create a risk to the safety of persons, property, electronic data, or software, or compromise the Board's ability to effectively conduct investigations;
- Information, files, documents, reports, records or other written materials that, if disclosed, would impede Board functions by discouraging persons from providing information to the Board;
- An electronic recording or a transcript, if prepared, of any proceeding of the Board;
- Such other information, files, documents, reports, records or other written materials as the Board may deem confidential to insure the integrity of the parole and parole supervision processes; and
- A record that consists of information, statement or testimony in written, audio or video form provided by a victim or, if the victim is deceased, the nearest relative of the victim.⁶⁵

⁶⁵ N.J.A.C. 10A:71-2.2(a).

There are currently only two published cases discussing confidentiality of documents in the parole release process. The first, Thompson v. New Jersey State Parole Board, held that a “Parole Board rule or policy flatly prohibiting prisoner access to parole files” was no longer “sustainable.”⁶⁶ While confidentiality of some documents may be necessary, applicants are “entitled not only 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.”⁶⁷ Although under this standard the 1986 Code’s confidentiality provisions were upheld, those provisions were much narrower than today’s broad confidentiality exceptions.

The Appellate Division in Thompson also created a rule to determine the propriety of withholding documents in individual cases, holding that when a document that played a “substantial role in producing [an] adverse decision” is withheld from the applicant’s file, the Board must inform the applicant of its role, and the Attorney General must include in its “Statement of Items Comprising the Record the Board’s statement on the matter.”⁶⁸ If the parole denial is appealed to the Appellate Division, the court “will undertake to review the materials and determine the propriety of the decision to withhold them.”⁶⁹ If the

⁶⁶ 210 N.J. Super. 107, 122 (App. Div. 1986).

⁶⁷ Id. at 123-24.

⁶⁸ Id. at 126.

⁶⁹ Id.

withholding was improper, there are various remedies: remand for reconsideration without the withheld materials, remand for reconsideration after disclosure to the applicant, or even exercise the court’s original jurisdiction.⁷⁰

Importantly in Thompson, the Court rejected a proposed rule to allow disclosure to the OPD but not the applicant, as counsel “cannot effectively evaluate materials purporting to report on the client without consulting the client about them.”⁷¹ Because the Court found this sufficient to defeat the proposal, it left open the question of whether this practice “would interfere with the attorney-client relationship.”⁷²

The second case, New Jersey State Parole Board v. Cestari, held without explanation in a footnote, citing Thompson, that there was “no current reason” for a psychological report to remain confidential.⁷³

2. OPD Litigation

In each of the parole cases the OPD has taken on, the Parole Board or Attorney General handling the case has required the attorney on the case to sign a Consent Protective Agreement in order to receive documents marked as confidential. The Agreement requires the attorney to refrain from sharing or even discussing confidential documents with his or

⁷⁰ Id.

⁷¹ Id. at 125.

⁷² Id.

⁷³ 224 N.J. Super. 534, 541 n.1 (App. Div. 1988).

her client. This prevents counsel from effectively assisting applicants in the parole release process and denies applicants their due process rights.

In most cases, our attorneys have signed the Agreements under protest, preserving our right to challenge the Agreement and the withholding of critical documents from our clients. However, in Mitchell v. New Jersey State Parole Board, A-0072-19T3, the OPD is currently challenging the Parole Board's withholding of psychological evaluations, confidential health records, confidential reports considered, and a confidential addendum from Mr. Mitchell.⁷⁴ After initial briefing, the Appellate Division issued an order remanding the matter to the Parole Board for a written statement of reasons supporting its withholding of disclosure.⁷⁵ The Parole Board responded by again labelling the above documents confidential, but only provided reasons for one: the psychological report.

Before the Appellate Division once again, the OPD is arguing that the State failed to provide adequate reasons for withholding the documents, and that Thompson and Cestari together advocate for limits on what may be designated confidential and withheld from applicants. Importantly, the OPD has pointed out that Thompson outright rejected a proposed rule that would allow disclosure to the OPD but not the applicant. The OPD is also arguing that not allowing attorneys to discuss and share confidential documents with our clients denies our clients due process and prevents attorneys from being effective

⁷⁴ Exhibit D, Mitchell Briefs.

⁷⁵ Exhibit D, Mitchell App. Div. Order.

counsel to their clients.⁷⁶ This case was argued before a three judge panel of the Appellate Division on September 15, 2021.

B. Right to Counsel

1. Background

There are clear distinctions between the right to counsel at a parole release hearing and the right to counsel at a parole revocation hearing, where parolees are guaranteed minimal due process.⁷⁷ Although states are still divided on this issue,⁷⁸ there is no Sixth Amendment right to counsel for parole release hearings in New Jersey. Courts have distinguished the due process protections entitled for parole release because the person is already imprisoned, unlike parole revocation, where the parolee has a liberty interest in retaining the “enduring attachments of normal life” so long as he or she does not violate the conditions of parole.⁷⁹

⁷⁶ See Thompson & Reingold, supra note 1 at 228. There, the authors discuss Gardner v. Florida, a U.S. Supreme Court case finding that the defendant was denied due process in part because his sentence was imposed based on confidential information not disclosed to the defendant. Id. The authors argue that because the lines between sentencing and parole decisions has been blurred, due process protections should be extended to parole release processes. Id. at 239, 249-251.

⁷⁷ Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (holding that the liberty a parolee holds, though limited, “is valuable and must be seen as within the protection of the Fourteenth Amendment” and therefore “[i]ts termination calls for some orderly process”).

⁷⁸ Compare Monson v. Carver, 928 P.2d 1017 (1996) (holding that, in Utah, a defendant does not have a Sixth Amendment right to counsel at a parole hearing), with State v. Carson, 56 P.3d 844 (2002) (holding that in Montana, a defendant’s right to counsel is violated when he is not permitted to have an attorney present at his parole hearing).

⁷⁹ Morrissey, 408 U.S. at 482.

Under the New Jersey’s current system, only parole applicants who can afford to hire an attorney receive help preparing for the hearing and submitting written documents to the Board.⁸⁰ Even hired counsel cannot be physically present at the hearing, however.⁸¹ The principal argument for excluding lawyers from parole hearings is that it allows the Board to hear from the person directly, in order to get the unvarnished truth about the person’s attitudes and disposition, without it being filtered through an intermediary.

New Jersey’s due process and right to counsel protections fall short of other states. New Jersey’s parole system gives outsized discretion to the Board, which has decided that no one, except for an interpreter, if necessary, may be present on behalf of the applicant during the parole release hearing.⁸² New Jersey’s parole statutes do not include any sort of case management or staff assistance. While the Code mentions that the parole applicant “shall have the right to be aided by a Board representative”⁸³—an individual assigned to their correctional facility and tasked with “assist[ing] inmates on all parole procedures, including any appearances before a hearing officer, Board panel or the Board”⁸⁴—the

⁸⁰ The Parole Book, *supra* note 6, at 15.

⁸¹ Id.

⁸² Id.

⁸³ N.J.A.C. 10A:71-3.13(g).

⁸⁴ N.J.A.C. 10A:71-2.11.

Appellate Division has held, albeit only in unpublished cases, that there is no right to have that representative in the parole hearing.⁸⁵

This issue is most salient when deciding the cases of juveniles waived and convicted in adult court and sentenced to lengthy periods of parole ineligibility, and thus guaranteed a meaningful opportunity for release under current New Jersey and U.S. Supreme Court precedent. The Supreme Court of Massachusetts, notably, has held that “in order to ensure that their opportunity for release through parole is meaningful,” parole applicants who had been convicted of offenses as juveniles must have access to counsel, access to funds for counsel and expert witnesses if they are indigent, and an opportunity for judicial review of the parole decision.⁸⁶

2. OPD Litigation

The OPD is challenging the denial of counsel at all stages of the parole release process in numerous cases before the Appellate Division. The OPD has focused its current litigation on clients with “special circumstances,” namely, cognitive disabilities or age at the time of offense. In In re Request to Modify, the New Jersey Supreme Court reiterated that parole applicants have a “liberty interest in being free from physical restraint.”⁸⁷ The Court then went further, finding that that interest was “heightened by the widespread

⁸⁵ See supra note 20 and accompanying text.

⁸⁶ Diatchenko v. District Attorney for the Suffolk District, 27 N.E.3d 349, 353 (Mass. 2015).

⁸⁷ 242 N.J. at 387 (quoting New Jersey State Parole Board v. Byrne, 93 N.J. 192, 210 (1983)).

presence of COVID-19 in jail.”⁸⁸ This language provides support for the argument that those with “special circumstances” have a “heightened” liberty interest and thus require greater protections, including the right to counsel present at the parole hearing.

The Mitchell case described above raises the right to counsel issue in the context of parole applicants with cognitive disabilities. There, the OPD is arguing that “both revocation and parole release proceedings restrict the individual’s liberty and may involve disputed facts, differing interpretations of expert reports, and as such, deserve the same due process protections when special or unusual circumstances are present.”⁸⁹ Mr. Mitchell has severe intellectual disabilities. Now 67 years old, he functions at a second-grade reading, applied math, and language level. In math computation, he functions at the third-grade level. He has failed the GED examination several times. He has also been diagnosed with schizophrenia. The OPD is arguing that these intellectual disabilities affect Mr. Mitchell’s “cognition, communication, and self-advocacy.” Thus, to protect his due process rights, he must have a new hearing with counsel present.

In another case, Farrell v. New Jersey State Parole Board, A-3237-20T2, the OPD is arguing that applicants who were waived to adult court and convicted as adults must be represented by counsel at their parole hearings to ensure the “meaningful opportunity for

⁸⁸ Id.

⁸⁹ Exhibit D, Mitchell Brief in Support.

release” guaranteed by Graham v. Florida,⁹⁰ Miller v. Alabama,⁹¹ and State v. Zuber.⁹² Because these cases require much more in-depth analysis of a juvenile’s circumstances and state of mind at the time of the offense and subsequent maturation, as well as the neuroscience that indicates children are less culpable than adults, counsel must be present at release hearings for juvenile offenders.⁹³ As the Massachusetts Supreme Court has noted, “parole eligibility is an essential component of a constitutional sentence” for juvenile offenders subject to a life sentence, and thus “the parole process takes on a constitutional dimension[.]”⁹⁴ Mr. Farrell, who was just 14 at the time of his offense and sentenced to life imprisonment with a thirty-year parole bar, is thus entitled to counsel as his “special circumstance” of age at the time of his offense requires it.

C. Non-Code Factors

1. Background

Through the rulemaking process, the Board has adopted 24 factors Board panels

⁹⁰ 560 U.S. 48 (2010)

⁹¹ 567 U.S. 460 (2012).

⁹² 227 N.J. 422 (2017).

⁹³ See Diatchenko, 27 N.E.3d at 360 (Because these parole decisions are “probably far more complex than it is in the case of an adult offender because of the unique characteristics of juvenile offenders,” an “unrepresented, indigent juvenile homicide offender will likely lack the skills and resources to gather, analyze, and present this evidence adequately.”).

⁹⁴ Id. at 356-57.

should consider when determining an applicant’s suitability for parole.⁹⁵ These same factors are used in determining FET length if the Board seeks to impose a FET above the presumptive term. The Parole Board’s final decision must satisfy the ultimate statutory standard—likelihood of recidivism or violating conditions—as informed by these factors.⁹⁶ Despite having these 24 regulatory factors, however, the Board often denies parole in reliance on non-Code factors, commonly: (a) lack of insight and/or remorse; (b) insufficient problem resolution; and (c) incarceration on multiple offenses.⁹⁷

2. OPD Litigation

There are quite a few issues with the Parole Board’s use of non-Code factors, which are outlined below. The OPD is challenging the use of these factors for many of these reasons.

a. Administrative Procedures Act

One problem with the frequent use of non-Code factors is that they have not gone through the procedures outlined in the Administrative Procedures Act (“APA”). Thus, the Parole Board has not had to explain the non-Code’s connection to the ultimate statutory standard—either the likelihood of criminal conduct or violation of conditions upon release.

⁹⁵ N.J.A.C. 10A:71-3.11(b).

⁹⁶ See In re Application of Trantino, 89 N.J. 347, 372 (1982) (Trantino II) (“[T]he individual’s likelihood of recidivism is now the sole standard for making parole determinations”).

⁹⁷ See, e.g., Acoli v. New Jersey State Parole Board, 462 N.J. Super. 39 (App. Div. 2019), on remand from 224 N.J. 213 (2016); see also McGowan, 347 N.J. Super. 544.

The OPD is currently arguing that the use of these non-Code factors in Pujols v. New Jersey State Parole Board, A-1288-20T4, which drew from the briefing in Stout v. New Jersey State Parole Board, A-4908-18T3, written by the Rutgers Constitutional Law Clinic and the ACLU-NJ violates the APA.⁹⁸ First, the failure to go through the necessary procedures means there is no definition given to these terms or explanation of how the factors relate to the ultimate statutory standards, as listed above. Second, the use of the factors has simply become a way for the Parole Board to circumvent the APA's mandates to deny parole in essentially every case, without notice and the opportunity for the public to have a say in the matter. Thus, Mr. Stout and Mr. Pujols have asked the Appellate Division to remand without the use of such factors. The Stout case was argued in October 2020 and is still awaiting decision. The Pujols case is currently awaiting argument before the Appellate Division.

b. Memory Problems

Another problem with these factors is that they fail to account for memory problems affecting parole applicants, and in fact, often adversely affect those with memory problems due to age or inebriation at the time of the offense. In one such case, Acoli v. New Jersey State Parole Board, the OPD is writing an amicus brief to the New Jersey Supreme Court. The Parole Board denied Mr. Acoli parole for the third time in June 2017, imposing a 180-month FET.⁹⁹ Two of the reasons were “lack of insight,” and “insufficient problem

⁹⁸ Exhibit E, Pujols Brief.

⁹⁹ Acoli, 462 N.J. Super. at 42-49.

resolution,” because his account of his memory of the offense had changed from the prior hearing, he paused before answering questions, and was hesitant to provide details.¹⁰⁰ However, Mr. Acoli is now an 87-year-old man suffering from dementia. The Parole Board’s use of the non-Code factors here fails to account for this circumstance and is especially problematic as peoples’ memories change and fade in time. The lack of a memory cannot sustain the idea that the person is likely to commit another offense or violate conditions of parole without more.¹⁰¹

c. Cognitive Disabilities

Further, those with cognitive or intellectual disabilities may not be able to fully comprehend the reasoning behind their actions. The OPD is potentially challenging the use of this factor in at least one case as violating the Americans with Disabilities Act by using an applicant’s disability to keep him behind bars.

d. Remorse

The Board also relies on “lack of remorse” to deny parole, despite the term lacking any legal definition. Decision-makers incorrectly believe that they know remorse when

¹⁰⁰ Id. at 53.

¹⁰¹ See, e.g., Trantino IV, 154 N.J. at 38 (finding that the Parole Board may not consider the failure to remember details of the offense if the record supports the finding that the applicant cannot and will not ever be able to remember those details); Trantino V, 166 N.J. at 177-78 (finding “the Board’s reliance on [petitioner’s] inadequate recollection of the details of his crimes to support it denial of parole constituted a clear abuse of discretion.”); Acoli, 462 N.J. Super. at 76 (Rothstadt, J., dissenting) (“[H]is flawed or even feigned memory loss is not sufficient to deny parole.”).

they see it.¹⁰² This factor is often given great weight, and is based on whether the individual’s verbal language, demeanor, and body language present indicia of remorse.¹⁰³ Where decision-makers rely on verbal communication as an expression of remorse, their preconceptions about “appropriate” expressions of remorse may cause them to inadvertently penalize people of different racial or ethnic backgrounds.¹⁰⁴ Relatedly, “[r]eading remorse across racial, ethnic, or cultural lines is fraught with the possibility of error.”¹⁰⁵ Importantly, there is little evidence to support any correlation between remorse and future good behavior, and thus, reliance on this factor is arbitrary.¹⁰⁶

e. Innocence

These factors also harm those who maintain their innocence. The criminal legal system is imperfect, and there are surely those who have been wrongfully convicted who become eligible for parole.¹⁰⁷ The applicant thus must either lie to the Parole Board or be

¹⁰² Susan A. Bandes, Remorse and Criminal Justice, 8 Emotion Rev. 14, 14 (2016), available at: https://www.researchgate.net/publication/283661089_Remorse_and_Criminal_Justice.

¹⁰³ Id. at 16.

¹⁰⁴ Susan A. Bandes, Remorse and Judging, in Remorse in Criminal Justice: Multi-Disciplinary Perspectives, at 18 (2020), available at: https://www.researchgate.net/publication/339258806_Remorse_and_Judging.

¹⁰⁵ Id. at 23.

¹⁰⁶ Bandes, Remorse and Criminal Justice, supra note 102, at 17.

¹⁰⁷ The National Registry of Exonerations, which has been tracking exonerations since 1989, has 43 listed exonerations in the state of New Jersey, the most recent of which occurred in 2021. In the last five years alone, there have been 13 exonerations in New Jersey. National Registry of Exonerations, available at: <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> (last accessed Aug. 10, 2021). These are just the exonerations that

penalized for lacking remorse or insight into a crime they did not commit. The OPD is currently looking to challenge on this basis in at least one case.

D. Age-Related Issues

1. Background

Under the U.S. and New Jersey Supreme Court precedents in Graham, Miller, and Zuber, juveniles given lengthy sentences must be given a “meaningful opportunity” for release. Generally, this means that juveniles cannot be subject to mandatory life without parole, or, in New Jersey, lengthy periods of parole ineligibility that are the “functional equivalent” of life without parole.¹⁰⁸ The Courts in Graham and Zuber were especially concerned with the length of time juvenile offenders would spend in prison, noting that juvenile offenders would spend more time than their adult counterparts simply because they were younger when they entered prison.¹⁰⁹

Moreover, the age-crime curve, supported by the same scientists relied on in those cases, shows that criminal offending happens in a bell curve—offending is at its peak in a

have been successful; there is no way to know just how many people are wrongly convicted. See Editorial Board, The Uptick in Exonerations Highlights Problems in Our Criminal-Justice System, Washington Post (February 5, 2016), https://www.washingtonpost.com/opinions/an-uptick-in-exonerations-highlights-problems-in-our-criminal-justice-system/2016/02/05/bf6912aa-cac7-11e5-ae11-57b6aeab993f_story.html.

¹⁰⁸ Miller, 567 U.S. at 479-80; Zuber, 227 N.J. at 447-48.

¹⁰⁹ Graham, 560 U.S. at 70 (“Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.”); Zuber, 227 N.J. at 429 (“The proper focus belongs on the amount of real time a juvenile will spend in jail and not on the formal label attached to his sentence.”).

person’s late teens and early twenties and sharply drops off in the mid- to late-twenties.¹¹⁰ This curve has been replicated “across groups differing in economic and socioeconomic status . . . and across culture,” indicating the period of adolescence is associated with law-breaking behavior.¹¹¹ The DOC’s own statistics show the low rate of reoffending as a person gets older, as well as national studies of recidivism rates and age.¹¹² Thus, people generally “age out” of crime.

2. OPD Litigation

a. Juvenile Offenders

In the Farrell case, the OPD is challenging the 120-month FET imposed on Mr. Farrell as contrary to the Miller/Zuber line of cases mandating that juvenile offenders be given a meaningful opportunity for release. That brief argues that imposing FETs outside of the presumptive terms for juvenile offenders now parole eligible is unconstitutional under the 8th Amendment to the U.S. Constitution and Art. I, Para. 12 of the New Jersey Constitution.¹¹³

¹¹⁰ Michael Rocque et al., Age and Crime, Encycl. Crime & Punishment 1 (Wesley G. Jennings, ed. 2016); Raymond E. Collins, Onset and Desistance in Criminal Careers: Neurobiology and the Age-Crime Relationship, 3 J. Offender Rehabilitation 1, 2 (2004).

¹¹¹ Elizabeth P. Shulman et al., The Age-Crime Curve in Adolescence and Early Adulthood is Not Due to Age Differences in Economic Status, 42 J. Youth Adolescence 848, 858 (2013).

¹¹² N.J. Dep’t of Corrections, 2015 Release Cohort Outcome Report: A Three-Year Follow Up 19 (2018); National Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences 155 (Jeremy Travis, Bruce Western, & Steve Radburn eds., 2014).

¹¹³ Exhibit F, Farrell Brief.

The OPD is challenging how the Parole Board’s process treats juvenile offenders in at least one case before the full Parole Board. There, the OPD is arguing that the parole procedures themselves conflict with Graham, Miller, and Zuber, as they do not take into account a juvenile offender’s age at the time of the crime and his family circumstances.

b. Aging Out

The Pujols case takes on the issues of “aging out”; Mr. Pujols was 21 when he committed his offense, so Miller does not apply directly to him. However, he is nearly 60 years old, and has had no infractions in over a decade. His age itself indicates his low risk of recidivism, compounded by at least a decade of infraction-free living while incarcerated. The OPD is arguing there that the failure to take into account the age-crime curve, neuroscience, and the DOC’s own recidivism statistics for older parolees and releasees is arbitrary and capricious.¹¹⁴

E. Ex Post Facto Claims

1. Background

Under the 1979 Parole Act, an applicant who is denied parole at his initial eligibility date “shall be released on parole on the new parole eligibility date unless new information . . . indicates by a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime if released on parole.”¹¹⁵ Thus, “old” information—information about the applicant’s crimes or information available to the Board at the time

¹¹⁴ Exhibit E, Pujols Brief.

¹¹⁵ N.J.S.A. 30:4-123.56(c) (1979) (emphasis added).

of the initial eligibility hearing—was not a lawful basis for denying parole at a successive eligibility date. With the 1997 changes to the Parole Act, the word “new” was deleted from the phrase “new information.”¹¹⁶ This change substantially expanded the grounds on which the Board could deny an applicant parole.

Retroactively applying a change to a parole law violates the Ex Post Facto Clause if “the change . . . create[s] ‘a sufficient risk of increasing the measure of punishment attached to the covered crimes’” (that is, a risk of keeping the inmate in prison longer by delaying or preventing parole).¹¹⁷ Thus, the expanded standard created this risk of increasing the measure of punishment.

In 2000, the Appellate Division rejected this argument in Trantino v. New Jersey State Parole Board, holding because “the 1997 statutory amendment does not modify the parole eligibility standard applicable to Trantino; rather, it simply allows the Board to consider all available evidence relevant to the application of that standard,” there was no ex post facto violation.¹¹⁸

This question is currently before the Third Circuit in Holmes v. Christie et al., No. 19-1089. The case was argued in March 2021 by attorneys from Steptoe & Johnson, LLP, who were assigned pro bono counsel for Mr. Holmes. No decision has yet been made.

¹¹⁶ N.J.S.A. 30:4-123.56(c) (1997).

¹¹⁷ Garner v. Jones, 529 U.S. 244, 250 (2000) (quoting Cal. Dep’t of Corr. v. Morales, 514 U.S. 499, 509 (1995)).

¹¹⁸ 331 N.J. Super. 577, 610-11 (App. Div. 2000). The Supreme Court, in the appeal from the Appellate Division, did not address the issue. Trantino V, 166 N.J. 113 (2001).

2. OPD Litigation

Despite the Appellate Division's Trantino case, OPD attorneys are seeking to challenge the changed standard as violative of the ex post facto clause in several cases, including with Mr. Holmes himself, who was recently denied parole and given a 240-month FET. The OPD is bringing this challenge with the goal of placing the issue in front of the New Jersey Supreme Court, which has yet to address the issue.

F. Excessive Future Eligibility Terms

1. Background

The New Jersey legislature tasked the Parole Board with “develop[ing] a schedule of future parole eligibility dates for adult inmates denied release at their eligibility date,” the schedule of which is heavily dependent on the “severity of the offense for which he was denied parole” and the “characteristics of the offender, such as, but not limited to, the prior criminal record of the inmate and the need for continued incapacitation of the inmate.”¹¹⁹ When imposing a FET, the Board is required to give reasons for that particular FET, “specifically providing an explanation of why and how the board panel or board determined the amount of time an inmate is required to wait for a subsequent parole hearing.”¹²⁰ If the date of the FET differs from the established schedule, “the board panel shall include particular reasons therefor.”¹²¹

¹¹⁹ N.J.S.A. 30:4-123.56(a).

¹²⁰ N.J.S.A. 30:4-123.53(a)(2).

¹²¹ N.J.S.A. 30:4-123.56(b).

The Board developed a schedule as follows:

1. Except as provided herein, a prison inmate serving a sentence for murder, manslaughter, aggravated sexual assault or kidnapping or serving any minimum-maximum or specific sentence in excess of 14 years for a crime not otherwise assigned pursuant to this section shall serve 27 additional months.
2. Except as provided herein, a prison inmate serving a sentence for armed robbery or robbery or serving any minimum-maximum or specific sentence between eight and 14 years for a crime not otherwise assigned pursuant to this section shall serve 23 additional months.
3. Except as provided herein, a prison inmate serving a sentence for burglary, narcotic law violations, theft, arson or aggravated assault or serving any minimum-maximum or specific sentence of at least four but less than eight years for a crime not otherwise assigned pursuant to this section shall serve 20 additional months.
4. Except as provided herein, a prison inmate serving a sentence for escape, bribery, conspiracy, gambling or possession of a dangerous weapon or serving any minimum-maximum or specific sentence less than four years for a crime not otherwise assigned to this section shall serve 17 additional months.¹²²

The Board gave itself the ability to increase or decrease the FET determined above by nine months “when, in the opinion of the Board panel, the severity of the crime for which the inmate was denied parole and the prior record or other characteristics of the inmate warrant such adjustment.”¹²³ In subsection (d), the Board goes further, giving itself essentially unlimited discretion to establish a future eligibility date of any length, so long as it is imposed unanimously by a three-member panel.¹²⁴

¹²² N.J.A.C. 10A:71-3.21(a).

¹²³ N.J.A.C. 10A:71-3.21(c).

¹²⁴ N.J.A.C. 10A:71-3.21(d) (“A three-member Board panel may establish a future parole eligibility date which differs from that required by the provisions of (a) or (b) and (c) above if the future parole eligibility date which would be established pursuant to such subsections is clearly

2. OPD Litigation

The discretion bestowed by the Board unto itself in N.J.A.C. 10A:71-3.21(d) has arguably transformed the parole eligibility process into a resentencing. Occasionally, the Board will repeatedly deny parole release and impose FETs that exceed the length of prison-time contemplated by the sentencing judge.¹²⁵ The Code also directs the Board to reconsider many of the same factors previously relied on in determining the individual's sentence, blurring the line between judicial sentencing and the Parole Board's duty to determine risk of recidivism or of violating parole conditions.

The OPD is challenging this broad discretion in the Pujols and Farrell cases, arguing that, like with the use of non-Code factors, the Parole Board is circumventing the required APA rulemaking process and is itself an abuse of discretion. These cases argue that the presumptive terms the Board has set are themselves reflective of the gravity of the offenses, and thus, the Board needs something extraordinary to impose FETs above those presumptive terms.

inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior.”).

¹²⁵ See, e.g., Klingebiel v. New Jersey State Parole Board, No. A-5341-04T1, 2008 N.J. Super. Unpub. LEXIS 3018, at *18-20 (App. Div. Aug. 11, 2008) (“In fact, the Board does not dispute that the sentencing judge who did not impose the twenty-five-year parole ineligibility term would have expected parole after approximately fifteen years absent some post-sentence development warranting longer incarceration.”).

Note

These issues are the ones most commonly seen as the OPD has taken steps to get involved in parole release appeals. The OPD continues to find new angles to challenge the unfair practices of the Parole Board and ensure a meaningful parole process for applicants.

Part III: Additional Action Steps to Improve the System of Parole

This final section outlines additional action steps the OPD can take in both the administrative and legislative realms to change and improve the system of parole in New Jersey.

A. Administrative Actions

1. Propose amendments to limit the length of FET extensions

The OPD should propose amendments to N.J.A.C. 10A:71-3.21 to limit the length of any extensions beyond the presumptive FETs. This Committee proposes that the Board only be permitted to go beyond the presumptive FET by a half increment.

For example, for homicide offenses, the presumptive FET is 27 months. Once the Board determines that the 27 months would be “clearly inappropriate,” then it should not be able to require the parole applicant to wait ten, 20, or even 30 years before parole is reconsidered. Instead, for homicide offenses, the Board should only be able to extend the FET by an increment of half of the presumptive FET, 13 months.

The OPD should also propose amendments to ensure that FETs only go beyond the presumptive terms in limited and extraordinary cases.

2. Propose amendments to limit the use of non-Code factors not based in science or law

The OPD should also propose amendments to N.J.A.C. 10A:71-3.11(b) to prohibit the Parole Board from relying on factors that have no sound legal or scientific basis when determining parole eligibility. As discussed, supra, the Board frequently relies on non-

Code factors to deny parole: lack of insight/remorse, insufficient problem resolution, and incarceration on multiple offenses. The Administrative Code grants the Board authority to consider non-statutory factors by instructing that the Board “shall consider the following factors and, in addition, may consider any other factors deemed relevant.”¹²⁶ This language must either be removed or amended. One approach is to add language prohibiting the Board from considering any factor that lacks a sound legal or scientific definition.

3. Propose Amendments to Remove the Use of Risk Assessment Tools

The Parole Board currently uses the Level of Service Inventory, or LSI-R, to determine risk of reoffense for parole applicants. However, the validity of this tool is in question. For example, the rates of false negatives using this tool was shown to be 59%, while it had a 20% false positive rate.¹²⁷ As scholars have pointed out, “[t]he 59% false negative rate for tools predicting any crime is arguably too high for their widespread use in criminal justice.”¹²⁸

Another review showed that the LSI-R had an area under the curve (AUC) of 0.63. This measure “tests the probability that a randomly selected offender has a higher score on a tool than a randomly selected non-offender,”¹²⁹ meaning that the tool will correctly assign

¹²⁶ See N.J.A.C. 10A:71-3.11 (emphasis added); The Parole Book, supra note 6, at 4.

¹²⁷ Seena Fazel, The Scientific Validity of Current Approaches to Violence and Criminal Risk Assessment 5, in Predictive Sentencing (Jan De Keijser, Julian Roberts, & Jesper Ryberg, eds. 2019).

¹²⁸ Id.

¹²⁹ Id. at 2.

a higher score 63% of the time to a randomly selected offender than a randomly selected non-offender. An AUC score of 0.5 would be chance. Thus, the LSI-R's AUC is only marginally better at predicting correct outcomes than chance. The LSI-R also neglects to include some of the most powerful predictors of criminal offending, such as age or gender, and instead uses unreliable factors such as, "could make better use of time," has "very few prosocial friends," and four items on attitudes.¹³⁰

The OPD should propose an amendment to either delete the use of risk assessment tools entirely, or to require the Board to use risk assessment tools that are found externally valid, with calibration and AUC scores much better than chance, and reassess regularly whether the tool remains valid.

4. Propose the creation of a "Racial Impact" committee

Additional data is necessary to understand the extent of disparities within the parole release process and any connections between the common factors the Board relies on to deny parole and race. Accordingly, the Board should create a "Racial Impact" committee to study the racial impact of parole decisions. This Committee must also produce regular racial impact reports analyzing the factors relied on for denying parole by racial group.

¹³⁰ Id. at 9.

B. Legislative Actions

In order to achieve lasting and expansive changes in the parole process, legislative action is necessary. There is already a template for reform: Bill S48, which was passed into law amending N.J.S.A. 2A:4A-21 et seq. to set forth new standards and practices for juvenile parole. Under the new law, early release on parole must be granted as long as a juvenile has made “substantial progress toward positive behavioral adjustment and rehabilitative goals.”¹³¹ There are also more frequent reviews of the parolee’s status—at least every three months—which are required to be sent to parolee’s counsel.¹³² Any post-incarceration term of parole is limited to six months, with a possible six-month extension, and may only be imposed if “necessary to effectuate the juvenile’s rehabilitation and reintegration into society.”¹³³ Importantly, juvenile parolees are given an explicit right to counsel at all revocation hearings.¹³⁴ These changes can provide a blueprint for future legislation for adult parole applicants and parolees, especially those who were juveniles at the time of their offenses and waived up to adult court.

1. Guarantee Applicants’ Rights to Counsel

As noted in Part II, the U.S. Supreme Court and the New Jersey Appellate Division have held that the State has no constitutional duty to provide counsel at parole

¹³¹ N.J.S.A. 2A:4A-44(d)(2).

¹³² N.J.S.A. 2A:4A-44(d)(6).

¹³³ N.J.S.A. 2A:4A-44(d)(5).

¹³⁴ N.J.S.A. 2A:4A-44(e).

proceedings.¹³⁵ The New Jersey legislature has not gone further to protect parole applicants' rights by passing a statute to guarantee the right to counsel at these proceedings. The OPD should push for such legislation.

The failure to provide counsel has resulted in the Parole Board's essentially unlimited discretion to deny parole release and impose FETs well above the presumptive terms they have set for themselves. It also denies applicants the ability to put together the most persuasive and effective mitigation arguments, as outside counsel could help to gather evidence unavailable to applicants while they are incarcerated. Attorneys specialized in Miller/Zuber matters could better aid applicants who were children waived up to adult court and now eligible for parole.

The right to counsel would help to hold the Parole Board accountable to the statutory standards and process protections applicants are due. The OPD should push for the right to counsel at parole release hearings and all subsequent proceedings.

2. Expand the OPD Enabling Statute

When parole applicants have the right to counsel, enforcing that right requires assigned representation of indigent applicants. The OPD should advocate for legislation to reinstate funding to the OPD for this representation and to explicitly provide for OPD involvement at all levels of the parole process. This will ensure that indigent parolees are represented by counsel who have expertise in parole matters.

¹³⁵ See supra, Part II.B.1; note 19 and accompanying text.

Formalizing the OPD's role and setting up a dedicated team of parole release attorneys in the office would ensure that at a minimum, parole applicants have attorneys with expertise in the area who can better protect their rights and provide support through the process. This would also allow the OPD to set up the necessary infrastructure to best support applicants during the parole release process.

Currently, most parole applicants have no representation at any stage of this process. The OPD enabling statute does not disallow representation of parole applicants in front of the Parole Board, but the annual appropriations bill does not budget funds for this direct representation. Thus, while writing mitigation letters (which is not representation) and appealing to the Appellate Division (which is not before the Parole Board) do not conflict with the appropriations bill, OPD representation at the administrative appeal is a closer call. To avoid any potential conflict, the OPD should push for funding for representation at all stages of the parole process and for an explicit mandate to represent applicants during parole release.

3. Guarantee Applicants' Rights to Confidential Materials

Currently, the Administrative Code requires a pre-parole report to be written but directs the Board to exclude from the copy of the report that must be served upon the applicant documents that have been classified as confidential by the Board or the Department of Corrections. The Board can also consider confidential materials during the hearing that the applicant cannot see or rebut. These materials include but are not limited to: the parole applicant's own medical or psychological evaluation; investigation reports from informants; transcripts from prior proceedings; and victim statements. The OPD

should push to introduce legislation that establishes a parole applicant's right of automatic access to all materials considered by the Parole Board in denying parole.

Although most of these materials can be made available to counsel with a consent agreement or court order, pro se parole applicants cannot review these confidential materials. This severely damages the applicant's ability to defend against the parole denial. As the Oregon Court of Appeals explained in the context of an attorney's right to confidential documents, "it would not be possible for appellate counsel to provide adequate assistance on the issue of whether the decision was supported by substantial evidence in the record if appellate counsel cannot inspect the entire record."¹³⁶ The same logic readily extends to a pro se parole applicant. Arguably, a protective order would restrict the inmate from misusing the information and protect the public interest, just as it would for any attorney. The court could impose restrictions on the parolee's access to the documents, such as a requirement to review them in the presence of his attorney. This would preserve the public interest and protect the applicant's right to exculpatory information.

Unlike most confidential documents, however, any victim impact statement or prosecutor input are not given to either the parole applicant or his attorney. This is especially concerning, as studies have shown that participation by the victim or their family, whether written or oral, is negatively correlated with parole being granted.¹³⁷ Thus

¹³⁶ Fisher v. Board of Parole & Post-Prison Supervision, 245 P.3d 671, 675 (Ore. App. 2010).

¹³⁷ See, e.g., Brent L. Smith & Kathryn Morgan, The Effect of Victim Participation on Parole Decisions: Results from a Southeastern State, 8 Criminal Justice Policy Review 57, 65 (1997); see

there are serious due process concerns with victims' input when the applicant is not allowed to see the testimony and respond or rebut the victim's statements, or sometimes even know whether the victim chose to submit testimony.¹³⁸ Guaranteeing an applicant's right to view confidential materials would help to address these concerns.

4. Provide Notification to the Applicant's Attorney and Family

Neither the applicant's defense attorney for the offense underlying parole nor the Office of the Public Defender (or similar defense agency) receives notification of or invitation to participate in parole hearings. This lack of notice and opportunity stands in stark contrast to the rights enjoyed by victims, victim family members, trial judges, and prosecutors.¹³⁹ The OPD should advocate for a notice requirement for the applicant's attorney and family.

also Julian V. Roberts, Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole, 38 Crime & Just. 347, 395-97 (2009).

¹³⁸ N.J.A.C. 10A:71-2.2(a)(10); Roberts, supra note 137, at 393.

¹³⁹ See N.J.A.C. 10A:71-3.8 (authorizing notice of the applicant's parole eligibility to be sent to the sentencing court, news agencies, and the prosecutor's office); N.J.A.C. 10A:71-3.48 (offering victims an opportunity to participate in the parole release process).

CONCLUSION

The system of parole in New Jersey is flawed. The OPD has taken on cases in limited circumstances to push the law for better outcomes for our past and current clients who become eligible for parole. However, the OPD could be much more effective if there were legislative and administrative changes to strengthen due process protections and remove problematic aspects of the parole release process. This report has laid out some of the steps the OPD is currently taking under its authority, and further outlines changes to the New Jersey statutes and administrative code that seek to change the system of parole in New Jersey for the better.

EXHIBIT A

CERTIFICATION OF JOSEPH J. RUSSO, ESQUIRE

JOSEPH J. RUSSO, of full age, hereby certifies that:

1. I am an attorney-at-law of the State of New Jersey.
2. I am the Deputy Public Defender in charge of the management of the state-wide Office of the Public Defender (OPD) Appellate Section.
3. On January 14, 2020, I personally filed an OPRA request of the New Jersey Parole Board, which specifically requested the following:

- From January 1, 2012 through December 31, 2019 the number of parole determinations made for inmates sentenced to at least life in prison.
- From January 1, 2012 through December 31, 2019 the number of denials of parole for inmates sentenced to at least life in prison.
- For all denials of parole from January 1, 2012 through December 31, 2019 the number of denials of parole for inmates sentenced to at least life in prison. For all denials of parole from January 1, 2012 through December 31, 2019 for inmates sentenced to at least life in prison, the length of the parole "hit" (future eligibility term) for each inmate.

Please note that the above aggregate data likely exists in the form of "electronically stored information" and thus constitutes a "government record" that is subject to OPRA. We are asking you pull this data from whatever database you store it in and produce it to us.

4. On January 24, 2020, the Parole Board requested a seven-

day extension of time to respond to my OPRA request.

5. On January 31, 2020, I received an Excel spreadsheet with two worksheets, to wit "Decisions to DENY parole" and "Decisions to GRANT parole."

6. I saved these two worksheets as .pdf documents in order to prevent the data contained therein from being corrupted.

7. I retained copies of the original Excel file.

8. Attached hereto are true copies of the .pdfs made from the Excel worksheets provided from the New Jersey State Parole Board in response to my January 14, 2020 OPRA request detailed supra.

9. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Respectfully submitted,

BY:



JOSEPH J. RUSSO, ESQUIRE
N.J. Id. No. 032151987

DATED: February 3, 2020

Inmate ID	FET	Number of Board Determinations of this FET for this Inmate	Comment
770000013	10 Yrs - 00 Mos - 00 Days	1	
770000055	10 Yrs - 00 Mos - 00 Days	1	
770000119	02 Yrs - 10 Mos - 00 Days	1	
770000125	05 Yrs - 00 Mos - 00 Days	2	
	07 Yrs - 00 Mos - 00 Days	1	
770000157	03 Yrs - 00 Mos - 00 Days	2	
770000174	02 Yrs - 03 Mos - 00 Days	3	
770000192	10 Yrs - 00 Mos - 00 Days	1	
770000217	10 Yrs - 00 Mos - 00 Days	1	
770000218	03 Yrs - 00 Mos - 00 Days	2	
770000232	02 Yrs - 03 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody
770000237	02 Yrs - 00 Mos - 00 Days	1	
770000242	15 Yrs - 00 Mos - 00 Days	1	
770000277	04 Yrs - 00 Mos - 00 Days	1	
	07 Yrs - 00 Mos - 00 Days	1	
770000291	02 Yrs - 08 Mos - 00 Days	2	
	06 Yrs - 00 Mos - 00 Days	1	
770000330	03 Yrs - 00 Mos - 00 Days	3	Board Determination(s) Rendered After Parole Violation Return to Custody
770000332	05 Yrs - 00 Mos - 00 Days	1	
	12 Yrs - 00 Mos - 00 Days	1	
770000338	03 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody
770000344	03 Yrs - 00 Mos - 00 Days	1	
	10 Yrs - 00 Mos - 00 Days	1	
770000350	03 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody
770000351	03 Yrs - 00 Mos - 00 Days	1	
	03 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody
770000358	03 Yrs - 00 Mos - 00 Days	4	
770000378	07 Yrs - 00 Mos - 00 Days	1	
	10 Yrs - 00 Mos - 00 Days	1	
770000382	03 Yrs - 00 Mos - 00 Days	1	
	12 Yrs - 00 Mos - 00 Days	1	
770000384	10 Yrs - 06 Mos - 00 Days	1	
	20 Yrs - 00 Mos - 00 Days	1	
770000391	03 Yrs - 00 Mos - 00 Days	1	
	08 Yrs - 00 Mos - 00 Days	1	
770000402	05 Yrs - 00 Mos - 00 Days	1	
770000408	05 Yrs - 00 Mos - 00 Days	1	
770000411	03 Yrs - 00 Mos - 00 Days	1	
	08 Yrs - 00 Mos - 00 Days	1	
770000424	00 Yrs - 36 Mos - 00 Days	1	
	03 Yrs - 00 Mos - 00 Days	4	
770000608	03 Yrs - 00 Mos - 00 Days	1	
770000643	10 Yrs - 00 Mos - 00 Days	1	
770000649	10 Yrs - 00 Mos - 00 Days	1	
770000673	03 Yrs - 00 Mos - 00 Days	1	
	07 Yrs - 00 Mos - 00 Days	1	
770000675	10 Yrs - 00 Mos - 00 Days	1	
770000684	09 Yrs - 02 Mos - 00 Days	1	

1

3

1

1

1

7700000691	10 Yrs - 00 Mos - 00 Days	1		
7700000708	12 Yrs - 00 Mos - 00 Days	1		
7700000714	03 Yrs - 00 Mos - 00 Days	2		
	05 Yrs - 00 Mos - 00 Days	1		
	10 Yrs - 00 Mos - 00 Days	1		
7700000719	10 Yrs - 00 Mos - 00 Days	1		
7700000730	03 Yrs - 00 Mos - 00 Days	1		
	12 Yrs - 00 Mos - 00 Days	1		
7700000733	15 Yrs - 00 Mos - 00 Days	1		
7700000742	10 Yrs - 00 Mos - 00 Days	1		
7700000757	03 Yrs - 00 Mos - 00 Days	2		
7700000769	05 Yrs - 00 Mos - 00 Days	1		
7700000773	10 Yrs - 00 Mos - 00 Days	1		
7700000778	05 Yrs - 00 Mos - 00 Days	1		
7700000791	03 Yrs - 00 Mos - 00 Days	1		
	05 Yrs - 00 Mos - 00 Days	1		
7700000818	10 Yrs - 00 Mos - 00 Days	1		
7700000860	08 Yrs - 00 Mos - 00 Days	1		
7700000900	10 Yrs - 00 Mos - 00 Days	1		
7700000904	03 Yrs - 00 Mos - 00 Days	2		
7700000932	02 Yrs - 00 Mos - 00 Days	1		
7700000936	10 Yrs - 00 Mos - 00 Days	1		
7700000939	10 Yrs - 00 Mos - 00 Days	1		
7700000962	10 Yrs - 00 Mos - 00 Days	1		
7700000967	10 Yrs - 00 Mos - 00 Days	1		
7700001024	02 Yrs - 00 Mos - 00 Days	1		
	03 Yrs - 00 Mos - 00 Days	2		
7700001049	05 Yrs - 00 Mos - 00 Days	1		
7700001124	03 Yrs - 00 Mos - 00 Days	2		
7700001155	10 Yrs - 00 Mos - 00 Days	1		
7700001199	15 Yrs - 00 Mos - 00 Days	1		
7700001275	12 Yrs - 00 Mos - 00 Days	1		
7700001277	03 Yrs - 00 Mos - 00 Days	1		
7700001381	10 Yrs - 00 Mos - 00 Days	1		
7700001448	03 Yrs - 00 Mos - 00 Days	1		
7700001530	03 Yrs - 00 Mos - 00 Days	1		
7700001554	10 Yrs - 00 Mos - 00 Days	1		
7700001654	03 Yrs - 00 Mos - 00 Days	1		
7700001775	03 Yrs - 00 Mos - 00 Days	1		
7700002739	10 Yrs - 00 Mos - 00 Days	1		
7700003119	01 Yrs - 06 Mos - 00 Days	1		
7700004126	15 Yrs - 00 Mos - 00 Days	1		
7700004152	02 Yrs - 00 Mos - 00 Days	1		
	03 Yrs - 00 Mos - 00 Days	1		
7700004210	12 Yrs - 00 Mos - 00 Days	1		
7700004392	10 Yrs - 00 Mos - 00 Days	1		
7700004406	03 Yrs - 00 Mos - 00 Days	1		
	08 Yrs - 00 Mos - 00 Days	1		
7700004494	03 Yrs - 00 Mos - 00 Days	1		
7700005664	03 Yrs - 00 Mos - 00 Days	2	Board Determination(s) Rendered After Parole Violation Return to Custody	2
7700005697	02 Yrs - 00 Mos - 00 Days	2	Board Determination(s) Rendered After Parole Violation Return to Custody	2
	02 Yrs - 03 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700005729	03 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700005860	01 Yrs - 08 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700017258	02 Yrs - 03 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1

7700018895	12 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700018923	10 Yrs - 00 Mos - 00 Days	1		
7700018926	10 Yrs - 00 Mos - 00 Days	1		
7700018931	03 Yrs - 00 Mos - 00 Days	2		
	10 Yrs - 00 Mos - 00 Days	1		
7700018936	07 Yrs - 00 Mos - 00 Days	1		
	08 Yrs - 00 Mos - 00 Days	1		
7700018941	03 Yrs - 00 Mos - 00 Days	1		
	05 Yrs - 00 Mos - 00 Days	1		
	06 Yrs - 00 Mos - 00 Days	1		
7700018960	05 Yrs - 00 Mos - 00 Days	1		
	02 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700019215	01 Yrs - 08 Mos - 00 Days	2	Board Determination(s) Rendered After Parole Violation Return to Custody	2
	02 Yrs - 03 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
	02 Yrs - 06 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700019274	10 Yrs - 00 Mos - 00 Days	1		
7700019486	03 Yrs - 00 Mos - 00 Days	3		
7700019894	08 Yrs - 00 Mos - 00 Days	1		
7700020076	10 Yrs - 00 Mos - 00 Days	1		
7700020178	10 Yrs - 00 Mos - 00 Days	1		
7700020293	03 Yrs - 00 Mos - 00 Days	1		
7700020623	03 Yrs - 00 Mos - 00 Days	2		
7700020629	18 Yrs - 00 Mos - 00 Days	1		
7700020813	10 Yrs - 00 Mos - 00 Days	1		
7700021063	08 Yrs - 00 Mos - 00 Days	1		
7700022737	07 Yrs - 00 Mos - 00 Days	1		
7700025513	10 Yrs - 00 Mos - 00 Days	1		
7700025796	10 Yrs - 00 Mos - 00 Days	1		
7700026633	02 Yrs - 05 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
	10 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700026667	08 Yrs - 00 Mos - 00 Days	1		
7700026669	05 Yrs - 00 Mos - 00 Days	2		
7700026681	03 Yrs - 00 Mos - 00 Days	3		
7700026700	05 Yrs - 00 Mos - 00 Days	1		
7700026814	10 Yrs - 00 Mos - 00 Days	1		
7700026994	05 Yrs - 00 Mos - 00 Days	1		
7700027082	10 Yrs - 00 Mos - 00 Days	1		
7700027320	02 Yrs - 00 Mos - 00 Days	2	Board Determination(s) Rendered After Parole Violation Return to Custody	2
	03 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700028802	06 Yrs - 00 Mos - 00 Days	1		
7700029196	03 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
	08 Yrs - 04 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700029213	03 Yrs - 00 Mos - 00 Days	2		
	08 Yrs - 00 Mos - 00 Days	1		
7700029237	05 Yrs - 00 Mos - 00 Days	1		
7700029241	03 Yrs - 00 Mos - 00 Days	1		
7700029249	08 Yrs - 00 Mos - 00 Days	1		
	10 Yrs - 00 Mos - 00 Days	1		
7700029279	03 Yrs - 00 Mos - 00 Days	2		
7700029316	10 Yrs - 00 Mos - 00 Days	1		
7700029718	20 Yrs - 00 Mos - 00 Days	1		
7700030581	07 Yrs - 00 Mos - 00 Days	1		
7700030637	07 Yrs - 07 Mos - 00 Days	1		
7700031194	08 Yrs - 00 Mos - 00 Days	1		
7700031304	06 Yrs - 00 Mos - 00 Days	1		

7700031727	06 Yrs - 00 Mos - 00 Days	1		
7700031734	10 Yrs - 00 Mos - 00 Days	1		
7700031769	08 Yrs - 00 Mos - 00 Days	1		
7700031776	01 Yrs - 08 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700031782	03 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700031785	07 Yrs - 00 Mos - 00 Days	1		
7700031874	16 Yrs - 08 Mos - 00 Days	1		
7700039328	03 Yrs - 00 Mos - 00 Days	1		
7700045503	05 Yrs - 00 Mos - 00 Days	1		
7700046034	08 Yrs - 00 Mos - 00 Days	1		
	10 Yrs - 00 Mos - 00 Days	1		
	16 Yrs - 08 Mos - 00 Days	1		
7700047396	03 Yrs - 00 Mos - 00 Days	1		
	04 Yrs - 00 Mos - 00 Days	2		
7700047443	03 Yrs - 00 Mos - 00 Days	2	Board Determination(s) Rendered After Parole Violation Return to Custody	2
7700047669	03 Yrs - 00 Mos - 00 Days	1		
7700047798	10 Yrs - 00 Mos - 00 Days	1		
	12 Yrs - 00 Mos - 00 Days	1		
7700048488	08 Yrs - 00 Mos - 00 Days	1		
7700048669	10 Yrs - 00 Mos - 00 Days	1		
7700049546	03 Yrs - 00 Mos - 00 Days	1		
	06 Yrs - 00 Mos - 00 Days	1		
7700049739	06 Yrs - 00 Mos - 00 Days	1		
	10 Yrs - 00 Mos - 00 Days	1		
7700050986	08 Yrs - 00 Mos - 00 Days	1		
7700052022	10 Yrs - 00 Mos - 00 Days	1		
7700052196	03 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700052232	10 Yrs - 00 Mos - 00 Days	1		
7700052380	10 Yrs - 00 Mos - 00 Days	1		
7700052382	03 Yrs - 00 Mos - 00 Days	4		
7700052526	08 Yrs - 00 Mos - 00 Days	2		
7700052708	09 Yrs - 00 Mos - 00 Days	1		
7700052915	06 Yrs - 00 Mos - 00 Days	1		
7700053253	03 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700053359	08 Yrs - 04 Mos - 00 Days	1		
	10 Yrs - 00 Mos - 00 Days	1		
7700053508	02 Yrs - 06 Mos - 00 Days	2	Board Determination(s) Rendered After Parole Violation Return to Custody	2
	03 Yrs - 00 Mos - 00 Days	2	Board Determination(s) Rendered After Parole Violation Return to Custody	2
7700054566	10 Yrs - 00 Mos - 00 Days	1		
7700055768	10 Yrs - 00 Mos - 00 Days	2		
7700056172	04 Yrs - 06 Mos - 00 Days	1		
7700056310	07 Yrs - 06 Mos - 00 Days	1		
7700056742	03 Yrs - 00 Mos - 00 Days	1		
7700057033	01 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
	01 Yrs - 02 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700059689	05 Yrs - 00 Mos - 00 Days	1		
7700060036	03 Yrs - 00 Mos - 00 Days	1		
7700060228	07 Yrs - 00 Mos - 00 Days	1		
7700060513	05 Yrs - 00 Mos - 00 Days	1		
	07 Yrs - 00 Mos - 00 Days	1		
7700060607	03 Yrs - 00 Mos - 00 Days	1		
7700061283	03 Yrs - 00 Mos - 00 Days	1		
	05 Yrs - 00 Mos - 00 Days	1		
7700062373	03 Yrs - 00 Mos - 00 Days	1		
	07 Yrs - 00 Mos - 00 Days	1		

7700063406	08 Yrs - 00 Mos - 00 Days	1		
7700063970	03 Yrs - 00 Mos - 00 Days	1		
7700064154	10 Yrs - 00 Mos - 00 Days	1		
7700064980	10 Yrs - 00 Mos - 00 Days	1		
7700071284	03 Yrs - 00 Mos - 00 Days	1		
7700071378	03 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700071408	03 Yrs - 00 Mos - 00 Days	1		
7700073596	03 Yrs - 00 Mos - 00 Days	1		
	05 Yrs - 00 Mos - 00 Days	1		
7700074089	06 Yrs - 00 Mos - 00 Days	1		
7700076474	02 Yrs - 03 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
	03 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700079945	02 Yrs - 00 Mos - 00 Days	1		
	02 Yrs - 08 Mos - 00 Days	1		
7700081817	01 Yrs - 06 Mos - 00 Days	2	Board Determination(s) Rendered After Parole Violation Return to Custody	2
7700086415	01 Yrs - 08 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700086623	10 Yrs - 00 Mos - 00 Days	1		
7700086692	03 Yrs - 00 Mos - 00 Days	1		
7700086873	06 Yrs - 00 Mos - 00 Days	1		
7700086874	10 Yrs - 00 Mos - 00 Days	1		
7700086994	03 Yrs - 00 Mos - 00 Days	2		
7700087111	02 Yrs - 00 Mos - 00 Days	1		
	03 Yrs - 00 Mos - 00 Days	1		
	06 Yrs - 00 Mos - 00 Days	1		
7700087242	02 Yrs - 03 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
	03 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700087266	10 Yrs - 00 Mos - 00 Days	1		
7700087300	10 Yrs - 00 Mos - 00 Days	1		
7700087340	03 Yrs - 00 Mos - 00 Days	1		
7700087420	07 Yrs - 06 Mos - 00 Days	1		
7700087898	10 Yrs - 00 Mos - 00 Days	1		
7700087931	03 Yrs - 00 Mos - 00 Days	1		
7700088132	01 Yrs - 06 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700088559	05 Yrs - 00 Mos - 00 Days	1		
7700088648	10 Yrs - 00 Mos - 00 Days	2		
7700088734	04 Yrs - 00 Mos - 00 Days	1		
	05 Yrs - 00 Mos - 00 Days	3		
7700092591	10 Yrs - 00 Mos - 00 Days	1		
7700095276	03 Yrs - 00 Mos - 00 Days	2	Board Determination(s) Rendered After Parole Violation Return to Custody	2
7700095290	03 Yrs - 00 Mos - 00 Days	4	Board Determination(s) Rendered After Parole Violation Return to Custody	4
7700095721	05 Yrs - 00 Mos - 00 Days	1		
	05 Yrs - 07 Mos - 00 Days	1		
7700095769	07 Yrs - 00 Mos - 00 Days	2		
7700095950	10 Yrs - 00 Mos - 00 Days	1		
7700096119	08 Yrs - 00 Mos - 00 Days	2		
7700096336	05 Yrs - 00 Mos - 00 Days	1		
7700099075	01 Yrs - 08 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700099516	10 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700099538	12 Yrs - 00 Mos - 00 Days	1		
7700099552	03 Yrs - 00 Mos - 00 Days	2		
7700099591	03 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
	07 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700099621	16 Yrs - 08 Mos - 00 Days	1		
7700099638	15 Yrs - 00 Mos - 00 Days	1		
7700099645	10 Yrs - 00 Mos - 00 Days	1		

7700099797	08 Yrs - 00 Mos - 00 Days	2	
7700099814	02 Yrs - 06 Mos - 00 Days	1	
	06 Yrs - 00 Mos - 00 Days	1	
7700100255	03 Yrs - 00 Mos - 00 Days	1	
	08 Yrs - 00 Mos - 00 Days	1	
7700100287	10 Yrs - 00 Mos - 00 Days	1	
7700100307	08 Yrs - 04 Mos - 00 Days	1	
7700100591	10 Yrs - 00 Mos - 00 Days	2	
7700100620	10 Yrs - 00 Mos - 00 Days	1	
7700101004	08 Yrs - 00 Mos - 00 Days	1	
7700104114	10 Yrs - 00 Mos - 00 Days	1	
7700104793	05 Yrs - 00 Mos - 00 Days	1	
7700104815	02 Yrs - 10 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700104818	12 Yrs - 00 Mos - 00 Days	1	
7700104865	10 Yrs - 00 Mos - 00 Days	2	
7700104914	20 Yrs - 00 Mos - 00 Days	1	
7700104930	07 Yrs - 00 Mos - 00 Days	1	
	08 Yrs - 00 Mos - 00 Days	1	
7700104950	03 Yrs - 00 Mos - 00 Days	1	
7700104968	20 Yrs - 00 Mos - 00 Days	1	
7700105119	10 Yrs - 00 Mos - 00 Days	1	
7700105474	10 Yrs - 00 Mos - 00 Days	1	
7700105607	20 Yrs - 00 Mos - 00 Days	1	
7700105901	10 Yrs - 00 Mos - 00 Days	1	
7700106064	03 Yrs - 00 Mos - 00 Days	1	
7700107951	03 Yrs - 00 Mos - 00 Days	1	
7700108384	10 Yrs - 00 Mos - 00 Days	1	
7700109704	08 Yrs - 00 Mos - 00 Days	1	
7700109812	03 Yrs - 00 Mos - 00 Days	1	
	15 Yrs - 00 Mos - 00 Days	1	
7700109815	10 Yrs - 00 Mos - 00 Days	2	
7700110157	02 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700110573	06 Yrs - 00 Mos - 00 Days	3	
7700110666	15 Yrs - 00 Mos - 00 Days	1	
7700110781	05 Yrs - 00 Mos - 00 Days	1	
	08 Yrs - 00 Mos - 00 Days	1	
7700110818	01 Yrs - 10 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700111001	03 Yrs - 00 Mos - 00 Days	1	
	08 Yrs - 00 Mos - 00 Days	1	
7700111017	03 Yrs - 00 Mos - 00 Days	1	
	06 Yrs - 00 Mos - 00 Days	1	
7700111978	12 Yrs - 00 Mos - 00 Days	1	
7700112011	10 Yrs - 00 Mos - 00 Days	1	
7700112233	08 Yrs - 00 Mos - 00 Days	1	
7700112836	03 Yrs - 00 Mos - 00 Days	1	
7700113127	07 Yrs - 00 Mos - 00 Days	1	
	09 Yrs - 00 Mos - 00 Days	1	
7700113213	10 Yrs - 00 Mos - 00 Days	1	
7700113220	02 Yrs - 06 Mos - 00 Days	1	
	03 Yrs - 00 Mos - 00 Days	2	
7700113608	07 Yrs - 00 Mos - 00 Days	1	
	10 Yrs - 00 Mos - 00 Days	1	
7700113621	07 Yrs - 00 Mos - 00 Days	1	
7700113736	02 Yrs - 03 Mos - 00 Days	2	
	03 Yrs - 00 Mos - 00 Days	1	

1

1

1

7700114089	05 Yrs - 00 Mos - 00 Days	1		
7700115021	01 Yrs - 05 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
	01 Yrs - 11 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700115036	05 Yrs - 00 Mos - 00 Days	1		
	10 Yrs - 00 Mos - 00 Days	1		
7700115371	03 Yrs - 00 Mos - 00 Days	1		
	05 Yrs - 00 Mos - 00 Days	2		
7700116847	02 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
	03 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700116975	03 Yrs - 00 Mos - 00 Days	1		
	08 Yrs - 00 Mos - 00 Days	1		
7700117503	03 Yrs - 00 Mos - 00 Days	1		
7700117609	03 Yrs - 00 Mos - 00 Days	2		
7700117699	03 Yrs - 00 Mos - 00 Days	3	Board Determination(s) Rendered After Parole Violation Return to Custody	3
7700117878	08 Yrs - 00 Mos - 00 Days	2		
7700118051	03 Yrs - 00 Mos - 00 Days	1		
	10 Yrs - 00 Mos - 00 Days	1		
7700118082	03 Yrs - 00 Mos - 00 Days	2		
	05 Yrs - 00 Mos - 00 Days	1		
7700118321	12 Yrs - 00 Mos - 00 Days	1		
7700118782	20 Yrs - 00 Mos - 00 Days	1		
7700118852	03 Yrs - 00 Mos - 00 Days	2		
7700119001	10 Yrs - 00 Mos - 00 Days	1		
7700119028	07 Yrs - 00 Mos - 00 Days	1		
7700119568	03 Yrs - 00 Mos - 00 Days	1		
7700120090	02 Yrs - 03 Mos - 00 Days	1		
	03 Yrs - 00 Mos - 00 Days	1		
7700120351	10 Yrs - 00 Mos - 00 Days	1		
7700120595	02 Yrs - 03 Mos - 00 Days	1		
7700121012	02 Yrs - 03 Mos - 00 Days	4		
7700121256	03 Yrs - 00 Mos - 00 Days	1		
7700121434	07 Yrs - 00 Mos - 00 Days	1		
7700121521	10 Yrs - 00 Mos - 00 Days	1		
7700121614	02 Yrs - 10 Mos - 00 Days	1		
	04 Yrs - 00 Mos - 00 Days	1		
	07 Yrs - 00 Mos - 00 Days	1		
7700121689	10 Yrs - 00 Mos - 00 Days	1		
7700122006	03 Yrs - 00 Mos - 00 Days	1		
7700122051	03 Yrs - 00 Mos - 00 Days	1		
	06 Yrs - 00 Mos - 00 Days	1		
7700122097	03 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700122459	06 Yrs - 00 Mos - 00 Days	1		
7700122487	06 Yrs - 00 Mos - 00 Days	1		
7700122548	10 Yrs - 00 Mos - 00 Days	1		
	15 Yrs - 00 Mos - 00 Days	1		
7700122556	10 Yrs - 00 Mos - 00 Days	1		
7700123499	01 Yrs - 02 Mos - 00 Days	1		
7700123560	06 Yrs - 00 Mos - 00 Days	1		
7700124710	02 Yrs - 00 Mos - 00 Days	1		
	02 Yrs - 06 Mos - 00 Days	1		
	06 Yrs - 00 Mos - 00 Days	1		
7700125734	03 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700126096	12 Yrs - 00 Mos - 00 Days	1		
7700127045	03 Yrs - 00 Mos - 00 Days	1		
7700134397	04 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1

	05 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
	10 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700134421	04 Yrs - 00 Mos - 00 Days	1		
7700134423	02 Yrs - 04 Mos - 00 Days	1		
	02 Yrs - 08 Mos - 00 Days	1		
7700134438	00 Yrs - 36 Mos - 00 Days	1		
	03 Yrs - 00 Mos - 00 Days	1		
7700134472	10 Yrs - 00 Mos - 00 Days	1		
7700141883	30 Yrs - 00 Mos - 00 Days	1		
7700142619	02 Yrs - 03 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700143155	10 Yrs - 00 Mos - 00 Days	1		
7700144383	03 Yrs - 00 Mos - 00 Days	1		
7700144885	10 Yrs - 00 Mos - 00 Days	1		
7700146594	10 Yrs - 00 Mos - 00 Days	1		
7700151169	05 Yrs - 00 Mos - 00 Days	2		
7700152980	10 Yrs - 00 Mos - 00 Days	1		
7700153040	10 Yrs - 00 Mos - 00 Days	1		
7700158139	03 Yrs - 00 Mos - 00 Days	1		
7700189259	15 Yrs - 00 Mos - 00 Days	1		
7700190319	03 Yrs - 00 Mos - 00 Days	1		
	05 Yrs - 00 Mos - 00 Days	1		
7700192039	10 Yrs - 00 Mos - 00 Days	1		
7700192403	03 Yrs - 00 Mos - 00 Days	1		
	02 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700193143	01 Yrs - 06 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
	02 Yrs - 05 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
	04 Yrs - 00 Mos - 00 Days	1	Board Determination(s) Rendered After Parole Violation Return to Custody	1
7700225321	01 Yrs - 08 Mos - 00 Days	1		
		478	Count: 79	79

Inmate ID	Number of Decisions to PAROLE for this Inmate	PV Note
7700000055	1	
7700000157	1	
7700000174	1	
7700000232	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700000237	1	
7700000277	1	
7700000350	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700000351	1	
	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700000391	1	
7700000401	1	
	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700000402	1	
7700000408	1	
7700000608	1	
7700000757	1	
7700000767	1	
7700000769	1	
7700000778	1	
7700000791	1	
7700000904	1	
7700000926	1	
7700001281	1	
7700001417	1	
7700001608	1	
7700001775	1	
7700003874	1	
7700004494	1	
7700005664	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700005697	2	Board Determination(s) Rendered After Parole Violation Return to Custody
7700005729	2	Board Determination(s) Rendered After Parole Violation Return to Custody
7700005860	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700017258	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700018869	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700018895	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700018926	1	
7700018938	1	
7700018960	1	
	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700019868	1	

7700019894	1	
7700020293	1	
7700020463	1	
7700020477	1	
7700020503	1	
7700025796	1	
7700026700	1	
7700027320	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700028802	1	
7700029241	1	
7700030564	1	
7700030699	1	
7700031683	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700031776	2	Board Determination(s) Rendered After Parole Violation Return to Custody
7700031782	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700045931	1	
7700047443	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700048488	1	
7700052196	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700053253	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700053508	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700056310	1	
7700066611	1	
7700079945	1	
	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700080139	1	
7700081817	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700086873	1	
7700086951	1	
7700086994	1	
7700087607	1	
7700089077	1	
7700089083	1	
7700099075	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700099591	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700099814	1	
7700100389	1	
7700100747	1	
7700103156	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700103769	1	
7700104815	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700105169	1	
7700109704	1	
7700109868	1	
7700110069	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700110157	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700110818	2	Board Determination(s) Rendered After Parole Violation Return to Custody

7700110931	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700111001	1	
7700111017	1	
7700111951	1	
7700112233	1	
7700112836	1	
7700113220	1	
7700114952	1	
7700115021	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700117609	1	
7700117952	1	
7700118852	1	
7700120458	1	
7700120595	1	
7700120638	1	
7700121012	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700121256	1	
7700122051	1	
7700122097	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700123499	1	
7700123560	1	
7700124050	1	
7700124710	1	
7700125534	1	
7700125734	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700134421	1	
7700134423	1	
7700141966	2	Board Determination(s) Rendered After Parole Violation Return to Custody
7700142619	1	Board Determination(s) Rendered After Parole Violation Return to Custody
7700152969	1	
7700190870	1	
7700192403	1	
7700193143	1	Board Determination(s) Rendered After Parole Violation Return to Custody
Total: 125		Counts - Pre PV: 89 Post PV: 36

EXHIBIT B

INITIAL PAROLE HEARING PROCESS

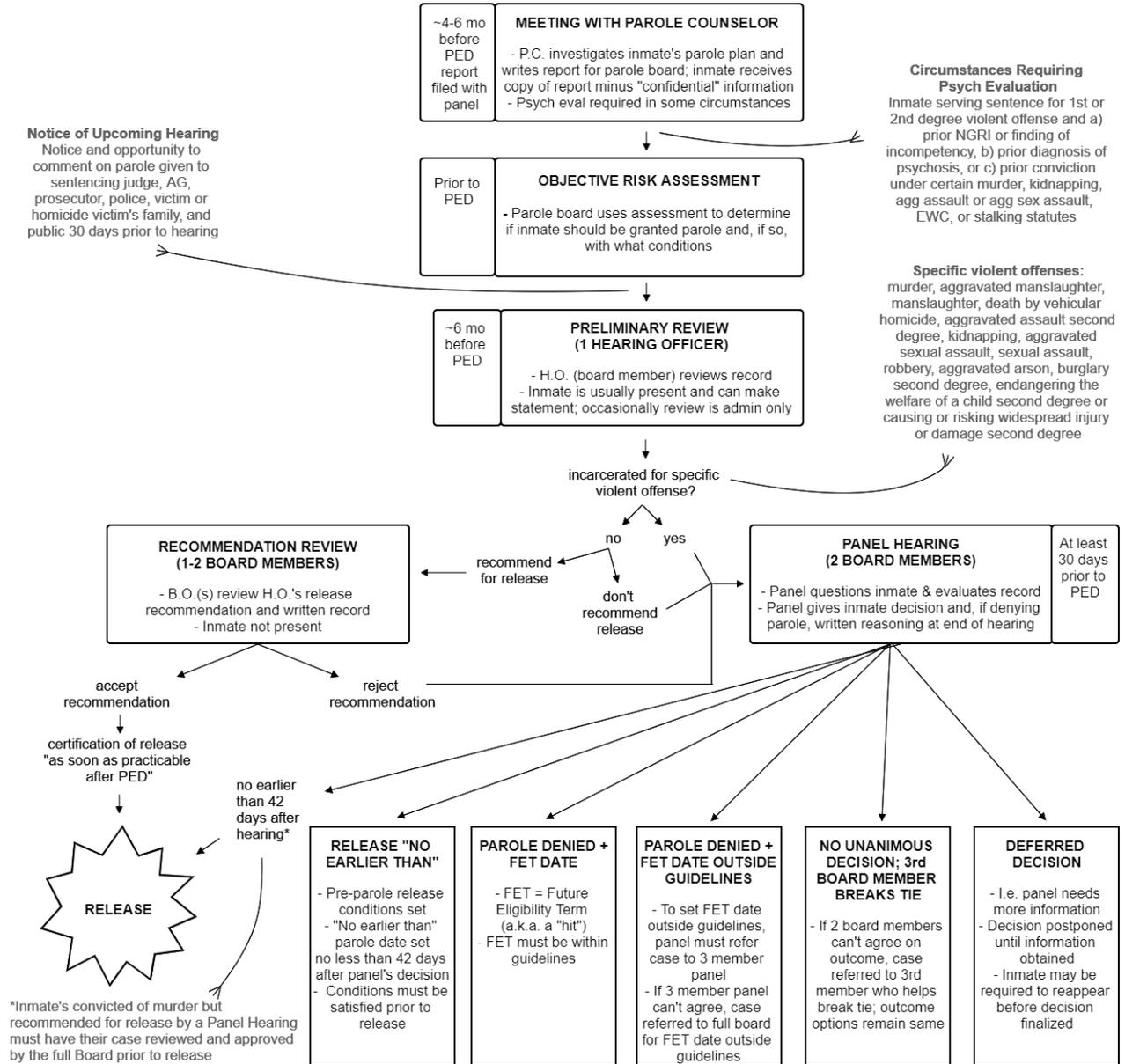


EXHIBIT C

**PAROLE RELEASE STATISTICS - STATE PRISON INMATES
1991-2020**

FISCAL YEAR	INITIAL HEARINGS		BOARD MEMBER REVIEWS		PANEL HEARINGS								RESULTS		
	RECOMMEND PAROLE	REFER TO PANEL	DEFER	TOTAL	PAROLE APPROVED	REFER TO PANEL/ DENIED	PAROLE APPROVED	PAROLE DENIED	PAROLE SERVE MAXIMUM	DEFER	REFER TO THREE MEMBER PANEL	REFER TO FULL BOARD	TOTAL	PAROLE RELEASE ESTABLISHED	CASES DECIDED*
FY 1992	4401	6659	554	11614	4450	136	3710	2855	426	416	42	49	7498	8982	12749
FY 1991	4577	6701	583	11861	4679	231	2445	3775	544	491	58	36	7349	7553	11927

**3059 WAS REVISED NUMBER FOR 2016 PER 2019 ANNUAL REPORT

EXHIBIT D

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

WILLIE MITCHELL, : **Civil Action**
 :
 Plaintiff-Movant, : **BRIEF IN SUPPORT OF**
 : **MOTION FOR REMAND**
 v. :
 :
 NEW JERSEY STATE PAROLE BOARD, :
 :
 Respondent. :

BRIEF ON BEHALF OF PLAINTIFF-MOVANT

Joseph E. Krakora
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
P.O. Box 46003
Newark, New Jersey 07101
973-877-1200

JOSEPH J. RUSSO, ESQ.
Deputy Public Defender
Appellate Section
Attorney ID# 032151987

Of Counsel and
On the Brief
Joseph.Russo@opd.nj.gov

PLAINTIFF IS CONFINED

TABLE OF CONTENTS

PAGE NO. (S)

PROCEDURAL HISTORY AND STATEMENT OF FACTS 1

 A. The Underlying Case 1

 B. The Parole Board’s Imposition of Future Eligibility
 Terms 1

 C. The Attorney General’s Proposed Consent Protective
 Order. 3

 D. Mr. Mitchell’s Intellectual Deficits & Mental Health
 Issues. 4

LEGAL ARGUMENT 5

 POINT I

 IN THE ABSENCE OF SPECIFIC COMPELLING REASONS ARTICULATED
 BY THE ATTORNEY GENERAL, DUE PROCESS MANDATES THAT THE
 CONFIDENTIAL DOCUMENTS BE PROVIDED TO APPELLATE COUNSEL
 WITHOUT RESTRICTIONS. 5

 A. The Parole Board's Reliance on the Withheld
 Confidential Documents Played a Substantial Role in
 Producing the Adverse Decision Which is the Subject
 of Mr. Mitchell’s Direct Appeal. 7

 B. The Proposed Consent Protective Order Prohibiting
 Counsel from Discussing or Sharing the Confidential
 Documents with Mr. Mitchell is Overbroad, Punitive,
 Unreasonable and Violates Due Process. 8

 C. The Imposition of a 10-Year Future Eligibility
 Term, and the Prior Imposition of an 18 Year Future
 Eligibility Term, Blurs the Line Between Sentencing
 and Parole, Therefore the Due Process Protections
 Provided at Sentencing Should Closely Parallel the
 Due Process Protections Afforded in Parole Release
 Determinations. 9

TABLE OF CONTENTS (CONT'D)

PAGE NO. (S)

D. Without the Ability to Share and Discuss the Confidential Documents with Mr. Mitchell, the Proposed Consent Protective Order Violates Due Process and Precludes Appellate Counsel from Rendering Effective Assistance of Counsel Under the Sixth Amendment of The United States Constitution and Article 1, ¶ 10 of the New Jersey Constitution. 11

POINT II

THIS CASE MUST BE SUMMARILY REMANDED BECAUSE THE UNCOUNSELED IMPOSITION OF A 10-YEAR FUTURE ELIGIBILITY TERM ON MR. MITCHELL, WHO SUFFERS FROM INTELLECTUAL DEFICITS AND SCHIZOPHRENIA (PARANOID TYPE), DEPRIVED HIM OF A LEGITIMATE OPPORTUNITY TO BE HEARD, THEREBY VIOLATING DUE PROCESS OF LAW. 12

A. Right to Counsel at Parole Release Hearings 13

B. The Right to the Assistance of a Parole Representative at Parole Release Hearings. 18

POINT III

THIS CASE MUST BE SUMMARILY REMANDED BECAUSE THE UNCOUNSELED IMPOSITION OF A 10-YEAR FUTURE ELIGIBILITY TERM ON MR. MITCHELL, WHO SUFFERS FROM INTELLECTUAL DEFICITS AND SCHIZOPHRENIA, VIOLATED FUNDAMENTAL FAIRNESS. 21

CONCLUSION 24

TABLE OF AUTHORITIES

PAGE NO. (S)

Cases

Acoli v. New Jersey State Parole Bd., 462 N.J. Super. 39
(App. Div. 2019) 6

Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2014) 20

Atkins v. Virginia, 536 U.S. 304 (2002) 22

Beckworth v. N.J. State Parole Bd., 62 N.J. 348 (1973) 13, 14

Betts v. Brady, 316 U.S. 455 (1942) 14

Diatchenko v. District Attorney for the Suffolk District,
27 N.E.3d 349, 360 (Mass. 2015) 17

Doe v. Poritz, 142 N.J. 1 (1995) 21

Evitts v. Lucey, 469 U.S. 387 (1985) 11

Gardner v. Florida, 430 U.S. 349 (1977) 10

Gideon v. Wainwright, 372 U.S. 335 (1963) 14

Greenholtz v. Inmates of the Penal and Correctional Complex,
442 U.S. 1 (1979) 5

Hall v. Florida, 572 U.S. 701 (2014) 22

In re Request to Modify Prison Sentences, Expedite Parole Hearings, &
Identify Vulnerable Prisoners, 242 N.J. 357 (2020)..... 6

Mempa v. Rhay, 389 U.S. 128 (1967) 10

Menechino v. Oswald, 430 F.2d 403 (2nd Cir. 1970) 15, 17, 18

Monson v. Carver, 928 P.2d 1017 (Utah 1996) 14

Morrissey v. Brewer, 408 U.S. 471 (1972) 14

New Jersey Parole Bd. v. Byrne, 93 N.J. 192 (1983) 6

TABLE OF AUTHORITIES (CONT'D)

PAGE NO. (S)

Cases (cont'd)

O'Neal v. New Jersey State Parole Bd., 149 N.J. Super. 174
(App. Div. 1977) 13

Payton v. N.J. Tpk. Auth., 148 N.J. 524 9

Puchalski v. New Jersey State Parole Board,
55 N.J. 113 (1969) 13, 14

Seacoast Builders Corp. v. Rutgers, 358 N.J. Super. 524
(App. Div. 2003) 9

State v. Carson, 56 P.3d 844 (Mont. 2002) 15

State v. Guzman, 313 N.J. Super. 363 (App. Div.)
certif. denied, 156 N.J. 424 (1998) 11

State v. O'Neil, 219 N.J. 598 (2014) 11

State v. P.Z., 152 N.J. 86 (1997) 21

State v. Sanchez, 129 N.J. 261 (1992) 19, 20

State v. Willie James Mitchell, No. A-4583-82
(App. Div. September 25, 1985) 1

Thompson v. N.J. State Parole Bd., 210 N.J. Super. 107 (1986) 6, 8

United States v. Gouveia, 467 U.S. 180 (1984) 19

United States v. Wade, 388 U.S. 218 (1967) 19

Wood v. Allen, 558 U.S. 290 (2010) 22

TABLE OF AUTHORITIES (CONT'D)

PAGE NO. (S)

Statutes

N.J.S.A. 2C:11-3 1
N.J.S.A. 2C:43-7 (b) 1
N.J.S.A. 30:4-123.14 13
N.J.S.A. 30:4-123.53 (a) 6

Administrative Code

N.J.A.C. 10A:71-2 (c) 3
N.J.A.C. 10A:71-2.11 18
N.J.A.C. 10A:71-2.2 (b) 6
N.J.A.C. 10A:71-2.2 (c) 7
N.J.A.C. 10A:71-3.13 (g) 18, 19

Rules

Mont. Admin. R. 20.25.401 (12) 15
Rule 4:10-2 (e) 9

Constitutional Provisions

Article 1, ¶ 10 of the New Jersey Constitution 11
Sixth Amendment of The United States Constitution 11

TABLE OF AUTHORITIES (CONT'D)

PAGE NO. (S)

Other Authorities

American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (2013)..... 4

<https://www.state.nj.us/parole/docs/AdultParoleHandbook.pdf> 16

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The Parole Act of 1979 6

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PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

The procedural history commences on December 11, 1981, four decades ago. To simplify, the procedural history and statement facts will be classified into the underlying case, the Parole Board's imposition of future eligibility terms, the Attorney General's proposed Consent Protective Order, and Mr. Mitchell's intellectual deficits and mental health issues.

A. The Underlying Case

Mercer County Indictment² 66-82 charged defendant-movant, Willie Mitchell, with one count of murder contrary to N.J.S.A 2C:11-3 for the stabbing death of his girlfriend on December 11, 1981.³ Following a trial and a guilty verdict, he was sentenced on April 15, 1983 by the Honorable Richard J.S. Barlow, Jr., J.S.C. to life imprisonment with a twenty-five-year period of parole ineligibility pursuant to N.J.S.A. 2C:43-7(b). (Pma2)⁴ His conviction and sentence were affirmed by a panel of this Court. State v. Willie James Mitchell, No. A-4583-82 (App. Div. September 25, 1985). (Pma4) The Supreme Court denied Mr. Mitchell's petition for certification on November 12, 1985.⁵ (Pma20)

B. The Parole Board's Imposition of Future Eligibility Terms⁶

¹ Because the procedural history and the facts are inextricably intertwined, these sections are combined in this brief to promote conciseness and clarity.

² The indictment is unavailable.

³ Prior to trial, Mr. Mitchell filed a Notice of Diminished Capacity. (Pma1)

⁴ "Pma" refers to the appendix. "Pmca" refers to confidential appendix.

"1T" refers to the transcript of the two-member Panel Hearing dated November 5, 2018.

⁵ It is unclear from the historical record whether Mr. Mitchell ever filed a petition for post-conviction relief.

⁶ Because Mr. Mitchell's offense was committed in 1981, all of the Board's decisions are governed by the Parole Act of 1979 which provides that "[a]n adult inmate shall be released on parole at the time of parole eligibility, unless information supplied [to the Board] or developed or produced at a hearing . . . indicates by

Mr. Mitchell has been incarcerated since December 11, 1981, over 39 years. He is now 67 years old. He has been denied parole on two occasions. First, on December 7, 2007 Mr. Mitchell was denied parole by a two-member panel⁷ and referred to a three-member panel for the establishment of a future eligibility term greater than administrative guidelines. (Pma21) The three-member panel imposed a 216-month (18 year) future eligibility term on February 6, 2008, providing Mr. Mitchell with a revised parole eligibility date of March 1, 2019. (Pma22) Mr. Mitchell was not represented by counsel during his initial parole proceedings.⁸

Second, on November 5, 2018, Mr. Mitchell was denied parole by a two-member panel. (Pma24) Thereafter, he was referred to a three-member panel for the establishment of an FET greater than administrative guidelines. (Pma24) In its decision, the two-member Panel noted that the parole denial and recommendation for imposing a future eligibility term were based in part on its review of "confidential material" and a "professional report." (Pma24) (Pma29) Just as at his earlier parole hearing, Mr. Mitchell was not represented by counsel and was not provided access to these confidential documents.

On January 16, 2019, a three-member Board panel imposed a 120-month

a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime under the laws of this State if released on parole at such time." N.J.S.A. 30:4-123.53(a)

⁷ The two-member panel decision noted that Mr. Mitchell is "special needs." (Pma21)

⁸ Mr. Mitchell filed *pro se* motions with this Court requesting the appointment of counsel in his direct appeal noting that he is functionally illiterate and functioning at a third-grade reading level. The motions and certifications were prepared by a prison "paralegal." The Honorable Carmen Messano, P.J.A.D. denied Mr. Mitchell's motion for the assignment of counsel on December 27, 2019 (order filed on December 30, 2019). In addition, a reconsideration motion as to the request for assignment of counsel was denied on March 16, 2020.

(ten year) future eligibility term, again noting that the FET was based in part on the review of "confidential material" and a "professional report." (Pma30) The three-member Board Panel's decision dated February 23, 2019 stated that a "document classified as confidential [] play[ed] a significant role in the three-member Board Panel's decision to establish a 120-month eligibility term." (Pma35) Again, as a *pro se* inmate, Mr. Mitchell was not provided access to these confidential documents.

On April 8, 2019, Mr. Mitchell filed an administrative appeal. (Pma37) On July 31, 2019 the Parole Board issued a Final Agency Decision (Pma44) affirming the two-member and three-member panel decisions stating that the "panel relied on confidential material and, pursuant to N.J.A.C. 10A:71-2(c), identified for the record the nature of the confidential information." (Pma46)

On September 3, 2019 Mr. Mitchell filed a *pro se* Notice of Appeal from the July 31, 2019 Final Agency Decision. (Pma49) On December 14, 2020, the Office of the Public Defender filed a notice of appearance. (Pma51)

C. The Attorney General's Proposed Consent Protective Order.

On December 18, 2020, counsel for Mr. Mitchell received from the Deputy Attorney General a proposed Consent Protective Order (Pma52) which sets forth the confidential documents at issue: (1) Confidential mental health records of Mr. Mitchell from 1983-1993; (2) Confidential in-depth psychological evaluation dated August 23, 2018; (3) Confidential Reports dated November 5, 2018; and (4) Confidential undated addendum. (Pma53) Pursuant to paragraphs 3 and 4 of the proposed Consent Protective Order,

counsel for Mr. Mitchell may utilize the confidential documents in prosecuting the appeal but cannot share or discuss them with Mr. Mitchell.⁹ (Pma54) Paragraph 3 states that “[n]o person who examines the confidential documents shall disseminate orally, in writing, or by any other means any information whatsoever contained therein to any person not also authorized to examine the Confidential documents.” (Pma54) And paragraph 4 states: “[t]he confidential documents referenced herein, numbered “1” through “2” above, shall not be provided to appellant, Willie Mitchell under the terms of this Order at any time.” (Pma54)

Thereafter, on December 21, 2020, counsel submitted a letter to the Deputy Attorney General setting forth objections to the proposed Consent Protective Order. (Pma60) Those objections are more fully set forth in the Legal Argument section of this brief.¹⁰

D. Mr. Mitchell’s Intellectual Deficits & Mental Health Issues.¹¹

As set forth above, Mr. Mitchell has serious intellectual deficits. His TABE test results, last administered in 2018, confirm the severity

⁹ The Deputy Attorney General in e-mail correspondence to counsel stated: “Regarding the documents which are deemed as confidential to your client, in order to provide you with those confidential documents, you will need to sign the attached Consent Protective Order, which dictates that you can use those documents in prosecuting your appeal but [] are forbidden from showing them or discussing them with your client. Upon my receipt of the signed order indicating your consent, I will sign it and file it with the court. When I receive the signed order from the court, I will provide you with the noted confidential documents.” (Pma58)

¹⁰ Suffice to say, the brief in support of the plenary appeal of the final decision of the Parole Board cannot be completed until the issues raised in this motion for remand are decided.

¹¹ The APA defines intellectual disability as a “disorder . . . that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains.” American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (2013) at 33. The American Association on Intellectual and Developmental Disabilities definition is similar. See, Intellectual Disability, Definition, Classification, and Systems of Supports, (Eleventh edition) (AAIDD) (2010) at 5.

of his deficits. He functions at a second-grade level in reading, applied math, and language. Further, he functions at a third-grade level in math computation. (Pma63) A December 7, 2007 Panel Decision notes that Mr. Mitchell is "special needs." (Pma21) He has failed the GED examination despite several attempts.¹²

Shortly after being sentenced on April 15, 1983, Mr. Mitchell had a "psychiatric intervention." (Pma65) He is currently taking anti-psychotic medication resulting from a diagnosis of chronic schizophrenia, paranoid type. (Pma65)

LEGAL ARGUMENT

POINT I

IN THE ABSENCE OF SPECIFIC COMPELLING REASONS ARTICULATED BY THE ATTORNEY GENERAL, DUE PROCESS MANDATES THAT THE CONFIDENTIAL DOCUMENTS BE PROVIDED TO APPELLATE COUNSEL WITHOUT RESTRICTIONS.

The United States Supreme Court has held that a prisoner does not have a fundamental liberty interest in parole. Greenholtz v. Inmates of the Penal and Correctional Complex, 442 U.S. 1, 8 (1979). Nonetheless, the Court found that Nebraska's parole statute "create[d] a protectible expectation of parole" by directing that the Parole Board "shall order [an eligible offender's] release unless" the Board finds certain facts. Id. at 11-12. Even though inmates had no right to parole under the

¹² In addition, a review of Mr. Mitchell's non-confidential record indicates that he has been essentially warehoused in our state prison system with minimal programming to address his disabilities. Seemingly without regard to his special needs, he has received substantial periods of time in solitary confinement (especially during the 1980's and 1990's) for various types of institutional infractions.

statute, because the law's structure and language created "the expectancy of release," inmates were entitled to due process protections. Id. at 12. In re Request to Modify Prison Sentences, Expedite Parole Hearings, & Identify Vulnerable Prisoners, 242 N.J. 357, 384 (2020)

Like Nebraska's expectancy of parole release, New Jersey has embraced a presumption that inmates "shall be paroled" on their first eligibility date. N.J.S.A.30:4-123.53(a). The Parole Act of 1979, applicable to this case, "create[d] a legitimate expectation of release . . . absent findings that justification for deferral exists," and gave rise to "a federally-protected liberty interest." Acoli v. New Jersey State Parole Bd., 462 N.J. Super. 39, 70 (App. Div. 2019) (Rothstadt dissenting) (quoting New Jersey Parole Bd. v. Byrne, 93 N.J. 192, 205 (1983)). Thus, Mr. Mitchell has "a protected liberty interest, rooted in the language of our parole statute, in parole release, and a resulting constitutional right to due process of law. Thompson v. N.J. State Parole Bd., 210 N.J. Super. 107, 120 (1986)

This due process protection logically extends to issues involving the withholding of confidential documents by the Parole Board.¹³ Mr. Mitchell's "liberty interest is sufficient to invoke certain procedural protections, Byrne, 93 N.J. at 208, among which is a limited right to disclosure of prison records in parole proceedings." Thompson, 210

¹³ N.J.A.C. 10A:71-2.2(b) provides: "No information, files, documents, reports, records or other written material deemed confidential pertaining to inmates or parolees shall be reviewed by any person except a Board member or employee or individual or law enforcement agency authorized by the Board or by the Chairperson." The State relies on this provision to prevent Mr. Mitchell from gaining access to the documents that were used to deny him parole and set a future eligibility term.

N.J. Super. at 121. These due process protections are meaningless without the ability of Mr. Mitchell to have access to all documents, confidential or otherwise, relied upon in the parole decision making process, absent the Attorney General setting forth narrowly tailored and compelling justifications for secrecy, which has not been done here.

Mr. Mitchell is "entitled not only 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 123-124. This is especially important in the instant case because Mr. Mitchell received an uncounseled 10-year future eligibility term while laboring under serious intellectual deficits and mental health issues.

A. The Parole Board's Reliance on the Withheld Confidential Documents Played a Substantial Role in Producing the Adverse Decision Which is the Subject of Mr. Mitchell's Direct Appeal.

The Parole Board's reliance on the withheld confidential documents played a substantial role in producing the adverse decision which is the subject of Mr. Mitchell's direct appeal. Indeed, the Panel Decision dated February 23, 2019 states at page 5 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." (Pma35) Further, the Notice of Final Agency Decision dated July 31, 2019 states at page 2 that "[t]he Board finds that the Board panel relied on confidential material and, pursuant to N.J.A.C. 10A:71-2.2(c), identified for the record the

nature of the confidential information.”¹⁴ (Pma46)

Thompson sets forth the remedies available to this Court when “confidential materials played a substantial role in producing the adverse decision.” The court stated that it would “undertake to review the [confidential] materials and determine the propriety of the decision to withhold them. If [the court] conclude[s] that nondisclosure was 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.

Clearly, the Panel Decision and the Final Agency Decision relied substantially on confidential documents.

B. The Proposed Consent Protective Order Prohibiting Counsel from Discussing or Sharing the Confidential Documents with Mr. Mitchell is Overbroad, Punitive, Unreasonable and Violates Due Process.

The proposed Consent Protective Order prohibiting counsel from discussing or sharing the confidential documents with Mr. Mitchell is overbroad, punitive, unreasonable, and smacks of a denial of due process. Neither the Parole Board nor the Attorney General has articulated any reason why disclosure would “threaten the life or physical safety of any person, interfere with law enforcement proceedings or result in the disclosure of professional diagnostic evaluations which would adversely

¹⁴ Mr. Mitchell did not have access to the very confidential documents relied upon by the Board in denying him parole and imposing a 120-month (10 year) future eligibility term.

affect [Mr. Mitchell's] rehabilitation or the future delivery of rehabilitative services." Id. at 118.

Nor did the Attorney General submit a privilege log to justify secrecy of the confidential documents. Seacoast Builders Corp. v. Rutgers, 358 N.J. Super. 524, 541 (App. Div. 2003) sets forth an analysis on the importance of privilege logs with specified objections. The "need for secrecy must be demonstrated with specificity as to each document. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient." Id. at 541., quoting Payton v. N.J. Tpk. Auth., 148 N.J. 524, 559 (italics added). Further, Rule 4:10-2(e) states:

When a party withholds information . . . the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Therefore, the proposed Consent Protective Order prohibiting counsel from discussing or sharing the confidential documents with Mr. Mitchell is overbroad, punitive, unreasonable, and constitutes a denial of due process. The Attorney General has not submitted any specific reasons to justify the secrecy of the confidential documents. A blanket assertion of confidentiality is simply not sufficient.

C. The Imposition of a 10-Year Future Eligibility Term, and the Prior Imposition of an 18 Year Future Eligibility Term, Blurs the Line Between Sentencing and Parole, Therefore the Due Process Protections Provided at Sentencing Should Closely Parallel the Due Process Protections Afforded in Parole Release Determinations.

The appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal

accused may be affected. While a defendant has no substantive right to a particular sentence within the range authorized by statute, sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. Mempa v. Rhay, 389 U.S. 128, 134 (1967) Nothing in our sentencing jurisprudence permits the imposition of a 10-year sentence without a zealous advocate at the side of the defendant. And on his day of judgement, the defendant would have access to confidential documents considered by the court.

In Gardner v. Florida, 430 U.S. 349, 362 (1977), a plurality of the Court concluded that the defendant was denied due process when his death sentence was imposed based upon confidential information which he did not have the opportunity to deny or explain. Noteworthy, Gardner has not been limited to death penalty cases. "Gardner is widely cited for the proposition that criminal defendants have a robust right to procedural due process protections in all aspects of sentencing." Kimberly Thomas and Paul Reingold, From Grace to Grids: Rethinking Due Process Protection for Parole, 107 J. Crim. L. & Criminology (2017) at 229. The authors further note:

We fail to see why the due process protections provided at the point of parole should not closely parallel the due process protections provided at sentencing, given that the practical liberty interests are identical, and the decisional processes are similar in both situations. In both settings, the decision-maker must decide exactly the same questions, namely how much risk does the defendant/prisoner pose, and how long should the defendant/prisoner serve?"

Id. at 249.

Mr. Mitchell has now received 28 years in future eligibility terms, most recently receiving a 10-year term, without access to confidential

documents relied upon by the Parole Board. This is clearly a deprivation of due process. Indeed, the distinctions between punishment imposed by our sentencing judges and the future eligibility terms imposed by the Parole Board are evaporating, making "anachronistic the siloing of parole into a separate category that is unworthy of due process." Id.

D. Without the Ability to Share and Discuss the Confidential Documents with Mr. Mitchell, the Proposed Consent Protective Order Violates Due Process and Precludes Appellate Counsel from Rendering Effective Assistance of Counsel Under the Sixth Amendment of The United States Constitution and Article 1, ¶ 10 of the New Jersey Constitution.

It is not possible for appellate counsel to provide effective assistance under the Sixth Amendment of the United States Constitution and Article 1, ¶ 10 of the New Jersey Constitution, without sharing and discussing the confidential documents with Mr. Mitchell. As noted in State v. O'Neil, 219 N.J. 598, 610-611 (2014): "The right to effective assistance includes the right to the effective assistance of appellate counsel on direct appeal. See Evitts v. Lucey, 469 U.S. 387, 396 (1985) ("A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."); State v. Guzman, 313 N.J. Super. 363, 374 (App. Div.) certif. denied, 156 N.J. 424 (1998) (holding that Strickland test applies to claims of ineffective assistance at trial level and on appeal)."

Certain provisions of the Consent Protective Order constitute an unlawful restriction on access to counsel and substantially restricts the scope of attorney-client communications. Counsel cannot effectively represent Mr. Mitchell with one hand tied behind his back. It is beyond cavil that the attorney-client relationship is sacred. If appellate

counsel is precluded from sharing and discussing critical confidential information relied upon by the Parole Board this will undoubtedly be prejudicial to Mr. Mitchell. Moreover, forcing appellate counsel to enter a Consent Protective Order as a condition precedent to obtaining confidential psychological reports, in which Mr. Mitchell was the subject of the evaluations, will undermine the attorney client relationship and substantially impede counsel's ability to discuss legal strategy, legal issues, and factual issues that will be raised in his plenary appeal. Appellate counsel and Mr. Mitchell must have the ability to speak freely regarding the decision of the Parole Board and discuss strategy without being handcuffed by a punitive Consent Protective Order.

POINT II

THIS CASE MUST BE SUMMARILY REMANDED BECAUSE THE UNCOUNSELED IMPOSITION OF A 10-YEAR FUTURE ELIGIBILITY TERM ON MR. MITCHELL, WHO SUFFERS FROM INTELLECTUAL DEFICITS AND SCHIZOPHRENIA (PARANOID TYPE), DEPRIVED HIM OF A LEGITIMATE OPPORTUNITY TO BE HEARD, THEREBY VIOLATING DUE PROCESS OF LAW.

Mr. Mitchell has received a total of 28 years in future eligibility terms without a legitimate opportunity to be heard. This failure of an opportunity to be reasonably heard is based upon Mr. Mitchell's special circumstances including his intellectual deficits and mental illness. Simply put, Mr. Mitchell was given the *opportunity* to be heard, but could not *effectively and legitimately* take advantage of that opportunity because of his intellectual deficits and schizophrenia. Mr. Mitchell's opportunity to be heard did not comport with minimal due process.

A. Right to Counsel at Parole Release Hearings.

New Jersey does not permit an attorney to represent a prisoner at parole release hearings in any meaningful way. Although a prisoner may be represented by counsel in a parole release hearing, counsel cannot appear at these critical hearings. New Jersey jurisprudence draws a distinction in due process protections between parole release and parole revocation. In Beckworth v. N.J. State Parole Bd., 62 N.J. 348 (1973), the Court held that an inmate in a parole release hearing has neither the right to counsel nor the right to a formal adversarial hearing. See also O'Neal v. New Jersey State Parole Bd. 149 N.J. Super. 174, 183 (App. Div. 1977); Puchalski v. New Jersey State Parole Board, 55 N.J. 113, 115 (1969) ("the prisoner shall have the right to consult legal counsel of his own selection, if he feels that his legal rights are invaded, and subject to the consent of the board to submit in writing a brief or other legal argument on his behalf.").

Beckworth was decided in 1973, O'Neal was decided in 1977, and Puchalski was decided in 1969, all before the effective date of the Parole Act of 1979, which provides for a presumption of release at a prisoner's first eligibility date. The statute in effect prior to the Parole Act of 1979, N.J.S.A. 30:4-123.14, "contemplat[ed] parole release only where the Board [was] of the opinion both (1) that there is reasonable probability that the inmate will be law-abiding and (2) that the release is compatible with society's welfare." Beckworth, 62 N.J. at 360.

Given the enhanced due process rights under the Parole Act of 1979, with its unambiguous presumption of release, the constitutional viability

of cases interpreting the repealed statutory scheme are questionable as applied to the unusual circumstances of the instant case. The last Supreme Court case that directly addressed the right to counsel was nearly five decades ago. The parole landscape has drastically changed since Beckworth and Puchalski were decided.

But our Supreme Court in Puchalski created room for the assignment of counsel in unusual circumstances like Betts v. Brady, 316 U.S. 455 (1942), the law of the land prior to Gideon v. Wainwright, 372 U.S. 335 (1963). In Puchalski, the Court stated that "under usual circumstances there appears to be no such need [in parole proceedings] for an attorney as there is up to the time of [] conviction and [] ultimate confinement. There is no contention here that the present case is in any way unusual." Puchalski, 55 N.J. at 356. The bottom line is that Puchalski did not close the door on the assignment of counsel in unusual circumstances. And even prior to the landmark Gideon decision, "[e]very court ha[d] power, if it deem[ed] proper, to appoint counsel where that course seem[ed] to be required in the interest of fairness." Betts, 316 U.S. at 471-472.

As indicated, there are distinctions between the right to counsel at a parole release hearing and the right to counsel at a parole revocation hearing. Morrissey v. Brewer, 408 U.S. 471, 480 (1972). Although some states are still divided on this issue there is generally no meaningful Sixth Amendment right to counsel in parole release hearings in New Jersey. Compare Monson v. Carver, 928 P.2d 1017 (Utah 1996) (holding that, in Utah, a defendant does not have a Sixth Amendment right to counsel at a parole hearing), with State v. Carson, 56 P.3d 844, 848

(Mont. 2002) ("The State concedes that a person appearing before the Board has a statutory right to be represented by counsel, pursuant to § 46-23-202(2)(a)")¹⁵ Courts have distinguished the due process protections entitled for parole release because the person is already imprisoned, unlike parole revocation, where the parolee has a liberty interest in retaining the "enduring attachments of normal life" so long as he or she does not violate the conditions of parole. Morrissey, 408 U.S. at 482.

Nevertheless, Mr. Mitchell submits that both revocation and parole release proceedings restrict the individual's liberty and may involve disputed facts, differing interpretations of expert reports, and as such, deserve the same due process protections when *special or unusual circumstances* are present. For Mr. Mitchell, "the stakes could hardly be higher. Since the Parole Board has the power to determine whether [he] [will] remain in prison for the rest of his life, he has an obvious interest in having his case for parole presented effectively. [Mr. Mitchell] is a man of little education and the transcripts of the parole release proceedings reveal, as might be expected, his inability to express himself clearly and to present his justifications for parole." Menechino v. Oswald, 430 F.2d 403, 415 (2nd Cir. 1970) (Feinberg, dissenting)

The anachronistic dichotomy between parole revocation and parole release fails in the context of future eligibility terms imposed outside normative guidelines. For example, a person whose parole is revoked based

¹⁵ Although this statute was repealed the right to counsel in parole hearings remains in Montana: "Offenders who appear for parole hearings may have a representative, including an attorney, present with them." Mont. Admin. R. 20.25.401(12).

upon a technical violation and is subsequently returned to prison for 12 months can hardly be said to have a greater bundle of rights than the prisoner who has a presumption of release and receives a 10-year future eligibility term. The latter is clearly a greater deprivation of liberty which, as here, must trigger substantial due process protections.

In the current New Jersey parole scheme, only parole applicants who can afford an attorney receive assistance preparing for the hearing and submitting written documents to the Board. New Jersey State Parole Board, The Parole Book, note 7, at 15 (2012).¹⁶ Nonetheless, counsel cannot be physically present at the hearing. Id. The principal argument for excluding lawyers from parole hearings is that it allows the Board to hear from the prisoner directly, to obtain the unvarnished truth about the person's attitudes and disposition, without it being filtered through an intermediary. However, this rationale cannot extend to prisoners like Mr. Mitchell, who has substantial intellectual deficits affecting cognition, communication, and self-advocacy. His TABE test results confirm the severity of his deficits. He functions at a second-grade level in reading, applied math, and language, and functions at a third-grade level in math computation. (Pma63) A December 7, 2007 Panel Decision notes that Mr. Mitchell is "special needs." (Pma21) He has failed the GED examination despite several attempts. Therefore, without the assistance of counsel, Mr. Mitchell stood naked before the parole authorities. As noted by Judge Feinberg, "[i]t requires little imagination to conclude that a trained lawyer could have materially aided both appellant and the

¹⁶ Available at: <https://www.state.nj.us/parole/docs/AdultParoleHandbook.pdf>

Board, unless the inaccurate and unworthy assumption is made that lawyers generally do more harm than good.” Menechino, 430 F.2d at 416.

Regarding whom may assist parole applicants before the Board, New Jersey’s safeguards are woefully inadequate. New Jersey’s parole system delegates substantial discretion to the Board, which has decided that no one, except for an interpreter, may be present on behalf of the applicant in the parole release hearing. The Parole Book at 15. In Wyoming, for example, an applicant is permitted to request the presence of families, friends, and/or an attorney at the hearing. It is then within the Board’s discretion whether to grant the applicant’s request for counsel.¹⁷ In South Carolina, an attorney hired by the applicant may make a presentation to the Board via video, but not in person.¹⁸ In Massachusetts, “[t]he board permits attorneys to represent inmates serving life sentences at their parole hearings, although currently there is no provision for providing counsel to those who are indigent. 120 Code Mass. Regs. § 300.08 (1997).” Diatchenko v. District Attorney for the Suffolk District, 27 N.E.3d 349, 360 (Mass. 2015) Further, “the parole hearing panel may . . . permit a qualified individual to represent an inmate who, because of a mental, psychiatric, medical, physical condition or language barrier is not competent to offer testimony at or understand the proceedings of an

¹⁷ Wyoming Board of Parole, Policy & Procedural Manual, 21, 25 (2018) available at: <https://drive.google.com/file/d/1wkXChfYsBtG7RXzGkU-grIHLmGtI6oEA/view>

¹⁸ South Carolina Board of Pardons & Paroles, Parole Board Manual, 20-23 (2019) Available at: <https://www.dppps.sc.gov/Parole-Pardon-Hearings/Parole-Board>

initial release or review hearing. 120 Code Mass. Regs. § 300.08 (2) (b) (1997)

The bottom line is that a narrow exception to the rule that counsel cannot be present at parole release hearings must be made when special or unusual circumstances - - such as substantial intellectual deficits or significant mental illness - - are evidenced. The Massachusetts model seems workable by providing counsel in special circumstances. Under these special circumstances an effective attorney "would improve, not injure, the parole release hearing." Menechino at 416.

B. The Right to the Assistance of a Parole Representative at Parole Release Hearings.

Especially noteworthy in Mr. Mitchell's case is the lack of any assistance at all, despite the mandate under the New Jersey Administrative Code that a parole counselor or other board representative be assigned to each State prison "to assist inmates on all parole procedures, including any appearance before a hearing officer, Board panel, or the Board." N.J.A.C. 10A:71-2.11. Moreover, a parole applicant "shall have the right to be aided by a Board representative pursuant to N.J.A.C. 10A:71-2.11." N.J.A.C. 10A:71-3.13(g). Although this representative is mandated by the Code, New Jersey has no case management system.¹⁹ Thus, there is no way to know whether parole applicants are aware of or able to use this representative.

Mr. Mitchell was never contacted by a parole counselor or board

¹⁹ The Prison Policy Initiative's research concluded that New Jersey does not have a case management system. Prison Policy Initiative, Parole Grades at: https://www.prisonpolicy.org/reports/parole_grades_table.html

representative to assist in preparation for his parole hearing, nor was that person available to him at his hearing. Mr. Mitchell was never told that this person even existed, much less offered their mandated services. Instead, after thirty-nine years, this disabled prisoner, suffering from intellectual deficits and mental illness, was thrust in front of the Board panel with no assistance from parole authorities to prepare for his hearing.²⁰

This failure by the Parole Board and the Department of Corrections violated the plain language of the New Jersey Administrative Code and exacerbated the due process violations in Mr. Mitchell's case. N.J.A.C. 10A:71-3.13(g) gives a parole applicant the right to a representative. This right is guaranteed both in preparation for and during a parole hearing, much like criminal defendants are guaranteed counsel both at trial and at "critical" pre-trial proceedings. See United States v. Gouveia, 467 U.S. 180, 189 (1984) (citing United States v. Wade, 388 U.S. 218 (1967)); State v. Sanchez, 129 N.J. 261, 274-75 (1992) (noting that the New Jersey Constitution provides a broader right to counsel than the federal constitution). Unlike in the criminal adversarial process, however, in parole release hearings the right to a representative is specifically guaranteed.

If this representative exists at New Jersey State Prisons, the mandate in the Code rings hollow if parole applicants are not made aware of their existence. A person cannot waive their right to counsel unless

²⁰ The fact that Mr. Mitchell was assisted by an inmate "paralegal" to effectuate his appellate remedies is of no moment.

the waiver is knowing and intelligent. Sanchez, 129 N.J. at 276. Though this is an administrative, and not a constitutional right, in other contexts, the New Jersey Supreme Court has emphasized that a waiver of constitutional or statutory rights must be "clear and unambiguous." Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430, 443-45 (2014). If a parole applicant does not know about his right to a parole counselor or board representative, he cannot clearly and unambiguously waive this right. The right is meaningless if the Board can waive it on behalf of the applicant by not making clear that the applicant is entitled to a counselor or representative.

Because the Code provides an obligation for the prison and Parole Board to make a parole counselor or board representative available to assist, the failure to do so in Mr. Mitchell's case violated the Administrative Code and requires a new hearing. The failure weighs even more heavily in the context of the due process violations in Mr. Mitchell's case because he needs more help than his "average" counterparts. Yet he was given no assistance either in preparation for or at his parole hearing, resulting in a future eligibility term much greater than the presumptive term. The lack of representation at any level -- either through counsel or through the administratively guaranteed counselor or representative -- denied Mr. Mitchell due process and requires a remand for a new hearing.

POINT III

THIS CASE MUST BE SUMMARILY REMANDED BECAUSE THE UNCOUNSELED IMPOSITION OF A 10-YEAR FUTURE ELIGIBILITY TERM ON MR. MITCHELL, WHO SUFFERS FROM INTELLECTUAL DEFICITS AND SCHIZOPHRENIA, VIOLATED FUNDAMENTAL FAIRNESS.

As Bryan Stevenson so eloquently commented “[t]he true measure of our character is how we treat the poor, the disfavored, the accused, the incarcerated, and the condemned.”²¹ Nowhere can that be truer than in a case like Mr. Mitchell’s where he is serving a life sentence while suffering from a substantial intellectual disability and chronic schizophrenia. Notions of fundamental fairness are certainly implicated. In essence, Mr. Mitchell appeared naked, without an advocate, before a two-member panel and received a 10-year future eligibility term. This is fundamentally wrong.

“New Jersey’s doctrine of fundamental fairness serves to protect citizens generally against unjust and arbitrary governmental action.” Doe v. Poritz, 142 N.J. 1, 108 (1995) (internal quotation omitted). The doctrine “has supported procedures to protect the rights of defendants at various stages of the criminal justice process, even when such protections are not constitutionally required.” State v. P.Z., 152 N.J. 86, 118 (1997).” It has been applied in a variety of contexts, all involving “a determination that someone was being subjected to potentially unfair treatment and there was no explicit statutory or constitutional protection to be invoked.” Doe, 142 N.J. at 109.

²¹ Stevenson, Bryan, Just Mercy: A Story of Justice and Redemption, p. 18 (2014).

The doctrine of fundamental fairness is especially applicable here because our jurisprudence has long afforded special protection to individuals with intellectual deficits. See, Atkins v. Virginia, 536 U.S. 304 (2002) (holding that individuals with intellectual disability require special protections and their execution would violate the Eighth Amendment); Hall v. Florida, 572 U.S. 701, 704 (2014) (Florida statutory threshold as interpreted by state's highest court to require accused to demonstrate IQ score of 70 or below before being permitted to present additional evidence of intellectual disability violated Eighth Amendment); see also, Wood v. Allen, 558 U.S. 290, 305 (2010) (Justice Stevens dissenting) (failure to investigate powerful mitigating evidence of defendant's deficits in penalty phase constituted ineffective assistance of counsel).

Consideration of intellectual disability should be no different in the context of parole. The risk that parole will be denied, and a substantial future eligibility term imposed, is much greater with an individual suffering from an intellectual disability and mental illness. "[Individuals with intellectual disability] may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." And "reliance on [intellectual disability] as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. [Individuals with intellectual disability] . . . face a special risk of wrongful execution." Atkins, 536 U.S. at 320-321.

The Parole Board has the power to determine whether Mr. Mitchell will remain in prison for the rest of his life. The uncounseled imposition of a 10-year future eligibility term on Mr. Mitchell, who suffers from intellectual deficits and schizophrenia, violated fundamental fairness. Therefore, the decision of the Parole Board must be summarily reversed, and this matter remanded for a new hearing.

CONCLUSION

For the reasons set forth, Mr. Mitchell respectfully requests that the decision of the Parole Board be reversed, and his case summarily remanded for a new hearing, with appointed counsel physically (or virtually) present to ensure that Mr. Mitchell has a meaningful opportunity to be heard consistent with due process. Prior to the Hearing, counsel must have access to the confidential documents, the ability to share them with Mr. Mitchell, and the ability to discuss them with him.

If this Court is inclined not to summarily remand for a new Hearing, then the confidential documents must be immediately released to appellate counsel with the ability to share and discuss them with Mr. Mitchell, so he is guaranteed effective assistance of counsel in his plenary appeal. Lastly, if this Court is not inclined to release the confidential documents without restrictions, Mr. Mitchell requests that the confidential records be reviewed *in camera* for a determination of what lesser restrictions may be imposed without violating due process or his right to effective representation.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Plaintiff-Movant

BY: 

JOSEPH J. RUSSO
Deputy Public Defender
Appellate Section
Attorney I.D. 032151987

DATED: February 18, 2021

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

WILLIE MITCHELL, : Civil Action
Plaintiff-Movant, : **SUPPLEMENTAL BRIEF FOLLOWING**
v. : **LIMITED REMAND TO PAROLE BOARD**
NEW JERSEY STATE PAROLE BOARD, :
Respondent. :

SUPPLEMENTAL BRIEF AND APPENDIX ON BEHALF OF PLAINTIFF-MOVANT

Joseph E. Krakora
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
P.O. Box 46003
Newark, New Jersey 07101
973-877-1200

JOSEPH J. RUSSO, ESQ.
Deputy Public Defender
Appellate Section
Attorney ID# 032151987

Of Counsel and
On the Brief
Joseph.Russo@opd.nj.gov

PLAINTIFF IS CONFINED

TABLE OF CONTENTS

PAGE NO. (S)

PROCEDURAL HISTORY AND STATEMENT OF FACTS 1

LEGAL ARGUMENT 2

POINT I

IN UTILIZING A ROTE AND MECHANICAL CHECKLIST, THE PAROLE BOARD ABUSED ITS DISCRETION AND FAILED TO PROVIDE AN ADEQUATE STATEMENT OF REASONS FOR PRESERVING THE CONFIDENTIALITY OF THE AUGUST 24, 2018 PSYCHOLOGICAL EVALUATION, THEREBY PRECLUDING MEANINGFUL JUDICIAL REVIEW, IN DEROGATION OF PROCEDURAL DUE PROCESS AND THIS COURT'S REMAND ORDER. 2

A. THE STATEMENT OF REASONS IS WOEFULLY INADEQUATE..... 4

B. READ TOGETHER, THOMPSON AND CESTARI MILITATE IN FAVOR OF RELEASING THE AUGUST 24, 2018 EVALUATION WITHOUT RESTRICTIONS..... 7

POINT II

TO COMPORT WITH DUE PROCESS, THE AUGUST 24, 2018 PSYCHOLOGICAL EVALUATION MUST BE RELEASED, WITHOUT RESTICTIONS, THEREBY PERMITTING COUNSEL TO DISCUSS AND SHARE THE EVALUATION WITH MR. MITCHELL. 13

POINT III

THE PAROLE BOARD HAS WAIVED CONFIDENTIALITY IN THREE OF THE FOUR ITEMS PREVIOUSLY DESIGNATED AS CONFIDENTIAL; DUE PROCESS AND FUNDAMENTAL FAIRNESS THEREFORE MANDATE THAT THESE ITEMS BE PROVIDED TO APPELLATE COUNSEL FORTHWITH WITHOUT RESTRICTIONS. 19

TABLE OF CONTENTS (CONT'D)

PAGE NO. (S)

POINT IV

NOT ONLY HAS THE PAROLE BOARD WAIVED CONFIDENTIALITY IN THREE OF THE FOUR ITEMS PREVIOUSLY DESIGNATED AS CONFIDENTIAL, BUT THE BOARD HAS BEEN INCONSISTENT AS TO WHETHER IT RELIED UPON MULTIPLE DOCUMENTS OR A SINGLE DOCUMENT IN DENYING MR. MITCHELL PAROLE AND IMPOSING A 120-MONTH FUTURE ELIGIBILITY TERM. FURTHER, THE ATTORNEY GENERAL HAS LIKEWISE DEMONSTRATED SUBSTANTIAL IRREGULARITY IN DEFINING WHAT DOCUMENTS IT CONSIDERS CONFIDENTIAL. 20

POINT V

SINCE MR. MITCHELL DID NOT HAVE ACCESS TO SUBSTANTIAL DOCUMENTS PREVIOUSLY DESIGNATED AS CONFIDENTIAL DURING HIS PAROLE HEARINGS, WHICH ARE NOW CONCEDED TO BE NON-CONFIDENTIAL, SUMMARY REVERSAL OF THE PAROLE BOARD'S DECISION IS MANDATED AND THIS CASE MUST BE REMANDED FOR A NEW HEARING WITH ASSIGNED COUNSEL PHYSICALLY PRESENT. 23

CONCLUSION 24

INDEX TO SUPPLEMENTAL APPENDIX

App. Div. Limited Remand Order
dated April 9, 2021 Spma 1

Statement of Reasons Following Remand
dated May 13, 2021 Spma 2

Statement of Items Comprising the Record on Appeal
filed April 22, 2020 Spma 5

TABLE OF AUTHORITIES

PAGE NO. (S)

Cases

Acoli v. New Jersey State Parole Bd.,
462 N.J. Super. 39 (App. Div. 2019)..... 3

In re Civil Commitment of W.X.C., 407 N.J. Super. 619, (App. Div.
2009), affirmed 204 N.J. 179 (2010)..... 15

In re Hawley Parole Application, 98 N.J. 108 (1984) 5

In re Request to Modify Prison Sentences,
Expedite Parole Hearings, & Identify Vulnerable Prisoners,
242 N.J. 357 (2020)..... 3

In re Vey, 124 N.J. 534 (1991) 4

Monks v. N.J. State Parole Bd., 58 N.J. 238 (1971) 5

New Jersey Parole Bd. v. Byrne, 93 N.J. 192 (1983) 3

Payton v. N.J. Tpk. Auth., 148 N.J. 524 14

Seacoast Builders Corp. v. Rutgers, 358 N.J. Super. 524
(App. Div. 2003)..... 14

State in Interest of Z.S., 464 N.J. Super. 507
(App. Div. 2020)..... 5

State v. Cestari, 224 N.J. Super. 534 (App. Div. 1988) 12

State v. O'Neil, 219 N.J. 598 (2014) 20

Thompson v. N.J. State Parole Bd.,
210 N.J. Super. 107 (1986)..... passim

Trantino v. N.J. State Parole Bd., 154 N.J. 19 (1998) 5

TABLE OF AUTHORITIES (CONT'D)

PAGE NO. (S)

Statutes

N.J.A.C. 10A:71-2.2(b) 3

N.J.S.A. 10A:71-2.1(c) 9, 11

N.J.S.A. 30:4-27.24 to 27.38 15

N.J.S.A. 30:4-123.53(a) 2, 16

Rules

Rule 4:10-2(e)14

Other Authorities

Department of Correction Standard 281 10

Louis Brandeis, "What Publicity Can Do", Harpers Weekly
(December 20, 1913)..... 15

Nathaniel Hsieh, Left Behind: Developmental Disability and the
Pursuit of Parole, Stanford Intellectual & Developmental
Disabilities Law and Policy Project (2018)..... 17

PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

Plaintiff-Movant, Willie Mitchell, relies upon the procedural history and statement of facts set forth in his initial brief in support of his motion for remand but adds the following:

On April 9, 2021, this Court partially granted Mr. Mitchell's motion and remanded this matter to the Parole Board "to provide a written statement of reasons supporting its decision to maintain the confidentiality of the records at issue." (Spma1)² This Court ordered that "[t]he remand shall be completed and the statement of reasons filed with the Clerk by May 14, 2021." (Spma1)

In response to the partial remand, on April 28, 2021, the two-member and three-member Board panels completed identical forms entitled "CONFIDENTIAL REPORTS CONSIDERED." (Spma2-3) The panels stated that "[t]he following confidential report did have an impact on the Board's panel's November 5, 2018 decision to deny parole: "In-depth [p]sychological [e]valuation dated August 24, 2018 by Jan Segal, Ph.D." (Spma2-3) Further, under "REASONS FOR NONDISCLOSURE" both panels utilized a conclusory checklist marking the following boxes: "FEAR OF RETALIATION AGAINST EVALUATOR PREPARING THE REPORT; POTENTIAL

¹ As with Mr. Mitchell's initial brief, the procedural history and the facts are combined to promote conciseness and clarity.

² "Spma" refers to plaintiff's supplemental appendix to this brief.

"Pma" refers to the appendix of Mr. Mitchell's initial brief.

"Pb" refers to plaintiff's initial brief.

"Rb" refers to respondent's initial brief.

"1T" refers to the transcript of the two-member Panel Hearing dated November 5, 2018.

MANIPULATION OF FUTURE EVALUATION(S); MAY RESULT IN INMATE BEING LESS THAN FORTHCOMING IN FUTURE EVALUATION(S)"; AND "PERMITS EVALUATOR TO ASSESS INMATE FAIRLY WITHOUT RISK OF RETALIATION OR REPRISAL." (Spma2-3) Thereafter, on May 5, 2021, the full Board affirmed the panels' decisions to deny disclosure for the identical "check the box" conclusory assertions of the panels. (Spma4)

Noteworthy, the parole panels and the full Board failed to submit a statement of reasons regarding three (3) items deemed "Confidential to Inmate and Third Parties," which were designated in the Attorney General's Statement of Items Comprising the Record on Appeal. (Spma5-7) These include "Confidential Mental Health Records . . . dated 1983-1993," "Confidential Reports Considered, dated November 5, 2018," and "Confidential Addendum, un-dated." (Spma7)

LEGAL ARGUMENT

POINT I

IN UTILIZING A ROTE AND MECHANICAL CHECKLIST, THE PAROLE BOARD ABUSED ITS DISCRETION AND FAILED TO PROVIDE AN ADEQUATE STATEMENT OF REASONS FOR PRESERVING THE CONFIDENTIALITY OF THE AUGUST 24, 2018 PSYCHOLOGICAL EVALUATION, THEREBY PRECLUDING MEANINGFUL JUDICIAL REVIEW, IN DEROGATION OF PROCEDURAL DUE PROCESS AND THIS COURT'S REMAND ORDER.

As argued in Mr. Mitchell's initial brief (Pb6), New Jersey has embraced a presumption that inmates "shall be paroled" on their first eligibility date. N.J.S.A. 30:4-123.53(a). The Parole Act of 1979 "create[d] a legitimate expectation of release . . . absent findings

that justification for deferral exists," and gave rise to "a federally-protected liberty interest." Acoli v. New Jersey State Parole Bd., 462 N.J. Super. 39, 70 (App. Div. 2019) (Rothstadt dissenting) (quoting New Jersey Parole Bd. v. Byrne, 93 N.J. 192, 205 (1983)). Thus, Mr. Mitchell has "a protected liberty interest, rooted in the language of our parole statute, in parole release, and a resulting constitutional right to due process of law. Thompson v. N.J. State Parole Bd., 210 N.J. Super. 107, 120 (1986). This principle was recently reaffirmed by our Supreme Court in In re Request to Modify Prison Sentences, Expedite Parole Hearings, & Identify Vulnerable Prisoners, 242 N.J. 357, 385 (2020), where the Court stated that the Parole Act created "a liberty interest in parole" that invokes due process protections.

In New Jersey, due process protections extend to issues related to the withholding of confidential documents by the Parole Board.³ Undeniably, Mr. Mitchell's "liberty interest is sufficient to invoke certain procedural protections," Byrne, 93 N.J. at 208, including "a limited right to disclosure of prison records in parole proceedings." Thompson, 210 N.J. Super. at 121. These due process protections are meaningless without the ability of Mr. Mitchell to have access to all

³ N.J.A.C. 10A:71-2.2(b) provides: "No information, files, documents, reports, records or other written material deemed confidential pertaining to inmates or parolees shall be reviewed by any person except a Board member or employee or individual or law enforcement agency authorized by the Board or by the Chairperson." The State relies on this provision to prevent Mr. Mitchell from gaining access to the documents that were used to deny him parole and set a future eligibility term.

documents, confidential or otherwise, relied upon in the parole decision making process, unless the Parole Board articulates narrowly tailored and compelling justifications for secrecy.

A. THE STATEMENT OF REASONS IS WOEFULLY INADEQUATE

In its initial response brief, the Attorney General failed to articulate narrowly tailored and compelling reasons for maintaining the confidentiality of the August 24, 2018 psychological evaluation. Moreover, on remand the parole panels and the Parole Board utilized a rote and mechanical checklist (Spma2-4), failing to articulate narrowly tailored and compelling reasons for maintaining the confidentiality of the August 24, 2018 psychological evaluation, thus evading meaningful judicial review.

The New Jersey Supreme Court has consistently held that “[a]lthough administrative agencies are entitled to discretion in making decisions, that discretion is not unbounded.” In re Vey, 124 N.J. 534, 543 (1991) (internal citations omitted). Administrative decisions must be “exercised in a manner that will facilitate judicial review.” Id. at 544. To facilitate judicial review, administrative agencies “must articulate the standards and principles that govern their discretionary decisions in as much detail as possible.” Ibid. (internal quotations omitted).

These general principles of administrative review are equally applicable to the Parole Board. “[T]he inherent difficulty in gauging whether a parole determination constitutes an abuse of discretion

does not engender a more exacting standard of judicial review than that applicable to other administrative agency decisions." Trantino v. N.J. State Parole Bd., 154 N.J. 19, 25 (1998); In re Hawley Parole Application, 98 N.J. 108, 112 (1984) (finding "no reason to exempt the Parole Board from the well-established principle" and generally accepted standard of review applicable to administrative agencies). Parole decisions are "highly subjective and discretionary." Hawley, 98 N.J. at 116. For that reason, however, "one of the best protections against arbitrary exercise of discretionary power lies in the requirement of findings and reasons that appear to reviewing judges to be rational." Id. at 115 (internal quotations omitted). "Such reasons are necessary "'not only [to insure] a responsible and just determination' by the agency but also '[to afford] a proper basis for effective judicial review.'" Id. at 116 (quoting Monks v. N.J. State Parole Bd., 58 N.J. 238, 245 (1971)).

Discretionary decision-making should never permit brevity to trump cogent reasoning and explanation. Recently, in State in Interest of Z.S., 464 N.J. Super. 507, 534 (App. Div. 2020), in the juvenile waiver context, Presiding Judge Jack Sabatino emphasized that a "statement of reasons cannot be incomplete or superficial. Conclusory assertions that are devoid of analysis are inadequate. To use a metaphor from what a math teacher may tell her students, the prosecutor must 'show the work.' We comparably expect the same in our system of justice from expert witnesses, who are forbidden from spouting net

opinions that do not explain the underlying 'why[s] and wherefore[s]' of their analysis."

Neither the parole panels nor the Parole Board showed its work. The conclusory "checklist" was incomplete, superficial, and devoid of analysis. Totally absent were reasons demonstrating thoughtful decision making. The checklist provides no explanations underlying the bold assertions that by disclosing the psychological evaluation Mr. Mitchell will engage in retaliation or reprisal against his evaluator, manipulate future evaluations, or be less than forthcoming in future evaluations. No evidence has been proffered that Mr. Mitchell was anything less than fully cooperative with current and prior psychological evaluations. Further, no evidence has been proffered that Mr. Mitchell has previously threatened, assaulted, or retaliated against prior evaluators.

Discretion is perhaps the most powerful tool in the Parole Board's arsenal. Clearly, the imposition of a ten-year future eligibility term will result in substantial additional imprisonment for Mr. Mitchell. Therefore, the decision to designate an evaluation as confidential must be wielded with cautious discernment and prudence. This is especially true here, where Mr. Mitchell may spend the remainder of his life in state prison given his advanced age and poor health.

The statement of reasons cannot be based upon whim or caprice and cannot be the product of unfettered discretion. The statement of reasons designating a critical document as confidential must be

rooted in coherent standards, so Parole Board discretion does not run amuck. In other words, the decision to designate a critical psychological evaluation as confidential must be individualized.

The overbroad designation of items as confidential in the Statement of Items Comprising the Record and in the proposed Consent Protective Order speaks volumes as to the arbitrariness employed in this case.

B. READ TOGETHER, THOMPSON AND CESTARI MILITATE IN FAVOR OF RELEASING THE AUGUST 24, 2018 EVALUATION WITHOUT RESTRICTIONS.

There are no published cases upholding the current confidentiality provisions relied upon by the Attorney General. Although the Appellate Division endorsed the Parole Board's confidentiality practices in 1986 in Thompson, 210 N.J. Super. 107, the Thompson Court was interpreting a prior, much more limited regulatory provision but still recognized that prisoners appearing before the Parole Board have a due process right to this information.

Notably, the Court in Thompson refused to adopt a proposed rule that would permit disclosure to the Public Defender but not the prisoner, the very issue before this Court. In rejecting this approach, the Court accepted the objection that counsel "cannot effectively evaluate materials purporting to report on the client without consulting the client about them." Id. at 125. The Court stated:

A fifth approach might be that suggested by the Attorney General and rejected by the Public Defender. The suggestion was that the withheld

materials be shown the Public Defender, but not the prisoner, so that only well-grounded assertions of improper nondisclosure would be made by counsel on appeal. The prisoner would not have access to the materials unless this court so ruled after *in camera* review. The Public Defender protests that counsel cannot effectively evaluate materials purporting to report on the client without consulting the client about them. We believe that to be a sufficient objection to the idea. We need not deal with the Public Defender's second objection, that the suggestion would interfere with the attorney-client relationship.

Id. at 125 (emphasis added)

In Thompson, the plaintiff-prisoner appealed from his denial of parole, arguing that he was entitled to have access to all documents contained in his parole file and considered by the Board. Mr. Thompson was denied disclosure of his Institutional Parole Package, Pre-parole Evaluation, and Psychological Report. The Attorney General contended that these items contained confidential material and were properly withheld.

The Court first recognized that prisoners who appear before the Parole Board have due process protections, stating that "prisoners have a protected liberty interest, rooted in the language of our parole statute, in parole release, and a resulting constitutional right to due process of law." Id. at 120. Consequently, a "Parole Board rule or policy flatly prohibiting prisoner access to parole files would no longer be sustainable." Id. at 122. On the other hand, confidentiality of some documents may be necessary "because of the widely recognized security and discipline problems encountered in

the operation of a penal institution, because of the fear of loss of valuable information from the public and from inmates and prison employees who must contemplate continued close contact with the prisoner, and because of the fear of the revelation of diagnostic materials which may interfere with therapeutic goals." Ibid.

The Court thus concluded that "prisoners are entitled not only 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 123-124.

Applying these principles, the Court first upheld the constitutionality of the administrative code and Department of Corrections Standard defining which documents shall be deemed confidential. Id. at 124. These provisions, however, are different than the ones that currently define confidentiality.

Then-regulation N.J.S.A. 10A:71-2.1(c) stated: "Inmates or parolees shall be afforded disclosure of adverse material considered at a hearing, provided such material is not classified as confidential by the Department and provided disclosure would not threaten the life or physical safety of 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. If disclosure is withheld, the reason for nondisclosure

shall be noted in the Board's files, and such information shall be identified as confidential."

At the time Thompson was decided, there was no separate regulation defining which documents were confidential. Instead, Department of Correction Standard 281 itemized the following documents as confidential:

- (a) Reports which are evaluative, diagnostic or prognostic in nature furnished with a legitimate expectation of confidentiality and which, if revealed to the inmate or others, could be detrimental to the inmate or could jeopardize the safety of individuals who signed the reports, or were parties to the decisions, conclusions or statements contained therein;
- (b) Information the disclosure of which could have a substantial adverse impact on the security or orderly operation of the institution;
- (c) Information or reports which would invade or jeopardize privacy rights of the inmate/parolee or others;
- (d) Disclosures which would jeopardize internal decision-making or policy determinations essential to the effective operation of any institution or the Department;
- (e) Disciplinary and criminal investigative reports, including those from informants, disclosure of which would impede ongoing investigations, create a risk of reprisal or interfere with the security or orderly operation of the institution;
- (f) Such other records as the Commissioner or Superintendents, based on their experience and exercise of judgment, believe must be kept confidential to insure maintenance of discipline and the orderly operation of the institution or Department.

The Court explained that these two provisions, read together, "create and define a reasonable confidentiality exception no broader

than the legitimate needs require." Id. at 124. Notably, these provisions are much narrower than those currently in effect. The Court then turned to the more difficult question concerning the propriety of individual determinations to withhold file documents, and created the following rule:

When any document in a parole file is administratively removed from the prisoner's copy of the file, N.J.A.C. 10A:71-2.1(c) requires 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 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. We will have no doubt of the Board's good faith in making such a statement, and we will not review materials which the Board says did not matter.

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 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

Three important aspects of Thompson must be highlighted: (1) the Court was interpreting the prior confidentiality regulations; (2) the Court clearly rejected adopting a proposed rule which would allow disclosure to the Public Defender but not the prisoner, one of the critical issues before this Court; and (3) Thompson did not address another significant issue before this Court: whether non-disclosure of critical documents "would interfere with the attorney-client relationship." Id. at 125.

State v. Cestari, 224 N.J. Super. 534 (App. Div. 1988), decided two (2) years after Thompson addressed, in part, changing the designation of a report from confidential to non-confidential. There, although the Parole Board designated the parole psychologist's evaluation as confidential, the Appellate Division, after quoting the report at great length, stated: [u]pon a full review of the case, we have determined that there is no current reason for this report to remain confidential. See Thompson v. New Jersey State Parole Bd., 210 N.J. Super. 107, 116-127 (App.Div.1986)." Id. at 541, F.N. 1.

Therefore, read together, Thompson and Cestari militate in favor of releasing the August 24, 2018 evaluation without restrictions.

POINT II

**TO COMPORT WITH DUE PROCESS, THE AUGUST 24,
2018 PSYCHOLOGICAL EVALUATION MUST BE
RELEASED, WITHOUT RESTRICTIONS, THEREBY
PERMITTING COUNSEL TO DISCUSS AND SHARE THE
EVALUATION WITH MR. MITCHELL.**

In plaintiff's initial brief, he argued that the proposed Consent Protective Order prohibiting counsel from discussing or sharing the confidential documents with Mr. Mitchell is overbroad, punitive, unreasonable, and smacks of a denial of due process. (Pb8) Further, plaintiff argued that counsel and Mr. Mitchell must have the ability to speak freely regarding the decision of the Parole Board and discuss strategy without being handcuffed. (Pb12) As indicated, this issue was specifically left open in Thompson: "[w]e need not deal with the Public Defender's second objection, that [non-disclosure] would interfere with the attorney-client relationship." Now, this issue of first impression is squarely before this Court.

Neither the Parole Board nor the Attorney General has articulated any reason why disclosure would "threaten the life or physical safety of any person, interfere with law enforcement proceedings or result in the disclosure of professional diagnostic evaluations which would adversely affect [Mr. Mitchell's] rehabilitation or the future delivery of rehabilitative services." Id. at 118. Following this Court's limited remand and the submission of a conclusory checklist, we are in the same position. The checklist provides no reasons

underlying the naked bold assertion that by disclosing the psychological evaluation Mr. Mitchell will engage in retaliation or reprisal against his evaluator, no reasons that Mr. Mitchell will potentially manipulate future evaluations, and no reasons that Mitchell will be less than forthcoming in future evaluations. We do not know whether this evaluator is Mr. Mitchell's treating psychologist with ongoing therapeutic intervention, or merely the forensic evaluator who may never evaluate Mr. Mitchell again. Certainly, more is required to substantially restrict the scope of attorney-client communications. And more is required to silence strategy sessions between a prisoner serving a life sentence and his public defender.

The Attorney General did not submit a privilege log to justify secrecy of the confidential documents. Seacoast Builders Corp. v. Rutgers, 358 N.J. Super. 524, 541 (App. Div. 2003), sets forth an analysis on the importance of privilege logs with specified objections. The "need for secrecy must be demonstrated with specificity as to each document."⁴ Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient." Id. at 541, quoting Payton v. N.J. Tpk. Auth., 148 N.J. 524, 559 (emphasis added). Further, Rule 4:10-2(e) states:

When a party withholds information . . .
the party shall make the claim expressly and
shall describe the nature of the documents,

⁴ To be clear, while Thompson does not mandate a privilege log, the submission of same in this case and future cases would substantially decrease due process concerns.

communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Presumably, the August 24, 2018 psychological evaluation relied upon prior evaluations and historical medical records. The State's expert had available to her Mr. Mitchell's mental health records and extensive prior evaluations. Experts commonly rely upon underlying data, records, and reports in rendering expert opinions so long as it is the type of evidence reasonably relied upon by experts in that specific field. This underlying information is generally admissible.⁵ Here, by a stroke of the keyboard, the underlying data relied upon in the August 24, 2018 psychological report has now lost its confidential designation, but the actual report relied upon by the Parole Board in denying Mr. Mitchell parole and imposing a 120-month future eligibility term will remain buried in darkness between counsel and his client. As profoundly noted by Justice Brandeis, "sunlight is said to be the best of disinfectants." Louis Brandeis, "What Publicity Can Do", Harpers Weekly (December 20, 1913).

⁵ For example, in In re Civil Commitment of W.X.C., 407 N.J. Super. 619, (App. Div. 2009), affirmed 204 N.J. 179 (2010), the trial court committed an inmate to the Special Treatment Unit, pursuant to the Sexually Violent Predator Act, N.J. Stat. Ann. §§ 30:4-27.24 to - 27.38. There, it was determined that the trial court did not abuse its discretion by relying on the opinions of two experts because their opinions were based, in part, on the opinions of non-testifying experts. The testifying experts relied on underlying reports concerning the inmate's mental health, criminal history, police reports, and clinical tests in rendering their opinions.

Mr. Mitchell should not be prejudiced by the State's designation of the psychological report as confidential. Mr. Mitchell, cloaked with constitutional rights, must at least be on a level playing field with the Parole Board and have the capability to review the critical evaluation that determines whether he will die in prison. Therefore, counsel must have unfettered access to the August 24, 2018 expert report, including the underlying data, records, and reports it relied upon. This unfettered access includes the ability to share and discuss the evaluation with Mr. Mitchell and potential experts.

Under the Attorney General's logic, Mr. Mitchell is entitled to review, and counsel is entitled to discuss with Mr. Mitchell, ten years of mental health records and evaluations - - but cannot discuss or permit Mr. Mitchell to review the evaluation which is at the heart of his parole denial. Release of this evaluation is especially critical because parole release determinations are primarily based upon the risk of committing another offense.⁶ In making this determination, the Parole Board utilizes the LSI-R (Level of Service Inventory Revised), which is the only objective test it employs. However, this test is fraught with error, another reason why full

⁶Because Mr. Mitchell's offense was committed in 1981, all of the Board's decisions are governed by the Parole Act of 1979, which provides that "[a]n adult inmate shall be released on parole at the time of parole eligibility, unless information supplied [to the Board] or developed or produced at a hearing . . . indicates by a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime under the laws of this State if released on parole at such time." N.J.S.A. 30:4-123.53(a).

disclosure of the psychological evaluation is required. As one scholar noted:

The LSI-R manual admits to a high false positive rate. This means that a substantial number of inmates (approximately 30 percent) identified by the LSI-R as high-risk will not actually recidivate. This significant risk of error is one of many ethical concerns with risk assessment tools. In essence, risk assessment tools make predictions based on statistical correlations and thus adopt a determinative framework that leaves little room for individualism. While this is problematic on an individual level for those who staunchly believe that people can always change, it becomes problematic on a much broader level when one considers the ways in which such assessments systematically disadvantage people of color, people from low socioeconomic backgrounds, and people with disabilities.⁷

Effective assistance of counsel, due process, and fundamental fairness mandate release of the August 24, 2018 psychological evaluation. Counsel must test the underlying risk assessment by asking Mitchell questions about his interview with the psychologist, including questions asked by the psychologist. Given Mr. Mitchell's intellectual deficits and mental illness, it is probable that his answers were misinterpreted, or he was confused.⁸ Counsel and Mr.

⁷ Nathaniel Hsieh, Left Behind: Developmental Disability and the Pursuit of Parole, Stanford Intellectual & Developmental Disabilities Law and Policy Project, at 6 (2018) (emphasis added).

⁸ "[A]typical parole board hearing requires an inmate to ascertain nuanced expectations, engage in rigorous self-analysis, interpret varied circumstances, and articulate persuasive reasoning all under extreme pressure. This is a formidable task for anyone, but it is exceptionally difficult for someone with a developmental disability who, by definition, has difficulty receiving, processing, and expressing information. Forcing a developmentally disabled inmate

Mitchell must have the ability to review the report and test its validity in the sacred space of the attorney client privilege, especially given that the LSI-R has a 30% false positive rate. And a defense retained expert must review the findings of the evaluation and discuss same with Mr. Mitchell and counsel.

Mr. Mitchell's input is not a mere convenience - - but a necessity. Without client input, Mr. Mitchell is at the mercy of the parole psychologist and the parole authorities. Releasing the report solely to counsel does not solve this constitutional quandary. Given the constitutional rights implicated, it belies common sense that a report which is the basis for imposing a substantial future eligibility term cannot be reviewed or discussed with Mr. Mitchell.

Therefore, the conclusory statement of reasons and the proposed Consent Protective Order prohibiting counsel from discussing or sharing the August 24, 2018 evaluation with Mr. Mitchell are punitive, unreasonable, and constitute a complete denial of due process. A naked rote assertion of confidentiality does not comport with basic procedural due process and is fundamentally unfair.

through a traditional parole board hearing without altering the method or means of evaluation is setting him or her up for failure." Id. at 10. Here, the Hearing lasted fewer than 20 minutes. Mr. 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) And the panel basically ignored Mr. Mitchell's testimony that he was on Risperdal because he had been hearing voices. (1T:13-2 to 14-1).

POINT III

THE PAROLE BOARD HAS WAIVED CONFIDENTIALITY IN THREE OF THE FOUR ITEMS PREVIOUSLY DESIGNATED AS CONFIDENTIAL; DUE PROCESS AND FUNDAMENTAL FAIRNESS THEREFORE MANDATE THAT THESE ITEMS BE PROVIDED TO APPELLATE COUNSEL FORTHWITH WITHOUT RESTRICTIONS.

Simply put, the Parole board did not comply with this Court's April 9, 2021 remand order. In derogation of the order, the parole panels and the Parole Board failed to submit a statement of reasons regarding three (3) items deemed "Confidential to Inmate and Third Parties." Noteworthy, these items were designated as confidential in the Attorney General's December 18, 2020, proposed Consent Protective Order (Pma52) and further designated as confidential in the Attorney General's Statement of Items Comprising the Record on Appeal. (Spma5-7) These items include "Confidential Mental Health Records for Willie Mitchell, dated 1983-1993," "Confidential Reports Considered, dated November 5, 2018," and "Confidential Addendum, un-dated." (Spma7)

Without elaboration, these items have lost their confidential designation, which is further evidence that the parole decision making was subjected to the whim and caprice of parole authorities. Since a statement of reasons was not provided reading these items, the Parole Board has waived any objections related to confidentiality. Thus, these documents must be immediately released to appellate counsel, without limitation, so he can provide effective assistance under the Sixth Amendment of the United States Constitution and Article 1, ¶ 10 of the New Jersey Constitution. See, State v. O'Neil, 219 N.J. 598,

610-611 (2014) (the right to effective assistance includes the right to the effective assistance of appellate counsel on direct appeal).

POINT IV

NOT ONLY HAS THE PAROLE BOARD WAIVED CONFIDENTIALITY IN THREE OF THE FOUR ITEMS PREVIOUSLY DESIGNATED AS CONFIDENTIAL, BUT THE BOARD HAS BEEN INCONSISTENT AS TO WHETHER IT RELIED UPON MULTIPLE DOCUMENTS OR A SINGLE DOCUMENT IN DENYING MR. MITCHELL PAROLE AND IMPOSING A 120-MONTH FUTURE ELIGIBILITY TERM. FURTHER, THE ATTORNEY GENERAL HAS LIKEWISE DEMONSTRATED SUBSTANTIAL IRREGULARITY IN DEFINING WHAT DOCUMENTS IT CONSIDERS CONFIDENTIAL.

To add insult to injury, the parole panels and the Parole Board have been inconsistent as to whether they relied upon a single confidential document (the psychological evaluation) or confidential documents (plural) in rendering its decisions. This is evidenced by reviewing the November 5, 2018 two-member panel decision, the February 23, 2019 three-member Board panel decision, and the July 31, 2019 Final Agency Decision.

In the November 5, 2018, two-member panel decision, it was noted that the parole denial and recommendation for imposing a future eligibility term of ten years were based in part on a review of "confidential material" and a "professional report." (Pma24) (Pma29) (emphasis added) The three-member Board Panel's decision dated February 23, 2019 stated that a single "document classified as confidential [] play[ed] a significant role in the three-member Board Panel's decision to establish a 120-month eligibility term." (Pma35)

(emphasis added) The July 31, 2019 Final Agency Decision affirming the two-member and three-member panel decisions (Pma44) stated that the “panel relied on confidential material.” (Pma46) Thus, from this record we glean the following: On November 5, 2018, multiple confidential documents were relied upon, on February 23, 2019, a single confidential document was relied upon, and on July 31, 2019, multiple confidential documents were relied upon. And now, after this Court’s remand, the Parole Board is relying upon a single document - - the psychological evaluation dated August 24, 2018. This bastion of inconsistency both prior to remand and post-remand, hardly engenders confidence in the Parole Board’s decision denying Mr. Mitchell parole and imposing a 120-month future eligibility term.

The Attorney General has likewise demonstrated irregularity in defining what documents it considers confidential. This irregularity becomes blatantly obvious when the proposed Consent Protective Order (Pma52) and the Statement of Items Comprising the Record (Spma5-7) are compared to representations made in respondent’s brief. In the former, the designated confidential documents included “Confidential Mental Health Records for Willie Mitchell, dated 1983-1993,” “Confidential Reports Considered, dated November 5, 2018,” and “Confidential Addendum, un-dated.” (Pma52) (Spma7) In the latter, the Attorney General represented that the “[t]he confidential items included several mental health evaluations of Mitchell. . . .” (Rb at 6); See also, (Rb at 19) (the court should “grant only a limited remand for

the sole purpose of allowing the Board to identify for the record the reasons for keeping the mental health evaluations confidential") (emphasis added).

Thus, given the lack of precision of the initial designated confidential documents, and the imprecise ever-changing nomenclature utilized, it is difficult to ascertain why the Attorney General initially characterized the confidential documents as "mental health records . . . dated 1983-1993", "reports", and "addendum", and subsequently represented that the actual confidential document is one evaluation, but simultaneously refers to "several mental health evaluations" (Rb6). Given that the sole remaining confidential document is the psychological evaluation dated August 24, 2018, it begs the following questions: (1) Why is this evaluation designated as confidential when "several [other] mental health evaluations" (Rb6) are not deemed confidential? (2) Why are the "confidential reports dated November 5, 2018", no longer deemed confidential? (Pma52) (Spma7) (3) Why was Mr. Mitchell not provided with this voluminous non-confidential documentation, including "several [other] mental health evaluations" prior to his parole hearings? (4) Is it a violation of due process and fundamental fairness for parole authorities to utilize overbroad confidential designations to deny access to evidence that may be exculpatory, and then change the confidential designation to non-confidential for the first time on direct appeal? (5) Does this practice rise to the level of a pattern and practice of withholding

evidence from indigent prisoners, like Mr. Mitchell, who are overwhelmingly *pro se*?

Therefore, not only has the Parole Board waived confidentiality in three of the four items previously designated as confidential, but the board has been inconsistent as to whether it relied upon multiple documents or a single document in denying Mr. Mitchell parole and imposing a 120-month future eligibility term. Further, the attorney general has likewise demonstrated substantial irregularity in defining what documents it considers confidential.

POINT V

SINCE MR. MITCHELL DID NOT HAVE ACCESS TO SUBSTANTIAL DOCUMENTS PREVIOUSLY DESIGNATED AS CONFIDENTIAL DURING HIS PAROLE HEARINGS, WHICH ARE NOW CONCEDED TO BE NON-CONFIDENTIAL, SUMMARY REVERSAL OF THE PAROLE BOARD'S DECISION IS MANDATED AND THIS CASE MUST BE REMANDED FOR A NEW HEARING WITH ASSIGNED COUNSEL PHYSICALLY PRESENT.

As argued in his initial brief (Pb12), Mr. Mitchell received a total of 28 years in future eligibility terms without a *legitimate* opportunity to be heard. This failure was based upon Mr. Mitchell's special circumstances including his intellectual deficits and mental illness. The Parole Board's response to this Court's remand order is particularly concerning because Mr. Mitchell was denied access to non-confidential documents that were necessary to defend himself during his parole hearings. It is likely that these underlying documents played a significant role in denying him parole. At a minimum, the

psychologist who performed the evaluation on Mr. Mitchell had access to these documents and relied upon them in opining that Mr. Mitchell was at risk for reoffending.

Mr. Mitchell's opportunity to be heard did not comport with minimal procedural due process. This denial of essential due process has been exacerbated by the Parole Board's naked response to this Court's limited remand, namely that Mr. Mitchell, a *pro se* special needs litigant, was denied access to substantial documents previously designated as confidential but now conceded to be non-confidential.

CONCLUSION

For the reasons set forth, Mr. Mitchell respectfully requests that the decision of the Parole Board be summarily reversed, and his case remanded for a new hearing with appointed counsel physically (or virtually) present to ensure that Mr. Mitchell has a meaningful parole hearing, with the effective assistance of counsel, consistent with due process. Prior to the Hearing, counsel must have access to the August 24, 2018 psychological evaluation and the documents now designated as non-confidential, with the unrestricted ability to share and discuss them with Mr. Mitchell.

If this Court is inclined not to summarily reverse and remand for a *de novo* Hearing, then the August 24, 2018 psychological evaluation must be immediately released to appellate counsel with the unrestricted ability to share and discuss same with Mr. Mitchell, so

he is guaranteed effective assistance of counsel in his plenary appeal. Lastly, if this Court is not inclined to release the psychological evaluation without restrictions, Mr. Mitchell requests that the August 24, 2018 evaluation be reviewed *in camera* for a determination of what lesser restrictions may be imposed without violating due process or his right to effective representation.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Plaintiff-Movant

BY: 

JOSEPH J. RUSSO
Deputy Public Defender
Appellate Section
Attorney I.D. 032151987

DATED: May 24, 2021

ORDER ON RESERVED MOTION

WILLIE MITCHELL
V.
NEW JERSEY STATE
PAROLE BOARD

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000072-19T3
MOTION NO. M-003257-20
BEFORE PART E
JUDGE(S): CARMEN MESSANO
MORRIS G. SMITH

MOTION FILED: 02/18/2021 BY: WILLIE MITCHELL
ANSWER(S) FILED: 03/08/2021 BY: NEW JERSEY STATE PAROLE BOARD
RESUBMITTED TO COURT: April 09, 2021

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS 9th day of April, 2021, HEREBY ORDERED AS FOLLOWS:

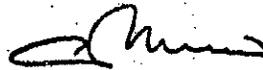
MOTION BY APPELLANT

MOTION FOR REMAND GRANTED IN PART

SUPPLEMENTAL: Appellant's motion for remand is partially granted. The matter is remanded to the Parole Board to provide a written statement of reasons supporting its decision to maintain the confidentiality of the records at issue. The remand shall be completed and the statement of reasons filed with the Clerk by May 14, 2021.

Thereafter, appellant may file a supplemental brief in support of the motion and respondent may file a supplemental opposition simultaneously no later than May 24, 2021. The court shall not accept further briefing from amicus, ACLU. The court retains jurisdiction and shall issue further orders in the motion on the motion in due course.

FOR THE COURT:



CARMEN MESSANO, P.J.A.D.

N/A STATEWIDE
ORDER - REGULAR MOTION
MC



State of New Jersey
NEW JERSEY STATE PAROLE BOARD

CONFIDENTIAL REPORT(S) CONSIDERED

Name: Willie Mitchell

SBI #: 980261A

Location: EJSP

The following confidential report(s) did have an impact on the Board panel's November 5, 2018 decision to deny parole:

In-depth Psychological Evaluation dated August 24, 2018 by Jan Segal, Ph.D.

REASONS FOR NONDISCLOSURE:

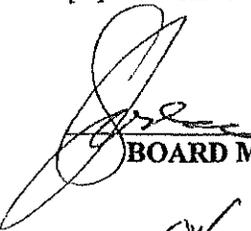
FEAR OF RETALIATION AGAINST EVALUATOR PREPARING REPORT

POTENTIAL MANIPULATION OF FUTURE EVALUATION(S) PREPARED FOR PAROLE CONSIDERATION

MAY RESULT IN INMATE BEING LESS THAN FORTHCOMING IN FUTURE EVALUATION(S)

PERMITS EVALUATOR TO ASSESS INMATE FAIRLY WITHOUT RISK OF RETALIATION OR REPRISAL

ENDANGERMENT OF LIFE OR PHYSICAL SAFETY OF PERSON



BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DATE: 01-28-2021



State of New Jersey
NEW JERSEY STATE PAROLE BOARD

CONFIDENTIAL REPORT(S) CONSIDERED

Name: Willie Mitchell

SBI #: 980261A

Location: EJSP

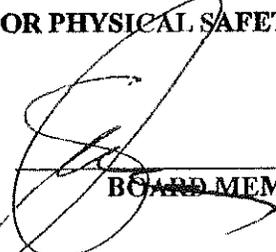
The following confidential report(s) did have an impact on the three-member Board panel's January 16, 2019 decision to establish a one hundred and twenty (120) month future eligibility term:

In-depth Psychological Evaluation dated August 24, 2018 by Jan Segal, Ph.D.

REASONS FOR NONDISCLOSURE:

- FEAR OF RETALIATION AGAINST EVALUATOR PREPARING REPORT
- POTENTIAL MANIPULATION OF FUTURE EVALUATION(S) PREPARED FOR PAROLE CONSIDERATION
- MAY RESULT IN INMATE BEING LESS THAN FORTHCOMING IN FUTURE EVALUATION(S)
- PERMITS EVALUATOR TO ASSESS INMATE FAIRLY WITHOUT RISK OF RETALIATION OR REPRISAL
- ENDANGERMENT OF LIFE OR PHYSICAL SAFETY OF PERSON


BOARD MEMBER


BOARD MEMBER

BOARD MEMBER

DATE: 04-28-2021

DECISION SHEET

SUBJECT/NAME MITCHELL, Willie

NO: 980261A

CATEGORY: APPEAL

STAFF MEMBER ROGERS

DECISION OF THE BOARD

Affirm The April 28, 2021 Determination Of The Two-Member Board Panel And The Three-Member Board Panel To Withhold The Disclosure Of The August 24, 2018 Pre-Parole Psychological Evaluation From Subject For The Following Reasons:

- Fear Of Retaliation Against Evaluator Preparing Report.
- Potential Manipulation Of Future Evaluation(S) Prepared For Parole Consideration.
- May Result In Inmate Being Less Than Forthcoming In Future Evaluation(S).
- Permits Evaluator To Assess Inmate Fairly Without Risk Of Retaliation Of Reprisal.

DATE 05-05-2021

YES NO ABSTAIN DISQUALIFIED

	YES	NO	ABSTAIN	DISQUALIFIED
 Samuel J. Plumeri, Jr.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
 Robert M. Bailicki	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
XXXXXXXXXXXXXXXXXXXX Kerri E. Cody	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
 Allen L. DelVento	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
 Thomas P. Haaf	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
 James B. Jefferson	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
XXXXXXXXXXXXXXXXXXXX Charlie Jones	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
 Julio A. Marengo	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
 Robert Riccardella	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
 Ronald L. Slaughter	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
ABSENT Trudy Steinhardt	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
 Clarence Taylor	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____ John M. Paitakes	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
_____ Kenneth L. Saunders	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

GURBIR S. GREWAL
Attorney General of New Jersey
Attorney for Respondent
R. J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625

FILED
APPELLATE DIVISION

APR 22 2020



By: CHRISTOPHER C. JOSEPHSON (#014101999)
Deputy Attorney General
(609) 376-2948
christopher.josephson@law.njoag.gov

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0072-19T3

WILLIE MITCHELL,)

Appellant,)

v.)

NEW JERSEY STATE PAROLE BOARD,)

Respondent.)

Civil Action

STATEMENT OF ITEMS
COMPRISING THE RECORD ON APPEAL

TO: CLERK OF THE COURT

WILLIE MITCHELL, #69357/SBI#980261A
East Jersey State Prison
Lock Bag R
Rahway, N.J. 07065

RECEIVED
APPELLATE DIVISION

APR 22 2020

SUPERIOR COURT
OF NEW JERSEY

CLERK:

PLEASE TAKE NOTICE that the respondent hereby certifies and files pursuant to R. 2:5-4(b) the following Statement of Items Comprising the Record on Appeal in the above-captioned case. The record consists of:

1. Transcript of Parole Hearing, dated November 5, 2018, to be provided by Appellant pursuant to R. 2:5-3;
2. Inmate Face Sheet;
3. Inmate Progress Notes;
4. Judgment of Conviction, Mercer County Indictment No. 66-82, dated April 15, 1983;
5. Assignment, Disciplinary and Transfer Progress Report, dated April 25, 1983-January 30, 1990;
6. Correspondence from Willie Mitchell to Parole Board, dated April 27, 2018;
7. Correspondence from Parole Board to Willie Mitchell, dated May 2, 2018;
8. Pre-Parole Reports, dated September 18, 2018-October 5, 2018;
9. Parole Eligibility Calculation, dated September 26, 2018;
10. Initial Hearing Questionnaire, dated October 4, 2018;
11. Case Assessment, dated October 4, 2018;
12. Two-Member Panel Notice of Decision, dated November 5, 2018;
13. Correspondence From Parole Board to Willie Mitchell Regarding Submission of Letter of Mitigation, dated November 8, 2018;
14. Letter of Mitigation, dated November 29, 2018;
15. Amended Two-Member Panel Notice of Decision, dated December 4, 2018;
16. Acknowledgment of Receipt of Letter of Mitigation, dated December 11, 2018;
17. Second Letter of Mitigation, dated December 12, 2018;
18. Acknowledgment of Receipt of Second Letter of Mitigation, dated December 18, 2018;

19. Three-Member Board Panel Notice of Decision Establishing a Future Eligibility Term, dated January 16, 2019;
20. Three-Member Board Panel Narrative Notice of Decision, dated February 23, 2019;
21. Administrative Appeal, dated April 8, 2019;
22. Correspondence from Parole Board to Willie Mitchell Acknowledging Receipt of Administrative Appeal, dated April 12, 2019;
23. Decision Sheet, dated July 31, 2019;
24. Notice of Final Agency Decision, dated July 31, 2019.

Confidential to Third Parties

1. Adult Pre-sentence Report, Mercer County Indictment No. 66-82, dated February 16, 1983;
2. Pre-Parole Medical Report, dated September 12, 2018;

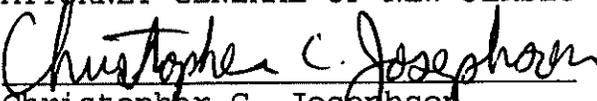
Confidential to Inmate and Third Parties

3. Confidential Mental Health Records for Willie Mitchell, dated 1983-1993;
4. Confidential In-Depth Psychological Evaluation, dated August 23, 2018;
5. Confidential Reports Considered, dated November 5, 2018;
6. Confidential Addendum, un-dated.

Respectfully submitted,

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By:


Christopher C. Josephson
Deputy Attorney General

Dated: April 21, 2020

EXHIBIT E

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1288-20T4

WILFREDO PUJOLS, : CIVIL ACTION
Appellant, : On Appeal from a Final
v. : Decision of the New Jersey
State Parole Board
NEW JERSEY STATE PAROLE BOARD, :
Respondent :
:

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

JOSEPH E. KRAKORA
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
Newark, NJ 07101
973-877-1200

MORGAN A. BIRCK
Assistant Deputy
Public Defender
Attorney ID: 303052019

Of Counsel and
On the Brief
Morgan.Birck@opd.nj.gov

TABLE OF CONTENTS

	<u>PAGE NOS.</u>
PRELIMINARY STATEMENT.....	1
STATEMENT OF FACTS & PROCEDURAL HISTORY.....	2
LEGAL ARGUMENT.....	5
POINT I	
THE PAROLE BOARD HAS NOT DEFINED THE STANDARDS BY WHICH IT DETERMINED THAT THERE IS A SUBSTANTIAL LIKELIHOOD THAT MR. PUJOLS WILL COMMIT A CRIME IF RELEASED ON PAROLE. (not raised below).....	5
A. The Parole Board's use of "insufficient problem resolution" and "lack of insight" constitutes improper ad hoc rulemaking.	6
B. The Parole Board's use of "insufficient problem resolution" and "lack of insight" without defining them and their nexus to the ultimate statutory standard constitutes an abuse of discretion that violates the required rulemaking process.	18
C. The use of the catch-all phrase "any other factors deemed relevant" does not allow the Parole Board to dispense with its rulemaking obligations.	22
POINT II	
THE PAROLE BOARD'S CHECKLIST METHODOLOGY OF DENYING MR. PUJOLS PAROLE FAILED TO ARTICULATE ITS BASIS FOR ITS DECISION IN A MANNER THAT PERMITS MEANINGFUL JUDICIAL REVIEW. (partially raised below).....	26
A. The rote and mechanical process by which the Parole Board considered Mr. Pujols's parole application precludes meaningful judicial review.	27

TABLE OF CONTENTS (CONT'D)

PAGE NOS.

B. The Parole Board failed to assess direct empirical evidence of non-likelihood of future criminality, including 9 years of infraction-free behavior.	37
POINT III	
THE RECORD ESTABLISHED IN THIS CASE DOES NOT SATISFY THE REQUIREMENTS ON THE PAROLE ACT OF 1979 THAT THERE IS A SUBSTANTIAL LIKELIHOOD THAT MR PUJOLS WILL COMMIT A CRIME IF RELEASED. (Aa110, 128-31).....	40
POINT IV	
THE PAROLE BOARD ACTED ARBITRARILY AND CAPRICIOUSLY IN ESTABLISHING A FUTURE ELIGIBILITY TERM INCONSISTENT WITH ITS OWN REGULATIONS. (9T 50-20 to 62-2).....	60
CONCLUSION.....	65

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

State Parole Board Notice of Final Agency Decision
Dated September 25, 2019..... Aa 128 to 132

Three-Member Panel Notice of Decision Dated March
20, 2019..... Aa 113 to 121

Two-Member Panel Notice of Decision Dated January
28, 2019..... Aa 110

INDEX TO CONFIDENTIAL APPENDIX

Confidential Psychological Evaluation,
September 10, 2018..... Aca 1 to 5

Level of Service Inventory - Revised (LSI-R),
August 21, 2018..... Aca 6 to 8

INDEX TO APPENDIX

Wilfredo Pujols Parole Eligibility Calculation..... Aa 1 to 3

Wilfredo Pujols Redacted Face Sheet Report..... Aa 4 to 8

2019 Pre-Parole Report..... Aa 9 to 13

Wilfredo Pujols Redacted Progress Notes Report..... Aa 14 to 28

Wilfredo Pujols Parole Package..... Aa 29 to 109

State Parole Board Two-Member Panel Notice of
Decision..... Aa 110

Wilfredo Pujols Letter of Mitigation..... Aa 111 to 112

State Parole Board Three-Member Panel Notice of
Decision..... Aa 113 to 121

Wilfredo Pujols Appeal to the Full Parole Board.... Aa 122 to 127

State Parole Board Notice of Final Agency Decision. Aa 128 to 132

Notice of Appeal..... Aa 133 to 136

Certification of Joseph J. Russo and Parole
Data..... Aa 137 to 149

Bass v. N.J. State Parole Bd., No. A-3639-18T1, 2020
N.J. Super. Unpub. LEXIS 2270 (Nov. 19, 2020)..... Aa 150 to 154

Coburn v. N.J. State Parole Bd., No. A-4921-16T3, 2018
N.J. Super. Unpub. LEXIS 1898 (Aug. 10, 2018)..... Aa 155 to 157

Hankins v. N.J. State Parole Bd., No. A-5060-14T3, 2017
N.J. Super. Unpub. LEXIS 281 (Feb. 6, 2017)..... Aa 158 to 159

Geiger v. N.J. State Parole Bd., No. A-5782-12T2, 2015
N.J. Super. Unpub. LEXIS 884 (Apr. 20, 2015)..... Aa 160 to 164

TABLE OF AUTHORITIES

PAGE NOS.

Cases

613 Corp. v. State, Div. of State Lottery,
210 N.J. Super. 485 (App. Div. 1986) passim

Acoli v. N.J. State Parole Bd., 462 N.J. Super. 39 (App. Div.
2019), on remand from 224 N.J. 213 (2016) 14

Balagun v. N.J. Dep’t of Corr.,
361 N.J. Super. 199 (App. Div. 2003) 31

Bass v. N.J. State Parole Bd., No. A-3639-18T1,
2020 N.J. Super. Unpub. LEXIS 2270
(App. Div. Nov. 19, 2020) 14

Brunswick Corp. v. Director, Div. of Taxation,
135 N.J. 107 (1994) 23

Coburn v. N.J. State Parole Bd., No. A-4921-16T3,
2018 N.J. Super. Unpub. LEXIS 1898
(App. Div. Aug. 10, 2018) 14

Dennery v. Board of Educ., 131 N.J. 626 (1993)..... 42

Dep’t of Env’tl. Protection v. Stavola,
103 N.J. 425 (1986) 15, 16

Drake v. Dep’t of Human Servs. Div. of Youth & Family Servs.,
186 N.J. Super. 532 (App. Div. 1982) 35, 36, 37

Geiger v. N.J. Parole Bd., No. A-5782-12T2,
2015 N.J. Super. Unpub. LEXIS 884 (App. Div. 2015) 33

Haines v. Kerner, 404 U.S. 519 (1972)..... 5

Hankins v. N.J. State Parole Bd., No. A-5060-14T3,
2017 N.J. Super. Unpub. LEXIS 281
(App. Div. Feb. 6, 2017) 14

In re Application of Trantino, 89 N.J. 347 (1982)..... 7

In re Auth. for Freshwater Wetlands Statewide
Gen. Permit 6, Special Activity Transition Area
Waiver for Stormwater Mgmt., Water Quality Certification,
433 N.J. Super. 385 (App. Div. 2013) 11

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Cases (cont'd)

In re Barnert Memorial Hosp. Rates, 92 N.J. 31 (1983)..... 23

In re Hawley Parole Application, 98 N.J. 108 (1984)..... 28, 42

In re Jamesburg High School Closing, 83 N.J. 540 (1980)..... 23

In re Provision of Basic Generation Serv. for Period
Beginning June 1, 2008, 205 N.J. 339 (2011) 13, 18

In re Request to Modify Prison Sentences, Expedite Parole
Hearings, & Identify Vulnerable Prisoners,
242 N.J. 257 (2020) (In re Request to Modify) 41

In re Shelton, 266 Cal. Rptr. 3d 467 (Ct. App. 2020)..... 21

In re Valley Hosp., 240 N.J. Super. 301 (App. Div. 1990)..... 31

In re Vey, 124 N.J. 534 (1991)..... 26

Kamienski v. Board of Mortuary Science,
80 N.J. Super. 366 (App. Div. 1963) 23

Kosmin v. N.J. State Parole Bd.,
363 N.J. Super. 28 (App. Div. 2003) 38, 48, 54

Matter of Health Care Administration Bd.,
83 N.J. 67 (1980) 11

McGowan v. N.J. State Parole Bd.,
347 N.J. Super. 544 (App. Div. 2002) 14

Mejia v. New Jersey Department of Corrections,
446 N.J. Super. 369 (App. Div. 2016) 31, 32

Metromedia, Inc. v. Dir., Div. of Taxation,
97 N.J. 313 (1984) 11, 18

Monks v. N.J. State Parole Bd.,
58 N.J. 238 (1971) 28

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Cases

N.J. Parole Board v. Byrne, 93 N.J. 192 (1983) 41

N.J. State Parole Board v. Cestari,
224 N.J. Super. 534 (App. Div. 1988) 42, 43, 56

Nieder v. Royal Indem. Ins. Co.,
62 N.J. 229 (1973) 5

Sessions v. Dimaya, 138 S. Ct. 1204 (2018) 7

State v. Jimenez, 266 N.J. Super. 560 (App. Div. 1993) 52

Toms River Affiliates v. Dep't of Env'tl. Protection,
140 N.J. Super. 135 (App. Div. 1976) 34

Trantino v. N.J. State Parole Bd., 154 N.J. 19 (1998) passim

United States v. Davis, 139 S. Ct. 2319 (2019) 7

Statutes

N.J.A.C. 10A:71-3.11 passim

N.J.A.C. 10A:71-3.11(b) passim

N.J.A.C. 10A:71-3.21 60

N.J.A.C. 10A:71-3.21(a) 60

N.J.A.C. 10A:71-3.21(d) 60, 63

N.J.S.A. 2C:44-1(c)(1) 52

N.J.S.A. 2C:44-1(c)(2) 57

N.J.S.A. 30:4-123.53(a) 7, 15, 23

N.J.S.A. 30:4-91.15 47

N.J.S.A. 52:14B-4 10

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Rules

R. 1:36-3..... 14, 33

R. 2:6-2(a) (1)..... 5

Constitutional Provisions

N.J. Const., Article V, Sec. 4, Para. 6..... 10

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TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

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PRELIMINARY STATEMENT

Despite nearly 10 years of infraction-free incarceration at a minimum custody level, extensive and enthusiastic program participation, and employment in positions requiring administrative approval, the Parole Board denied Mr. Wilfredo Pujols parole -- and on top of that, imposed a future eligibility term ("FET") more than four times the presumptive term. The Board, in making this determination, used factors that were unvetted through the Administrative Procedures Act, are undefined, and have no apparent connection to whether Mr. Pujols is likely to commit another crime if released. To make matters worse, the Board's initial decision was wholly contained in a single-page checklist, precluding adequate appellate review.

Further, even if the Board's procedures had been sufficient, its decision, which selectively focused on a crime that occurred over 30 years prior and on infractions that occurred nearly a decade before, ignored more recent and probative evidence of Mr. Pujols's growth: nearly 10 years of zero infractions, maintaining the minimum possible custody status, eagerly participating in programming, and working in a job requiring administrative approval. The Board's decision to deny Mr. Pujols parole and to impose a 120-month FET cannot be supported by the record. This Court must remand for the Board to grant Mr. Pujols parole, or in the alternative, to reduce his FET to the presumptive term.

STATEMENT OF FACTS & PROCEDURAL HISTORY¹

Mr. Pujols acknowledges that 34 years ago, on January 9, 1987, when he was 20 years old, he committed a murder when he was caught stealing from his girlfriend's mother's purse. (Aa115)² It is also true that at the time of this offense, Mr. Pujols was on probation for receiving stolen property and aggravated assault, and that while on probation, he participated in the theft of another car. (Aa114-15) Mr. Pujols also recognizes that his institutional record is not perfect: he has had 11 infractions connected with eight events over his 31 years in prison. (Aa19-22)

However, Mr. Pujols has been infraction-free since 2011. Over the course of his incarceration, he has completed over 50 programs. (Aa18-19; 54-109) He completed his G.E.D. in 2005 and was awarded a Certificate for Distinction of Exemplary Student for the Academic Year. (Aa86-87) In 2014, he became a graduate of the Foundation Ministries Bible Institute degree program. (Aa88) He also completed multiple vocational training programs, and an

¹ Mr. Pujols combines his Statement of Facts and Procedural History for the Court's ease of reading, as they are intertwined for the purposes of this appeal.

² "Aa" refers to the appendix to this brief. "Aca" refers to the confidential appendix to this brief. The transcript volume corresponds to the following date: 1T - January 28, 2019 (two-member panel hearing)

instructional tech at the prison noted Mr. Pujols had "excellent attendance" and was "very enthusiastic about programming." (Aa11) At his parole hearing, Mr. Pujols noted that he enjoys working and that he has been continuously employed during his entire incarceration. (1T10-20 to 24) He has worked across many fields, including being a Teacher's Aid (TA) at two separate institutions. (Aa4) At the time of the parole hearing, he was employed -- and continues to be employed -- in the "Yard" work detail, performing "routine grounds maintenance" which includes operating tractors, lawn mowers, power washers, snow blowers, leaf blowers, and weed trimmers. (Aa10) This detail requires administrative approval because the work is done outside on the grounds and uses major machinery. Sergeant Ross, his supervisor, noted that his attendance at work was "excellent," he needed "minimal" supervision, and he has an "excellent" ability to work with others. (Aa10)

Mr. Pujols's housing officer noted that his personal hygiene is "excellent," he needs "minimal" supervision, and he leads a quiet life including reading books, watching TV, working in the yard, and cleaning his bed area. (Aa9)

In preparation for parole, Mr. Pujols completed all available programs from the Office of Transitional Services, including Thinking for a Change (T4C), Successful Transition and Reentry Series (STARS), Successful Employment through Lawful

Living and Conflict Management (SEALL), Helping Offenders Parent Effectively (HOPE), Family Reunification and Transition (FRAT), and Cage Your Rage (CYR), as well as Focus on the Victim (FOV), which he emphasized helped him understand his actions and their consequences. (1T 20-21 to 21-16) (Aa13, 18) In all these programs he had perfect attendance. (Aa18) These services, specially geared towards preparing parole applicants for release, all occurred after his last infraction. He has not committed an infraction since before he was trained in the building trades, got his theology degree, and completed the programs focused on release.

After 31 years in prison, Mr. Pujols became eligible for parole for the first time in 2018. On January 28, 2019, a two-member panel denied Mr. Pujols parole and referred his case to a three-member panel to impose a future eligibility term ("FET") outside the presumptive 27-month FET. (Aa110) On March 20, 2019, the three-member panel imposed a 120-month FET. (Aa113-21) Mr. Pujols appealed to the full Parole Board, which affirmed both the denial of parole and the application of a 120-month FET on September 25, 2019. (Aa128-132)

The Office of the Public Defender (OPD) filed a notice of appeal as within time on January 14, 2021. (Aa133 to 136)

LEGAL ARGUMENT

POINT I

THE PAROLE BOARD HAS NOT DEFINED THE STANDARDS BY WHICH IT DETERMINED THAT THERE IS A SUBSTANTIAL LIKELIHOOD THAT MR. PUJOLS WILL COMMIT A CRIME IF RELEASED ON PAROLE. (not raised below)³

Despite nearly a decade of infraction-free incarceration and a presumption of release, the Parole Board relied on Mr. Pujols's supposed "insufficient problem(s) resolution," specifically including his "lack of insight into criminal behavior," and "minimiz[ation of] conflict" in denying him parole and imposing a future eligibility term (FET) of 120 months -- over four times the presumptive term. (Aa110, 113-21, 128-32) However, Mr. Pujols's presumptive entitlement to parole cannot be

³ See R. 2:6-2(a)(1). While the legal arguments made here were not raised in the hearing before the Parole Board below, this is obviously because Mr. Pujols is a prisoner who was not provided counsel and who himself could not be expected to raise points of law. Moreover, the Parole Board, which is not comprised exclusively or even substantially of lawyers, would not be in a position to consider any legal arguments, even if Mr. Pujols had raised them.

Additionally, these issues "concern[] matters of great public interest" and therefore should be heard on appeal, even if they were not raised by pro se appellant below. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). In New Jersey, courts maintain broad discretion to relax court rules in the interest of justice and fairness. R. 1:1-2. It would be fundamentally unfair to expect uncounseled prisoners to raise constitutional claims at the agency level or bar subsequent review of them. See Haines v. Kerner, 404 U.S. 519, 520 (1972) (a pro se complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers").

overcome based on the conclusory findings that he "lacks insight" or "minimizes conduct." Rather, if these concepts are to be relevant in determining the continued deprivation of Mr. Pujols's liberty, they must be defined with sufficient clarity to satisfy both constitutional and statutory requirements of administrative due process. Moreover, their use must be explained by the Parole Board, and the process of analysis and balancing against the mitigating factors must be sufficiently revealed, so that this Court may exercise meaningful judicial review. The use of such ill-defined and subjective criteria as a staple to deny parole violates parole applicants' -- including Mr. Pujols's -- rights and cannot support the denial of parole and excessive FET in Mr. Pujols's case.

A. The Parole Board's use of "insufficient problem resolution" and "lack of insight" constitutes improper ad hoc rulemaking.

In using "insufficient problem resolution" and "lack of insight" as bases to deny parole and impose excessive FETs, the Parole Board is using factors that are unvetted and unpromulgated through the notice-and-comment process required under the Administrative Procedures Act ("APA"), constituting ad hoc decision making and denying Mr. Pujols, and other parole applicants, due process. This Court should remand for a new hearing where the "insufficient problem resolution" and "lack of insight" factors cannot be considered absent APA rulemaking.

It is a basic tenet of due process, both under the Fourteenth Amendment and under New Jersey constitutional and administrative law, that someone subject to the law's constraints must have fair notice of the standards by which their liberty is to be granted or withheld. As Justice Neil Gorsuch recently wrote for the United States Supreme Court, "In our constitutional order, a vague law is no law at all." United States v. Davis, 139 S. Ct. 2319, 2323 (2019) (striking down phrase "crime of violence" as unconstitutionally vague in defining criminal offense); accord Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

The New Jersey statute regarding parole release "creates a protected expectation of parole in inmates who are eligible for parole." Trantino v. N.J. State Parole Bd., 154 N.J. 19, 25 (1998) (Trantino IV). Under the version of the Parole Act applicable to Mr. Pujols, there is a strong presumption of parole, and parole must be granted unless it is shown by a "preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime under the laws of this State if released on parole at such time." N.J.S.A. 30:4-123.53(a) (1996); see also In re Application of Trantino, 89 N.J. 347, 366 (1982) (Trantino II).

Through the rulemaking process, the Parole Board has adopted rules and regulations implementing and giving definition to this statutory standard. Thus, N.J.A.C. 10A:71-3.11(b) delineates 23

factors that hearing officers, panels, and the full Board must consider in making parole decisions:⁴

1. Commission of an offense while incarcerated;
2. Commission of serious disciplinary infractions;
3. Nature and pattern of previous convictions;
4. Adjustment to previous probation, parole and incarceration;
5. Facts and circumstances of the offense;
6. Aggravating and mitigating factors surrounding the offense;
7. Pattern of less serious disciplinary infractions;
8. Participation in institutional programs which could have led to the improvement of problems diagnosed at admission or during incarceration. This includes, but is not limited to, participation in substance abuse programs, academic or vocational education programs, work assignments that provide on-the-job training and individual or group counseling;
9. Statements by institutional staff, with supporting documentation, that the inmate is likely to commit a crime if released; that the inmate has failed to cooperate in his or her own rehabilitation; or that there is a reasonable expectation that the inmate will violate conditions of parole;
10. Documented pattern or relationships with institutional staff or inmates;
11. Documented changes in attitude toward self or others;
12. Documentation reflecting personal goals, personal strengths, or motivation for law abiding behavior;

⁴ In 2021, the Parole Board added a 24th factor pertaining to the applicant's "growth and increased maturity."

13. Mental and emotional health;
14. Parole plans and the investigation thereof;
15. Status of family or marital relationships at the time of eligibility;
16. Availability of community resources or support services for inmates who have a demonstrated need for same;
17. Statements by the inmate reflecting on the likelihood that he or she will commit another crime; the failure to cooperate in his or her own rehabilitation; or the reasonable expectation that he or she will violate conditions of parole;
18. History of employment, education, and military service;
19. Family and marital history;
20. Statement by the court reflecting the reasons for the sentence imposed;
21. Statements or evidence presented by the appropriate prosecutor's office, the Office of the Attorney General, or any other criminal justice agency;
22. Statement or testimony of any victim or the nearest relative(s) of a murder/manslaughter victim;
23. The results of the objective risk assessment instrument.

In reviewing the Parole Board's decision denying parole, this Court must consider whether the Board's findings and conclusions are sufficient to overcome the presumption of parole, as informed by the above factors. See Trantino II, 89 N.J. at 372 ("[T]he individual's likelihood of recidivism is now the sole standard for making parole determinations"); Trantino IV, 154

N.J. at 31 (cautioning against treating recidivism and rehabilitation as “cognate criteria,” since rehabilitation is relevant “only as it bears on the likelihood that the inmate will not again resort to crime.”).

This Court should thus not consider Parole Board findings or conclusions that are not facially directed towards the statutory standard, particularly when those findings or conclusions are based on factors that have not been vetted appropriately through the rulemaking procedures under the APA, N.J.S.A. 52:14B-4. Indeed, ultimately, the New Jersey Constitution requires that the public be given fair notice of regulations that affect the public:

No rule or regulation made by any department, officer, agency or authority of this state, except such as relates to the organization or internal management of the State government or a part thereof, shall take effect until it is filed either with the Secretary of State or in such other manner as may be provided by law. The Legislature shall provide for the prompt publication of such rules and regulations.

[N.J. Const., Article V, Sec. 4, Para. 6.]

While the Parole Board’s exercise of discretion is entitled to substantial deference, an administrative agency’s discretion to act in “selecting the appropriate procedures to effectuate their regulatory duties and statutory goals” is not absolute. In re Auth. for Freshwater Wetlands Statewide Gen. Permit 6, Special

Activity Transition Area Waiver for Stormwater Mgmt., Water Quality Certification, 433 N.J. Super. 385, 413 (App. Div. 2013). Hence, “[i]t is fundamental that administrative regulations must not only be within the scope of the delegated authority, but also must be sufficiently definite to inform those subject to them as to what is required.” Matter of Health Care Administration Bd., 83 N.J. 67, 82 (1980).

The 23 factors contained in N.J.A.C. 10A:71-3.11(b), having been vetted through the notice and comment process required under the APA, may be presumed to be reasonably relevant in considering parole applications. However, insufficient problem resolution and lack of insight are not listed among those factors. The use of these factors, upon which the Board relied so heavily in Mr. Pujols’s case, appears therefore to be an example of ad hoc rulemaking that violates the APA.

As our Supreme Court has held, “[w]here the subject matter of the inquiry reaches concerns that transcend those of the individual litigants and implicate matters of general administrative policy, rule-making procedures should be invoked.” Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, 331 (1984) (citations omitted). The Court further explained the importance of the rulemaking procedure under the APA:

The procedural requirements for the passage of rules are related to the underlying need for general fairness and decisional

soundness that should surround the ultimate agency determination. These procedures call for public notice of the anticipated action, broad participation of interested persons, presentation of the views of the public, the receipt of general relevant information, the admission of evidence without regard to conventional rules of evidential admissibility, and the opportunity for continuing comment on the proposed agency action before a final determination. [Ibid. (internal citations omitted)]

The rulemaking process mandated in the Administrative Procedures Act is one way the Legislature discharges the constitutional obligation to publish, and thereby give the public meaningful notice, of administrative rules and regulations.

Metromedia requires that if an agency has in effect adopted an administrative rule, then it must promulgate that rule through the prescribed rulemaking procedures. Metromedia outlined six factors to analyze when determining if an agency has engaged in de facto rulemaking -- whether the agency action:

- 1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group;
- 2) is intended to be applied generally and uniformly to all similarly situated persons;
- 3) is designed to operate in future cases, that is, prospectively;
- 4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization;
- 5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a

- clear, past agency position on the identical subject matter; and
- 6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

Id. at 331-32. "The pertinent evaluation focuses on the importance and weight of each factor and is not based on a quantitative compilation of the number of factors which weigh for or against labeling the agency determination as a rule." In re Provision of Basic Generation Serv. for Period Beginning June 1, 2008, 205 N.J. 339, 343 (2011).

In this case, each of the Metromedia factors show that the use of "insufficient problem resolution" and "lack of insight" in parole decisions should have been promulgated and vetted through the APA-required rulemaking process.

First, the use of "problem resolution" and "insight" is intended and has been used to encompass a large segment of the regulated public: all incarcerated people eligible for parole. Every incarcerated person eligible for parole must be granted parole by the Parole Board unless it is proven they will commit another offense (if the offense occurred prior to 1997) or will likely violate the terms of their release (if the offense occurred after 1997). In assessing this question, the Board uses factors it has promulgated under its own regulation. The Board has also begun to use factors not promulgated under the regulation: "insufficient problem resolution," which includes

"insight" into prior criminal history and "minimizes conduct." Indeed, this Court has reviewed many Parole Board decisions in which "insufficient problem resolution," and specifically "insight" is used as a determinative factor, including most recently in Acoli v. N.J. State Parole Bd., 462 N.J. Super. 39 (App. Div. 2019), on remand from 224 N.J. 213 (2016); see also McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544 (App. Div. 2002).⁵

Second, the use of these factors is not applied to a specific group of parole-eligible prisoners. Parole hearing officers uniformly assess each applicant for whether they possess "insight" into their prior criminal history. This is clear in that the Parole Board has included the factor as part of its standard checklist in the preprinted Notice of Decision form that is presumably used in every parole determination.

Third, these same facts show that the use of "problem resolution" and "insight" is a prescribed legal standard that is

⁵ A number of unpublished opinions of this Court also refer to "lack of insight" as undergirding the Parole Board's decision under review. See, e.g., Bass v. N.J. State Parole Bd., No. A-3639-18T1, 2020 N.J. Super. Unpub. LEXIS 2270 (App. Div. Nov. 19, 2020); Coburn v. N.J. State Parole Bd., No. A-4921-16T3, 2018 N.J. Super. Unpub. LEXIS 1898 (App. Div. Aug. 10, 2018); Hankins v. N.J. State Parole Bd., No. A-5060-14T3, 2017 N.J. Super. Unpub. LEXIS 281 (App. Div. Feb. 6, 2017). Pursuant to R. 1:36-3, counsel includes these unpublished opinions in the appendix. Counsel offers them for the limited proposition that the Board frequently refers to "lack of insight" in its decisions. Counsel is aware of no cases that are contrary to that limited proposition.

being used both presently by the Parole Board, and prospectively for future parole determinations, i.e., it was not a specialized finding that applied only to Mr. Pujols or Mr. Acoli but not for future parole applicants.

When an agency has statutory rulemaking authority, the agency's rule in one case would apply to all other matters, thereby satisfying the first three Metromedia factors. See Dep't of Env'tl. Protection v. Stavola, 103 N.J. 425, 438 (1986)

(holding that if the Department of Environmental Protection "has implied statutory authorization to regulate certain beach club cabanas, then its ruling in this case would apply to all other beach clubs . . . thus falling within Metromedia guidelines Nos. (1), (2), and (3)"). Clearly, the Parole Board has statutory rulemaking authority to establish criteria for parole that supplement the statutory standard.

Fourth, "insufficient problem resolution" and "lack of insight" are legal standards that are not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization. N.J.S.A. 30:4-123.53(a) establishes the ultimate legal standard as whether there is "a substantial likelihood an inmate will commit another crime if released." There is no obvious, or even non-obvious, inferential chain leading from the ultimate statutory standard and finding "insufficient problem resolution," including "lack of insight,"

in large measure because it is not known or knowable to the reasonably informed person what is meant by "insight" or "problem resolution." Thus, the use of these factors would "impose[] an unfair burden" on parole applicants. Stavola, 103 N.J. at 438.

Fifth, the use of "problem resolution" and "insight" were not previously expressed in any official and explicit agency determination, adjudication, or rule -- this is not a situation of a non-substantive restatement of a previous policy that had already been vetted through the rulemaking process required by the APA. Instead, it is a factor added in with no explanation of its definition or its application.

Finally, the use of "problem resolution" and "insight" as significant factors in determining parole eligibility clearly reflects a decision by the Parole Board "in the nature of the interpretation of law or general policy." These factors are being used as an interpretation by the Parole Board of its statutory responsibility to determine whether a "substantial likelihood exists [that] the inmate will commit another crime." "Insight" and "problem resolution" have now acquired an importance in parole determinations that equals, if not exceeds, that of any of the 23 factors that are contained explicitly in the parole regulation, N.J.A.C. 10A:71-3.11(b), which have been vetted through the rulemaking process. (See Aa129) ("Further, the Board finds that your program participation does not negate the fact

that you still lack insight into your criminal behavior and minimize your conduct.”) The APA requires that it be validated through the same process.

All these factors highlight the fatal defect in using the “insufficient problem resolution” and “lack of insight” factors in parole determinations without having first vetted them through the rulemaking process to determine whether they have any relevance to the ultimate statutory standard. Of foremost concern is the definitional question: what is “insight” or lack thereof? While the term “insight” apparently is a technical term of art in the fields of psychology and psychoanalysis,⁶ it has not been established that this is the meaning that the Parole Board intends. Nor is it clear what constitutes sufficiently resolving problems.

Even if the definitional question were resolved, there remains the ultimate question of whether “lack of insight” and “insufficient problem resolution,” however defined, have bearing on the sole statutory issue before the Parole Board: the likelihood that the applicant will commit another crime. Establishing this nexus is exactly what the rulemaking process

⁶ The concept of “insight” in particular stems from the Gestalt school of psychology. See generally, Janet Davidson & Robert Sternberg, eds., The Nature of Insight (1996). Whether it has general acceptance in the scientific community is one question that would have been vetted in the notice and comment process.

would achieve, and therefore its absence is all the more erroneous under the Metromedia standards. "Agencies should act through rulemaking procedures when the action is intended to have a 'widespread, continuing, and prospective effect,' deals with policy issues, materially changes existing laws, or when the action will benefit from the rulemaking's flexible fact-finding procedures." In re Provision of Basic Generation Serv., 205 N.J. at 349-50 (quoting Metromedia, 97 N.J. at 329-31).

In the absence of such rulemaking procedure, the Parole Board's ad hoc adoption of insight as an indicator of whether Mr. Pujols and other parole applicants are likely to commit a crime in the future should be rejected as an exercise in ad hoc rulemaking forbidden by the APA, requiring a new parole hearing without consideration of the factor.

B. The Parole Board's use of "insufficient problem resolution" and "lack of insight" without defining them and their nexus to the ultimate statutory standard constitutes an abuse of discretion that violates the required rulemaking process.

Acceptance of such an amorphous terms as "insufficient problem resolution" and "lack of insight," without the definitional clarity that the rulemaking process would hopefully bring would also inject unbridled administrative discretion into the parole process. This constitutes an abuse of discretion and is insufficient to sustain a denial of parole.

As this Court found in another procedural context in 613 Corp. v. State, Div. of State Lottery, 210 N.J. Super. 485 (App. Div. 1986), inclusion of extraneous subjective factors not included in formal rule violates the APA. In 613 Corp., 3 adult bookstore corporations challenged the denial of state lottery licenses by the Division of State Lottery allegedly based on the ground that there was a "sufficiency of existing agents in its area." Id. at 489. This Court found that the agency's denial of the licenses was based not only on proximity to other licensees, but also on other factors, such as the controversial nature of their businesses, which had not been the subject of rulemaking.

One of the primary concerns this Court expressed was that by injecting this new criterion, the agency's review of lottery applications was now "fraught with indicia of subjectivity." Id. at 502. Although multiple factors were considered in their determination, the agency officials "were unable to even approximate a formula delineating the relative weight given to each factor." Ibid. The procedural guidelines -- a one page document -- were not made available to the person recommending licenses for applicants, and the decision "boiled down to the investigator's 'gut reaction' based upon asserted subjective knowledge of a given area." Ibid. Under this system, "[t]he absence of published standards to ensure fair and consistent application of eligibility requirements has resulted in a

procedure which vests unfettered discretion in the Director and his staff in violation of the principles which structure such discretionary actions." Ibid.

According to this Court, the most "disturbing" part of the "unbridled discretion" at play was that "the affected public cannot fairly anticipate or address the procedure as there is no specific provision in the statute or regulations which describe the determination process." Id. at 503. The public could not know what factors the agency relied on or how heavily they relied on certain factors, and "no one has any way of predicting the inferences that can be drawn from the Commission's actions in future application denials." Ibid. Ultimately, as this Court recognized, "[t]here can be no public confidence in a system that awards licenses based only on an individual's 'gut reaction' or subjective impressions. Such a system breeds suspicion and fosters contempt and corruption." Ibid. The approval of "vague, unpublished sufficiency standards" in the case was held to be an abuse of discretion, and the agency's decision reversed. Id. at 504. The court remanded to give the agency the opportunity to go through the proper rulemaking process. Ibid.

So too, here, the vetting of unfettered discretion in the officers of the Parole Board to meld the undefined concepts of "insufficient problem resolution" and "lack of insight" into whatever conclusion they wish to reach (almost inevitably the

denial of parole), fatally undermines the validity of the Board's ultimate conclusion. "Lack of insight" is becoming an all too convenient method of explaining parole denial in the absence of any other reasons more susceptible to contradiction or review -- what California courts have called a "talisman for denying parole." In re Shelton, 266 Cal. Rptr. 3d 467, 479-82 (Ct. App. 2020) (overturning the denial of parole where the parole applicant's alleged lack of insight was not rationally related to the standard of future dangerousness).

If the Parole Board is not held accountable for its invention of the conclusory terms "insufficient problem resolution" and "lack of insight" without intervening public notice and comment, then deference to the Parole Board's decisions will have crossed the line to unquestioning judicial acquiescence to the Parole Board's determinations. There is currently no basis for the courts to examine the validity of the Parole Board's conclusions, or any way for parole applicants to adduce evidence to rebut the claim. Thus, the Parole Board can continue using these terms, without any definition, connection to the ultimate statutory standard, or explanation of their use in the parole decision process without judicial oversight.

Moreover, there was no explanation of how each factor was weighed, just as in 613 Corp. The two-member panel's decision was merely a checklist, and there was absolutely no explanation given

at the parole hearing when Mr. Pujols was denied parole. The Final Agency Decision consistently repeated that the factors are just one of myriad factors the panel considers, yet it is not clear how those factors are weighed, especially when "lack of insight" is also applied and apparently enough to discard the weight of an entire factor. (Aa129) "Lack of insight" has thus become the "one size fits all" expression, indeed, a "talisman", of agency discretion that could explain any result, without fear of contradiction.

Therefore, the Parole Board's "approval of the vague, unpublished" "insufficient problem resolution" and "lack of insight" factors constitutes an abuse of the Board's discretion. 613 Corp., 210 N.J. Super. at 504. The Parole Board's decision must be reversed, and the matter remanded for a new parole hearing for Mr. Pujols and to give the Board an opportunity to adopt the proper rules. Ibid.

C. The use of the catch-all phrase "any other factors deemed relevant" does not allow the Parole Board to dispense with its rulemaking obligations.

The catch-all phrase in N.J.A.C. 10A:71-3.11 denotes that the Parole Board may consider factors not listed that are "deemed relevant." However, the Parole Board cannot use this catch-all phrase to circumvent the notice and rulemaking process. Because the Parole Board's use of "insufficient problem resolution," including "lack of insight," has become a factor considered in

most -- if not all -- parole cases, its broad application has bypassed the required rulemaking process and is impermissible.

Although administrative agency regulations are presumptively valid, the Supreme Court has held that "an administrative agency may not under the guise of interpretation give a statute a greater effect than the [enabling] language allows." In re Barnert Memorial Hosp. Rates, 92 N.J. 31, 40 (1983). Therefore, administrative agencies are "merely a 'creature of legislation who must act only within the bounds of the authority delegated to [it].'" Brunswick Corp. v. Director, Div. of Taxation, 135 N.J. 107, 113 (1994) (Garibaldi, J., dissenting) (quoting In re Jamesburg High School Closing, 83 N.J. 540, 549 (1980)). Our courts are obliged to "restrain an administrative agency when it acts beyond the scope of the authority granted it by the Legislature." Ibid. Applicable here is the imperative that "when the rule of an administrative agency contravenes the statute which created it, the rule lacks efficacy." Kamienski v. Board of Mortuary Science, 80 N.J. Super. 366, 370 (App. Div. 1963).

In the parole context, the Supreme Court held in Trantino II that under N.J.S.A. 30:4-123.53(a), "the individual's likelihood of recidivism is now the sole standard for making parole determinations." 89 N.J. at 372. Any factors other than those bearing on this question, such as "punishment that serves

society's needs for general deterrence or a concern or retribution," are not relevant. Ibid. Therefore, the Parole Board is authorized to only consider those factors relevant to this inquiry, and this inquiry alone.

The loose construction of the Parole Board's regulation, N.J.A.C. 10A:71-3.11(b), containing the catch-all phrase "any other factors deemed relevant" would allow the agency to consider factors that have no bearing on the standard contained in the enabling statutory authorization. The Board could then use undefined words and phrases -- like "lack of insight" -- with no way for the parole applicant to understand the standard to which they will be held.

Further, allowing the Board to apply a generic factor used in every case would allow the Parole Board to circumvent the rulemaking process. The catch-all phrase should be narrowly construed to allow the Board to consider a factor in a certain case because the factor is highly relevant to the statutory standard. It should not allow the Board to consider a generic factor in every case, else the regulation allow the Board to ignore the mandates of the APA.

In Mr. Pujols's case, the use of "problem resolution" and "insight" to deny him parole and implement a 120-month FET constituted ad hoc rulemaking and deprived him of administrative due process. If this Court were to accept the Parole Board's

logic that the agency can apply any factors it deems relevant, such as "insight," in determining parole release without having to explain what the factor entails or to engage in the required rulemaking procedure, this Court would be rendering the APA and the Supreme Court's decision in Metromedia meaningless. The Court must reverse the Board's decision and remand for a new hearing.

POINT II

THE PAROLE BOARD'S CHECKLIST METHODOLOGY OF DENYING MR. PUJOLS PAROLE FAILED TO ARTICULATE ITS BASIS FOR ITS DECISION IN A MANNER THAT PERMITS MEANINGFUL JUDICIAL REVIEW. (partially raised below)⁷

The two-member panel's only explanation for denying Mr. Pujols's parole is contained only within a single checklist marked with a few pen strokes. The three-member panel's decision, while appearing slightly more in-depth, actually only recites the checklist's factors in narrative form. And the Final Agency decision does not explain the two- or three-member panel decisions or provide its own explanation for finding that the panels did not abuse their discretion. This bare-bones, rote manner of determining parole does not allow for meaningful judicial review and is an abuse of discretion.

The New Jersey Supreme Court has consistently held that "[a]lthough administrative agencies are entitled to discretion in making decisions, that discretion is not unbounded." In re Vey, 124 N.J. 534, 543 (1991) (internal citations omitted). Administrative decisions must be "exercised in a manner that will facilitate judicial review." Id. at 544. To facilitate judicial

⁷ See footnote 3, supra. However, Mr. Pujols, in his letter to the full Board, did argue that the three-member panel relied on the same factors as the two-member panel and did not provide an "independent basis" to support the excessive FET. He also argued that the Board overlooked and undervalued the mitigating factors. 613 Corp., 210 N.J. Super. at 495.

review, administrative agencies "must articulate the standards and principles that govern their discretionary decisions in as much detail as possible." Ibid. (internal quotations omitted).

Additionally,

Agency determinations will not be disturbed unless the findings could not have been reasonably reached on sufficient credible evidence considering the proofs as a whole, giving due regard to the agency's expertise where such is a relevant factor . . . The sense of 'wrongness' arises in several ways, among which are the lack of inherently-credible supporting evidence, the obvious overlooking or undervaluation of crucial evidence or a clearly unjust result.

[613 Corp., 210 N.J. Super. at 495 (internal citations omitted).]

Here, the Parole Board has not only overlooked but essentially ignored crucial evidence, namely the past nine years of Mr. Pujols's exemplary behavior, programming, employment, and stellar record, and instead inexplicably given greater importance to infractions a decade earlier and criminal conduct stemming from over 30 years ago. And because of the checklist process, there is no real explanation why. This was an abuse of discretion.

A. The rote and mechanical process by which the Parole Board considered Mr. Pujols's parole application precludes meaningful judicial review.

The principles of administrative review that apply generally are equally applicable to the Parole Board. "[T]he inherent difficulty in gauging whether a parole determination

constitutes an abuse of discretion does not engender a more exacting standard of judicial review than that applicable to other administrative agency decisions." Trantino IV, 154 N.J. at 25; In re Hawley Parole Application, 98 N.J. 108, 112 (1984) (finding "no reason to exempt the Parole Board from the well-established principle" and generally accepted standard of review applicable to administrative agencies). Parole decisions are "highly subjective and discretionary." Hawley, 98 N.J. at 116. For that very reason, however, "one of the best protections against arbitrary exercise of discretionary power lies in the requirement of findings and reasons that appear to reviewing judges to be rational." Id. at 115 (internal quotations omitted). "Such reasons are necessary "not only [to insure] a responsible and just determination' by the agency but also '[to afford] a proper basis for effective judicial review.'" Id. at 116 (quoting Monks v. N.J. State Parole Bd., 58 N.J. 238, 245 (1971)).

However, the Parole Board has adopted a rote and mechanical "checklist" methodology of review that does not allow for meaningful judicial review and conceals arbitrary decision-making. The pre-printed panel Notice of Decision that Mr. Pujols received is essentially a checklist that allows a panel member to, with as few pen strokes as possible, reduce to tangible form the ostensible basis for the decision. Yet the cause of brevity has superseded the goal of clarity and cogent explanation. In

Mr. Pujols's case, the checklist for the most part merely catalogs objective and undisputed facts that are already available in the written record, such as the fact that he was convicted of a new crime while on probation and fails to even recount the facts underlying his original crimes in 1986-87 that are considered "reasons for denial." (Aa110)

Similarly, the three-member panel decision determining Mr. Pujols's future eligibility term from March 20, 2019 copied -- word-for-word, check-for-check, and circle-for-circle -- the two-member panel's checklist determining his parole denial, with one exception -- pointing out that the "facts and circumstances" of the offense included the strangulation of the victim. Its Notice of Decision simply lists the factors it has applied, and the facts related to those factors; there is no analysis or weighing of the APA-compliant factors at all. The only factor that received an extended discussion was "insufficient problem resolution." Most of that discussion was relating what Mr. Pujols said during his hearing, and the panel summarily concluded that he does "not understand the personality defects that have impelled [him] to act in a criminal manner on the street or an anti-social manner while incarceration [sic]. Further, the Board panel finds that [he] downplay[s] [his] actions and provide[s] excuses to [his] conduct." (Aa119) The panel's belief that Mr. Pujols does "not understand the severity of his behavior," does

not understand his “manipulative conduct or why it appears [he does] what [he] want[s] to do,” and has “not conducted a substantive introspection into your past poor decision-making” (Aa 120) is similarly conclusory, and fails to provide why the Board believes this, or how these conclusions are weighed against the other APA-vetted factors in Mr. Pujols’s case.

Finally, the Final Agency Decision of September 2019 merely recites, again in narrative form, the list of factors checked off by the panel, then addresses Mr. Pujols’s contentions by summarily referring to the panel’s decision, without explaining why or how certain factors are weighed. It merely states that “based on the aggregate of all relevant factors, there is a substantial likelihood that you will commit another crime.” (Aa131) In weighing the factors for a future eligibility term, again, the Final Agency Decision states that, “no particular weight is afforded to any one factor over another factor, nor is there a quantitative assessment of factors,” (Aa130) and again summarily confirms the three-member panel’s FET decision.

The problem with checklists is that they are a mere inventory of factors; they do not reveal the critical process of how the Parole Board has weighed those factors to reach its conclusion. It is that balancing process that this Court must review to determine whether it was reasonable. But if there is no articulation by the Parole Board of how it engaged in that

balancing, then quite literally there is nothing for this Court to review. "Quasi-judicial administrative decisions must set forth 'an analytical expression of the basis which, applied to the found facts, led to the holdings below.' . . . It is not only the duty of the agency to find the necessary facts, but also to explain its reasoning." In re Valley Hosp., 240 N.J. Super. 301, 306 (App. Div. 1990) (emphasis added) (internal citations omitted). "We cannot accept without question an agency's conclusory statements, even when they represent an exercise in agency expertise. The agency is 'obliged . . . "to tell us why."'" Balagun v. N.J. Dep't of Corr., 361 N.J. Super. 199, 202-03 (App. Div. 2003) (internal citations omitted).

This Court has grappled with the use of similarly discretionary methodology in the context of prison disciplinary hearings. Mejia v. New Jersey Department of Corrections, 446 N.J. Super. 369 (App. Div. 2016). There, the appellant argued that his sanction of three-and-a-half years in administrative segregation, the longest sanction possible, was improper due in part to the lack of any regulation that required an officer to explain the reasoning behind his or her sanctioning decision. See id. at 378-79. The court was concerned that "[t]he DOC regulations include factors to be utilized in imposing sanctions, but unfortunately leave the use of those or other 'such factors' entirely to the discretion of the hearing officer." Id. at 378.

“Without any regulation requiring the articulation of sanctioning factors, we have no way to review whether a sanction is imposed for permissible reasons and is located at an appropriate point within the allowable range.” Id. at 379. The court reversed the sanction imposed for being impermissibly excessive and anticipated “that the requirement for the consideration and articulation of sanctioning factors by hearing officers this opinion imposes will assure the sanctioning of state prisoners becomes more ‘fair and equitable.’” Id. at 380.

Although the procedural context in Mejia is different than that in Mr. Pujols’s case, parole hearing officers, like prison disciplinary hearing officers, are also authorized to consider factors on a checklist entirely under their own discretion but are not required to articulate the basis for weighing the factors so identified. This procedure also has the effect of barring effective, if any, meaningful judicial review. This lack of justification undermines any confidence in a parole hearing officer’s decision, as in Mejia.

Indeed, this Court has criticized the Parole Board’s practice of checking off factors in denying prisoners their right to parole release. In an unpublished decision, this Court vacated the Parole Board’s decision denying the appellant parole and remanded the decision for full reconsideration. Geiger v. N.J. Parole Bd., No. A-5782-12T2, 2015 N.J. Super. Unpub. LEXIS

884 (App. Div. 2015).⁸ (Aa147-51) The court's description of the record in Geiger is remarkably similar to the one before the Court here:

[T]he panel's and the Board's reasoning for its finding are not adequately explained. The panel's decision is cursory, consisting only of a check list which makes only fleeting reference to an interview and documents in the file, without making any effort to explain their significance. Instead, it dwells on problem resolution, a catchall phrase that has no specific content, especially in the context of the law governing the Board's decision. [Geiger, 2015 N.J. Super. Unpub. LEXIS 884, at *12 (emphasis added) (Aa163-64)]

As in Geiger, here there has been no attempt to balance and weigh the significance of the mitigating factor against the aggravating factors. After Mr. Pujols was denied parole in his parole interview, the hearing officers failed to provide any reasoning at all for the decision. Thus, the only explanation we have for the decision to deny Mr. Pujols parole is a checklist, with few words and no explanation for how the factors are weighed. Entirely no relationship to the ultimate standard of proving a likelihood that Mr. Pujols would commit another crime if released was established. Like in Geiger, the Parole Board checked off "insufficient problem resolution," a catch-all factor

⁸ Pursuant to R. 1:36-3, Counsel offers Geiger for the limited proposition that a Parole Board decision that consists only of a check list which makes only fleeting reference to an interview and documents in the file, without making any effort to explain their significance, cannot be sustained upon judicial review. Counsel is aware of no cases that are contrary to that limited proposition.

not delineated in N.J.A.C. 10A:71-3.11(b), and opined only that Pujols "lacked insight" into his prior criminal behavior, "minimized conduct" and "sees the world based on how it affects him." (Aa110)

And in the three-member panel's Notice of Decision, while ostensibly better as it was in narrative form, the only factor with any real discussion was "insufficient problem resolution." Even then, it was reciting Mr. Pujols's hearing testimony and stating he did not adequately show insight. There was no discussion of why 10 additional years was necessary to allow Mr. Pujols to, according to the Panel, sufficiently address his problem resolution. (Aa114-21)

While a checklist methodology may serve as a useful tool for guiding the Parole Board in identifying the factors relevant to the likelihood of a prisoner committing another crime if released, it does not assist in weighing and balancing those factors. This Court has approved of this methodology where the checklist is "adequately defined" and has "sufficient flexibility" only "to carry out the purposes of the legislation." Toms River Affiliates v. Dep't of Env'tl. Protection, 140 N.J. Super. 135, 144 (App. Div. 1976). That is not the case here: The Parole Board's use of a checklist and its practice of checking off factors without articulating the underlying reasoning does not fulfill the agency's duty to explain its decision in a

meaningful way. The checking-off of factors alone, without more, is too facile a procedure. This Court must reverse and remand the Board's decision to deny Mr. Pujols parole and require the agency to adequately define its reasoning in relation to the ultimate statutory goal, and in relation to the FET outside the presumptive guidelines.

The Parole Board's Notice of Final Agency Decision suffers from similar deficiencies. In Drake v. Dep't of Human Servs. Div. of Youth & Family Servs., 186 N.J. Super. 532, 538 (App. Div. 1982), this Court held that a Final Decision issued by the Director of the Division of Youth and Family Services terminating the residential placement of a child with disabilities at a school was deficient for failing to substantiate the findings for the termination. As with the Final Agency Decision in the case of Mr. Pujols, the Final Decision in Drake "merely [sustained] the Recommended Decision of the 'Adolescent Services Specialist' 'for the reasons expressed by [her] in her Recommended Decision.'" Id. at 533. The Final Decision in Drake did not provide this Court with any information sufficient for meaningful judicial review or include any information about the child "except for broad generalizations about his 'excellent progress at [the school] and the fact that he 'enjoys his relationship with [his mother] and his family.'" Id. at 534. Conclusions about the child were unsubstantiated by

any facts; “[t]he single conclusion that ‘he has the ability to be self-sufficient with respect to activities of daily life’ is naked; there are no findings at all to support this determination.” Ibid. Furthermore, this Court held that there were terms that were not defined, such as “activities of daily life,” leaving this Court “relegated to presumptions.” Ibid.

The Parole Board’s Notice of Final Agency Decision mirrors the Final Decision in Drake in that it fails to provide this Court with sufficient information for meaningful judicial review, again leaving this Court “relegated to presumptions.” The Board here simply listed, again in narrative form, the factors and evidence it says is “a matter of record” that were considered. (Aa129) Yet it does not explain how these factors and evidence were considered. Then, the Board summarily concurred with the panels’ conclusions, without explaining why, for example, Mr. Pujols “gained little insight” from his programming, or what Mr. Pujols must do or say to show that he has “insight.” (Aa129) As in Drake, there were no specific findings beyond summary conclusions and terms were left undefined. There is no way for this Court to adequately review the record with such little explanation for the Board’s decision.

Standing alone, a “checklist methodology” such as the one employed by the Parole Board fails to make a rational connection between the facts on record and the Parole Board’s decision

analyzing and balancing the weight of the factors. See Drake, 186 N.J. Super. at 536 (holding a reviewing court must “examine why and under what authority the agency acted,” in which the administrative agency should “catalogue the full scope of that to be considered by a competent factfinder.”). The Board’s decision must be reversed.

B. The Parole Board failed to assess direct empirical evidence of non-likelihood of future criminality, including nine years of infraction-free behavior.

The factors used by the Parole Board to deny Mr. Pujols parole can be grouped into two general categories: (1) Mr. Pujols’s prior criminal history and past record of institutional infractions, which are undisputed, but which occurred either on or before the date of Mr. Pujols’s crime in 1987, or else more than nine years prior while incarcerated; and (2) the Parole Board’s finding that he had not demonstrated sufficient “insight into [his] criminal behavior”.

The Parole Board failed to explain why the most recent nine-year record of completely acceptable behavior by Mr. Pujols, during which he was preparing, through DOC programming specifically designed for release into the community, combined with the mitigating factors that the Board acknowledges are present here, are not more reliable predictors of the current likelihood of recidivism than those factors it cited that are qualitatively and quantitatively more remote in time and

circumstance. See Kosmin v. N.J. State Parole Bd., 363 N.J. Super. 28, 33 (App. Div. 2003) (noting a seven-year period without infractions and extensive participation programming undercut the Board's denial of parole).

While Mr. Pujols does not contend that the passage of 31 years from the original crimes inevitably means there can never be substantial likelihood that a person will commit a new crime if released, this significant passage of time is certainly a very relevant consideration, especially considering Mr. Pujols's age at the time of the offenses, which would have been considered mitigating if the offenses were committed today. The Parole Board was at least required to explain how it had weighed the remoteness of time of the aggravating factors and why it felt that his most recent record of infraction-free conduct was a less reliable indication of the likelihood he would commit another crime than the criminality that occurred decades before.

In this case, however, the Parole Board merely recited the fact of the prior criminal activity and parole violations without even attempting to explain why those incidents, as serious as they were, are still relevant in assessing the current risk of re-offense. When the record presents such an obvious reason to question the relevance of activity that took place 31 years ago, the Parole Board's failure in its duty to articulate the reasons for its decisions or to demonstrate that there is

sufficient preponderance of credible evidence to support its conclusions, amounts to an abuse of discretion.

The relevance of institutional infractions nearly a decade earlier that the Board cited were similarly not explained. The Board failed to explain why almost 10 years of no infractions, while Mr. Pujols was engaging "enthusiastically" in programming specifically designed to reduce recidivism, working a job that required administrative approval due to the nature of being outside the prison walls and using dangerous equipment, and achieving the lowest custody level he could possibly achieve, was less indicative of future criminality than events that occurred many years and even decades prior.

If the Board is privy to some understanding that rebuts the logical inferences to be drawn from the past nine-year experience, then it must reveal that understanding to the Court so that its decision is capable of meaningful judicial review. Otherwise, the Board's conclusions are an abuse of discretion and erode whatever judicial deference to which the Parole Board is usually entitled.

POINT III

THE RECORD IN THIS CASE DOES NOT OVERCOME THE PAROLE ACT'S PRESUMPTION OF RELEASE BECAUSE IT DOES NOT ESTABLISH THAT THERE IS A SUBSTANTIAL LIKELIHOOD THAT MR PUJOLS WILL COMMIT A CRIME IF RELEASED. (Aa110, 128-31)

The two-member Board panel abused its discretion in denying Mr. Pujols parole. The panel gave no explanation for how the factors were weighed, how the "insufficient problem resolution" factors relate to the statutory standard, and why these factors indicate Mr. Pujols is substantially likely to commit a future offense. Further, the emphasis on events that happened over 30 years ago, and institutional infractions that occurred nearly a decade prior, in disregard of more recent evidence, was arbitrary and capricious. Finally, there was no discussion of Mr. Pujols's age at the time of his offenses, which would now be considered mitigating, and the statistical unlikelihood based on brain science that he would commit another offense. This Court must reverse the Board's decision.

Under the Parole Act of 1979, a parole applicant "shall be released on parole at the time of parole eligibility unless information supplied or developed . . . indicates that there is a substantial likelihood that the inmate will commit a crime under the laws of this State if released on parole." In re Application of Trantino, 177 N.J. Super. 499 (App. Div. 1981) (emphasis added). The law shifted the burden to the State "to

prove that the prisoner is a recidivist and should not be released." N.J. Parole Board v. Byrne, 93 N.J. 192, 205 (1983). Importantly, there is a "legitimate expectation of release" and thus a "federally protected liberty interest." Id. at 207; see also In re Request to Modify Prison Sentences, Expedite Parole Hearings, & Identify Vulnerable Prisoners, 242 N.J. 257, 384-85 (2020) (In re Request to Modify).

This was a "radical change" from the prior Parole Act of 1948, and "while fitness for parole remains a determination to be made by parole authorities, parole eligibility is now a function of the sentenced received." Trantino II, 89 N.J. at 355, 368. "In effect, this decision has become a judicial responsibility to be exercised at the time of sentencing" -- due to the more definite and harsher sentences implemented under the new sentencing scheme in 1979, the Legislature "reformed the Parole Act to reduce the discretion involved in parole decisions." Id. at 368 (emphasis added). "In short, because the punitive aspect of his sentence already has been served, [Pujols] had a constitutionally protected right to parole unless the State could prove that there was a 'substantial likelihood' that he would commit another crime." Trantino v. N.J. State Parole Board, 166 N.J. 113, 197 (2001) (Trantino V).

"A denial of parole is subject to judicial review for arbitrariness." N.J. State Parole Board v. Cestari, 224 N.J.

Super. 534, 547 (App. Div. 1988) (citing Hawley, 98 N.J. at 112-13). A reviewing court looks to three factors in reviewing an agency action:

- (1) whether the agency's action violates express or implied legislative policy, i.e., did the agency follow the law;
- (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and
- (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Trantino IV, 154 N.J. at 24.]

Reviewing courts may reverse agency decisions that are "arbitrary, capricious or unreasonable, or are not 'supported by substantial credible evidence in the record as a whole.'"

Trantino V, 166 N.J. at 191-92 (emphasis in original) (quoting Dennery v. Board of Educ., 131 N.J. 626, 641 (1993)). "Thus, if the record does not contain sufficient evidence that there is a substantial likelihood an inmate will commit another offense if released, the denial of parole must be found to have been arbitrary and capricious." Cestari, 224 N.J. Super. at 547.

The record shows that the Parole Board abused its discretion in denying Mr. Pujols parole. In so doing, the panel checked the following factors: the "facts and circumstances" of the offense, prior offense record, criminal record getting

"increasingly more serious," committed to incarceration for multiple offenses, on probation when he committed the current offense, had previously been incarcerated, institutional record, LSI-R score of 17, and "insufficient problem resolution," specifically "lack of insight into criminal behavior," "minimiz[ing] conduct," and "see[ing] the world based on how it affects him," "manipulative and fraudulent behavior," and not understanding "why he acts as he does other than to say he made stupid decisions." (Aa110) In this case, when viewing the record as a whole, the Board's decision was arbitrary and capricious.

As in Cestari, the Board panel used the "serious nature" of the offense -- crossing out "serious nature" and writing "facts and circumstances" -- to deny parole. "However, under the Parole Act of 1979 'the gravity of the crime may not now be considered an independent reason for continuing punishment and denying parole.'" 224 N.J. Super. at 548 (quoting Trantino II, 89 N.J. at 373). Because there was no explanation by the Board panel why the circumstances of the offense indicated Mr. Pujols was likely to recidivate, its use was arbitrary and capricious. This is notable because the DOC's own statistics show that those who have served over two years are the least likely to recidivate, and those convicted of violent offenses are in fact the least likely of all offenders to be rearrested and reconvicted. State of N.J. Dep't of Corrections, 2015 Release Cohort Outcome Report: A

Three-Year Follow Up 21, 23 (2018) (2015 Outcome Report).⁹ This undermines the Board's determination that the offense itself, without further explanation, is an indicator of recidivism.

Moreover, when using the "nature and circumstances of the offense," which occurred over 31 years prior, the Board simply checked the box, not explaining why the offense so long ago was still as relevant as nearly a decade of infraction-free living wherein DOC employees found his need to be supervised "minimal." The Board also seemingly relied heavily on the fact that Mr. Pujols was on probation at the time of the offense. But our courts have held that if a person's prior record is remote in time, it is arbitrary and capricious for the Board to rely on that record in denying parole. In Trantino V, our Supreme Court held that the "Parole Board's extensive reliance on evidence relating to . . . events occurring prior to the 1963 murders [for which defendant was incarcerated] was arbitrary and capricious." 166 N.J. at 121. The Court found that "[t]hat evidence provided no substantial support for the Board's conclusion that Trantino was substantially likely to commit another crime if released on parole now." Ibid. The Court noted that the events were so remote that they did not support the

⁹ Available at https://www.state.nj.us/corrections/pdf/offender_statistics/2015_Release_Recidivism_Report.pdf

conclusion that Trantino would reoffend. Ibid. Instead, the reliance on "such distant events" may be understood as a "makeweight to overcome the lack of substantial evidence to support the Board's conclusions." Id. at 190.

Here, too, the Board's reliance on evidence of the offense for which Mr. Pujols was on probation, the fact that he was on probation at the time of the offense, and the current offense itself was a "makeweight" to overcome the lack of substantial evidence that Mr. Pujols is "substantially likely" to commit another offense. The Board did not explain why these factors, more than three decades prior, carried more weight in Mr. Pujols's risk of recidivism than more recent evidence.

The Board also disregarded that Mr. Pujols was serving a youth sentence for his prior offenses (Aa3) -- especially important as we now know more about the neuroscience that animates young peoples' actions. The Board failed to look at Mr. Pujols's young age at the time of the present offense as well -- he was merely 20 years old. In determining whether his prior offenses will predict recidivism, the Board failed to recognize "one of the brute facts of criminology": that offending peaks in the late teens and early 20s, and then drops precipitously throughout the mid-20s. Travis Hirschi & Michael Gottfredson, Age

and the Explanation of Crime, 89 Am. J. Soc. 552, 552 (1983)¹⁰; Gary Sweeten, Alex R. Piquero, & Laurence Steinberg, Age and the Explanation of Crime, Revisited, 42 J. Youth & Adolescence 921, 922 (2013) ("Crime bears a robust relationship with age, rapidly peaking in the late teen years, with a decline nearly as rapid soon thereafter, and continued declines throughout adulthood."). This is because in situations of emotional arousal, those in their late teens and early 20s still lack impulse control -- and this control is not developed until approximately the mid-20s. Elizabeth Scott et al., Bringing Science to Law and Policy: Brain Development Social Context, and Justice Policy, 57 Wash. U.J.L.& Pol'y 13, 26-27 (2018); Laurence Steinberg, Adolescent Brain Science and Juvenile Justice Policymaking, 23 Psy. Pub. Pol. & L. 410, 414 (2017). See also Brent Roberts et al., Patterns of Mean-Level Change in Personality Traits Across the Life Course: A Meta-Analysis of Longitudinal Studies, 132 Psych. Bulletin 1, 14-15 (2006) (finding that personality changes more during young adulthood than at any other period).¹¹

Thus, the age-crime curve again cuts against the Board's conclusion -- Mr. Pujols committed both his prior offenses and

¹⁰ Available at <https://www.jstor.org/stable/2779005>.

¹¹ Available at https://www.researchgate.net/publication/7337585_Patterns_of_Mean-Level_Change_in_Personality_Traits_Across_the_Life_Course_A_Meta-Analysis_of_Longitudinal_Studies.

the current offense when he was 18 and 20 years old, which corresponds with the peak of the curve. Mr. Pujols's brain was still developing, and the likelihood that he now, at 55 years old, would commit another offense, is at odds with well-settled neuroscience research.

It is also at odds with empirical studies of recidivism rates for older people: "[R]ecidivism rates decline markedly with age," National Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences 155 (Jeremy Travis, Bruce Western, & Steve Radburn eds., 2014), which holds across criminal history, type of offense, and types of recidivism measures. See generally id. It is also contradicted by the DOC's own statistics, which show that those in their 50s are half as likely to be reconvicted than those under 30. 2015 Outcome Report at 19. These findings are replicated over time; the DOC has issued a similar report analyzing the future behavior of people released from state prisons for every year since 2007, and each time has found an inverse relationship between age and future criminal activity.¹²

¹² See N.J.S.A. 30:4-91.15 (requiring Commissioner of Corrections to produce reports on recidivism of persons released from state correctional facilities). These reports are available at <https://www.state.nj.us/corrections/pages/OffenderInformation.html#OffenderStats>.

At the very least, the Board should have taken into account Mr. Pujols's age at the time of these offenses and recognized his developmental stage before concluding that these offenses indicate future criminality. The Board's reliance on the underlying offense and Mr. Pujols's prior record to support a finding of likelihood to recidivate, without any regard for his youth and associated deficiencies in impulse control due to his brain, or his current age, renders the Board's reliance on these long-ago offenses arbitrary and not based in substantial evidence in the record.

The Parole Board also erroneously found "insufficient problem resolution" and the subfactors "lack of insight" and "minimizes conduct" in support of its decision denying Mr. Pujols parole. In the psychological report and in the parole hearing, Mr. Pujols admitted what he did over 30 years prior, and explained exactly why: he was angry about being fired, sought to steal some tools from the man who fired him, and when caught by the man's girlfriend, he panicked and was scared about being incarcerated again, so reacted and killed the witness to his breaking and entering and theft. [REDACTED]

[REDACTED] [REDACTED] [REDACTED] See Kosmin, 363 N.J. Super. at 43 (finding "difficultly in understanding" the Parole Board's reliance on "lack of insight" when the parole applicant explained

her actions were in response to the victim's abuse). Indeed, Mr. Pujols, in his letter to the full Board noted: "My past actions are regrettable and the remorse I have for taking the life of Marie Condon, which has adversely affected the lives of all who knew and loved her, can never be sufficiently expressed. My actions will haunt me for the rest of my life." (Aa123) As this Court explained in Kosmin, a reliance on the lack of insight is not supported when a parole applicant "has admitted full responsibility for the crime" and explains the "underlying cause of [the applicant's] criminal behavior." Id. at 42-43. Here, Mr. Pujols has taken full responsibility for the offense and explained why he acted the way he did, both in the panel hearing and in his psychological evaluation. Thus, it is again "difficult to understand" what more the Parole Board requires of Mr. Pujols, id. at 43, and the use of "lack of insight" was an abuse of discretion.

The Parole Board also summarily stated that Mr. Pujols "minimized his conduct," "sees the world based on how it affects him" and "includes manipulative and fraudulent behavior." (Aa110) However, nowhere does the Board explain what these conclusory statements mean, exactly what he said that "minimized" or was "manipulative or fraudulent" -- especially since he admitted outright all his past transgressions -- or, more importantly, the connection between these conclusions and the finding that Mr.

Pujols is substantially likely to commit another offense. Like "lack of insight," there is no explanation for the outsized weight the Board panel gave these factors, and no connection to the ultimate standard of likelihood to reoffend.

Additionally, Mr. Pujols had an LSI-R score of 17, which indicates a 17.1 percent chance of reconviction within two years of release -- far from a "substantial likelihood" that he will commit another crime. And this score would be the same across age groups, and thus does not consider Mr. Pujols's age, which as explained above, indicates he is far less likely than a younger person to recidivate. It is unclear why the Parole Board has placed this score as a reason to deny parole, when it is a "low/moderate" risk score, Christopher T. Lowenkamp & Kristin Bechtel, The Predictive Validity of the LSI-R on a Sample of Offenders Drawn from the Records of the Iowa Department of Corrections Data Management System 71 Fed. Prob. J. 1, 2 (2001),¹³ and indicates a less than one-in-five chance that Mr. Pujols will reoffend. This low score, instead of being used in mitigation, was instead inexplicably used in aggravation.

Further, this low score itself should cast substantial doubt on the Parole Board's conclusion, as the LSI-R has had its

¹³ Available at https://www.uscourts.gov/sites/default/files/71_3_4_0.pdf#:~:text=The%20LSI%20DR%20is%20a,indicate%20an%20individual's%20risk%20category.

validity consistently established over decades of use and across racial groups. See Melinda D. Schlager & David J. Simourd, Validity of the Level of Service Inventory-Revised (LSI-R) Among African American and Hispanic Male Offenders, Crim. Just. & Behavior 1, 8-9 (2007)¹⁴; Lowenkamp & Bechtel, 71 Fed. Prob. J. This is especially important because compared with risk assessment instruments, researchers have found that decisionmakers with "access to extensive information" and no "immediate feedback" on the accuracy of their predictions -- "features of many real-world scenarios" -- tend to "overestimate[] risk, hurting their classification accuracy." Zhiyuan Lin, Jongbin Jung, Sharad Goel, & Jennifer Skeem, The Limits of Human Predictions of Recidivism, 6 Sci. Adv. 1, 4-5 (2020).¹⁵ Essentially, "algorithmic risk assessments can often outperform human predictions of reoffending." Id. at 5.

The Parole Board here seems to have relied heavily on extraneous details, leading it to find a "lack of insight," the exact sort of "extensive information" the studies warn reduce a person's accuracy in determining recidivism risk. The Parole Board seemed to consider this extraneous information more than

¹⁴ Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.877.4090&rep=rep1&type=pdf>.

¹⁵ Available at <https://advances.sciencemag.org/content/6/7/eaaz0652/tab-pdf>.

the LSI-R score, which has proven to be a valid predictor of risk. (Aa129, 131) This was an abuse of discretion.

One concerning note is that the two-member panel asked Mr. Pujols specifically about his trial, asking him: "You took it to trial and you pled not guilty, right?" (1T 15-7 to 8) When Mr. Pujols responded affirmatively, he was asked, "Why did you do that?" (1T 15-11) These questions are wholly unrelated to his risk of recidivism and go directly to his fundamental constitutional rights to a trial by a jury of his peers and the presumption of innocence. In the sentencing context, judges may not consider the fact that a defendant has gone to trial in imposing a sentence. N.J.S.A. 2C:44-1(c)(1). In the same way that "a defendant has a right to defend, and a sentencing judge may not enhance the penalty because he contests his guilt," State v. Jimenez, 266 N.J. Super. 560, 570 (App. Div. 1993), the Parole Board should not take into consideration whether a parole applicant has gone to trial or pleads guilty in determining whether he is suitable for parole. These questions by the Parole Board raise alarming implications for those who exercise their fundamental rights under the United States and New Jersey constitutions, and should not have been considered during Mr. Pujols's hearing at all.

On the other hand, there are many factors the Board ignored that support that Mr. Pujols is unlikely to reoffend. Mr. Pujols

has for 10 years now been without any infractions, major or minor, something completely ignored at all stages of the parole process. He has prepared for release by taking -- with perfect attendance -- all available programming, including the six "Core Programs" listed by the DOC's Office of Transitional Services as "cost-effective, proven practices system wide that increase offenders' ability and motivation to practice responsible, crime-free behavior." <https://www.state.nj.us/corrections/pages/ots.html>. In fact, an instructional tech noted that Mr. Pujols was "very enthusiastic" about programming. (Aa11) Yet the Parole Board ignored the DOC's own programming specifically designed to reduce the risk of reoffense, and instead seemed to rely more heavily on the undefined, unvetted "lack of insight" factor, which has not been proven to show increased risk of reoffense. (Aa129)

Moreover, Mr. Pujols has achieved not only the most minimum-security status he can reach, but he works a job that requires administrative approval due to its location on the grounds and the use of heavy and dangerous machinery. Mr. Pujols drives lawn mowers, tractors, and snow blowers and operates weed whackers, power washers, and leaf blowers with very little supervision. Despite the dangerous nature of this equipment, Sergeant Ross wrote that Mr. Pujols requires "minimal" supervision and has an "excellent" ability to work with others. (Aa10)

Mr. Pujols has completed the "OSHA 30" programming course and related programming that teach fire safety, welding safety, flagging, and hazardous communications, providing him with the skills necessary to succeed in workplaces when he is released. (Aa11) He has been continuously employed during his entire incarceration, and as he noted, he has "never been fired from a job." (1T 10-20 to 22) In fact, he said, he "love[s] to work" and that he "enjoy[s] working." (1T 10-24)

According to those at the prison, Mr. Pujols requires "minimal" supervision within his housing block as well. Instead, he lives a quiet life reading books, watching television, and cleaning his bed area. (Aa9)

Mr. Pujols has completed his GED and was awarded a certificate for "Exemplary Student for the Academic Year," is a graduate of the Foundation Ministries Bible Institute's Theology program and has engaged in both educational and vocational programming throughout his incarceration. (Aa6-7, 18-19, 86-88) As noted in his institutional Face Sheet, and corroborated by his own Parole Packet, Mr. Pujols has completed over 50 programs across the educational, vocational, and therapeutic spectrum. See Kosmin, 363 N.J. Super. at 33-34. He has tutored other people in the prisons who are unable to read, was employed as a Teacher's Aid, where he received an "Outstanding Person" award, and has been very involved in Hispanic Americans for Progress and

Hispanic Educational Literacy Program. (Aa17, 26, 61, 63, 65-70, 73, 76, 78-85) He has received letters and certificates of appreciation and commendation for his assistance in programming at the prison. (Aa61, 66, 71) He has completed numerous behavioral classes throughout the years. (Aa6-7, 18-19, 56, 59, 72, 74, 75, 77, 84, 91, 92, 94-101, 103-05)

Mr. Pujols has not been charged with any new offenses during his incarceration. He has had 11 total infractions corresponding with eight events over the course of his 31 years in prison. (Aa19-22) However, even the most recent infractions were now 10 years ago. Instead, for the last 10 years, Mr. Pujols has remained entirely infraction free, and has enthusiastically jumped into programming to prepare him for release into his community and a successful future. The Parole Board did not explain why decade-or-older infractions and offenses -- especially those that occurred while his brain was still developing -- and vague terms like "lack of insight" hold more weight than the actual and noted behavioral changes in Mr. Pujols: 10 years of infraction-free living and preparatory action for successful release.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Mr. Pujols also had numerous family members, friends, and his fiancée write letters of support for him, showing that upon

release, he would have a strong network of loved ones who would help him reenter the community in a successful manner. (Aa33-53)

Mr. Pujols has continued to show remorse for his actions and take responsibility for what he has done. This, as well as the other mitigating factors in his case, would not appear to a reasonable person to be the actions and temperament of an individual who would commit a crime again if released. The Parole Board has failed to meet the requirement of the Parole Act of 1979 by not being able to show by a preponderance of the evidence that Mr. Pujols is substantially likely to commit a crime if released; in fact, it has failed to even show that Mr. Pujols is likely to commit a crime at all.

This problem is not Mr. Pujols's alone -- according to data obtained by the OPD through an Open Public Records Act (OPRA) request, between 2012 and 2019, 91.24 percent of people serving life terms who became parole-eligible were denied parole.

(Aa137-149) These data show that despite the Parole Board's statutory duty to release, and the supposed more circumscribed discretion under the Parole Act of 1979, the Parole Board has consistently undermined sentencing courts' authority to sentence offenders with the expectation that parole will be granted upon parole eligibility. See N.J.S.A. 2C:44-1(c)(2) (directing sentencing courts to consider a defendant's parole eligibility in determining the appropriate term of imprisonment). This data

should further "undermine the deference" this Court ordinarily would give to the Parole Board. See Trantino V, 166 N.J. at 188.

Mr. Pujols has gone to great lengths since October 18, 2011 to prepare himself for parole and show that he is ready to re-enter society as a law-abiding citizen. The Parole Board did not acknowledge Mr. Pujols's extensive programming except to say that it has not helped him gain "insight." But no matter how much programming Mr. Pujols has completed that is designed specifically for success upon release, or how many years since his last infraction, it does not seem to matter in the face of the undefined and talismanic power of the "insufficient problem resolution" factor the Parole Board has made up out of whole cloth.

The Parole Board apparently did not find probative the fact that Mr. Pujols has a niece and other family members eager to provide support during his reentry process. That he was at the height of the age-crime curve when he committed his offenses and is now an older man with a developed brain and decades of incarceration behind him. [REDACTED]

[REDACTED] And the Board apparently did not seem to care that Mr. Pujols has spent the last 10 years doing everything he can to reenter society successfully. Rather, the Board has selectively looked at actions taken at least a decade,

and in the case of his prior criminal history, three decades prior to deny Mr. Pujols release. Thus, the Parole Board acted arbitrarily and capriciously when denying Mr. Pujols parole, and this Court must remand for a hearing with consideration of the full record, and adequate explanations from the Parole Board.

POINT IV

**THE PAROLE BOARD ACTED ARBITRARILY AND
CAPRICIOUSLY IN ESTABLISHING A FUTURE
ELIGIBILITY TERM INCONSISTENT WITH ITS OWN
REGULATIONS. (9T 50-20 to 62-2)**

For essentially the same reasons it denied parole, the Parole Board imposed a 120-month future eligibility term (FET) on Mr. Pujols. This FET, more than four times the presumptive term, was applied in violation of the administrative code.

N.J.A.C. 10A:71-3.21 governs the schedule of future parole eligibility dates for prisoners by the Parole Board. It provides that "a prison inmate serving a sentence for murder . . . shall serve 27 additional months." N.J.A.C. 10A:71-3.21(a). Here, the Parole Board deviated from the presumptive FET of 27 months by establishing an FET of 120 months. Mr. Pujols is aware of the provision of N.J.A.C. 10A:71-3.21(d) which provides:

A three-member Board panel may establish a future parole eligibility date which differs from that required by the provisions of (a) or (b) and (c) above if the future parole eligibility date which would be established pursuant to such subsections is clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior.

But the increased FET imposed in this case suffers from much the same defect as the other aspects of the Parole Board's decision-making process: failure to articulate in any meaningful or reviewable way the basis and reasons for the discretionary departure from the presumed norm and circumvention of the

required rulemaking process. While Mr. Pujols's crime was undoubtedly serious, it was for that very reason that he is subject to the presumptive 27-month FET in the first place. Thus, there must have been something additional that dictated that he be given an FET of 10 additional years of incarceration. At a minimum, this Court should give clear direction to the Board that its decisions must be undergirded by reasoning, so that the judiciary may, when necessary, perform its constitutional function of engaging in appropriate review.

Even under its own standards, however, the Board abused its discretion in imposing a 120-month FET on Mr. Pujols. The Board should remand for the imposition of FET of the presumptive term.

A. As with the factors, the Board engaged in ad hoc rulemaking and attempted to circumvent its rulemaking obligations under the APA.

The Board has created a presumptive 27-month FET for those convicted of the most serious crimes under the Code. However, as with the catch-all phrase in N.J.A.C. 10A:71-3.11, the Board has given itself unfettered discretion to circumvent the required rulemaking process and allow for increasingly excessive FETs. As described in Points I and II, the Parole Board is engaging in improper ad hoc rulemaking that renders its application of 120-month FETs an abuse of discretion. Moreover, it is circumventing its own regulations by regularly imposing excessive FETs. The Board's decision to exceed the presumptive term without adequate

explanation or reviewable standards cannot support Mr. Pujols's 120-month FET.

As explained in Points I and II, supra, the use of "insufficient problem resolution" and "lack of insight" to justify a departure from the presumptive term is improper, as neither term has been defined or related to the ultimate statutory standard. In the context of imposing a future parole eligibility date, the Parole Board has failed to articulate why these factors show the presumptive term is "clearly inappropriate" due to Mr. Pujols "lack of satisfactory progress." The vagueness of these terms and the lack of connection to the regulatory criteria render their use an abuse of discretion.

Moreover, the presumptive term of 27 months itself reflects the gravity of Mr. Pujols's offense. Yet the Board's departure from the FET is unsupported by reviewable standards that show why a departure more than four times the presumptive term is necessary. In fact, there is no benchmark that the Parole Board refers to in determining just how large a departure it should make from the presumptive term. The Board has given itself unfettered discretion in not only denying parole based on unvetted factors, but also using those factors to apply FETs with essentially no limits.

The data collected from the OPD's OPRA request shows just how effectively the Parole Board has circumvented the required

rulemaking process. The data show that of those who were sentenced to a maximum of life and denied parole, 30.8 percent were given an FET of at least a decade. 28.8 percent were given an FET of between four and nine years. Less than half -- 40.4 percent -- received three years or less, the presumptive term. (Aa 137-149) This shows the Parole Board is more often than not ignoring the presumptive term that they themselves have set for themselves through the rulemaking process. Not only that, but in one of every three cases, the Board is not just doubling or tripling the presumptive term, but more than quadrupling the term. In some cases, the Board is applying 20- or 30-year FETs, 8.9 and 13.3 times the presumptive FET, respectively. (Aa139, 141, 144-46)

The lack of any standards by which the Board applies these excessive FETs, and the rate at which it is doing so, shows that the Board is acting arbitrarily and contravening the APA's mandates. The imposition of these extreme FETs is wholly improper, and Mr. Pujols's case must be remanded for the imposition of the presumptive term.

B. Even under the administrative standard for extending an FET, the Board failed to show that an FET more than four times the presumptive term was necessary.

Even under the standard promulgated in N.J.A.C. 10A:71-3.21(d), however, the Parole Board did not show that the ordinary FET was "clearly inappropriate due to the inmate's lack of

satisfactory progress in reducing the likelihood of future criminal behavior" in Mr. Pujols's case. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Mr. Pujols has taken advantage of every available programming opportunity, including the six from the Office of Transitional Services specifically designed for successful release into the community. Nowhere on the record is there any evidence that Mr. Pujols has not made substantial progress in reducing the likelihood of criminal behavior; in fact, he has over the last decade done everything he possibly could to prepare himself for release.

As explained above, Mr. Pujols has taken full responsibility for his actions and has expressed remorse, and thus the "lack of insight" and "insufficient problem resolution" factors are unsupported in the record. Even if they were supported, the Parole Board does not explain why 2.5 years is not adequate to address these problems, or why 10 years is necessary here.

It is entirely unclear why the Parole Board believed that it would take Mr. Pujols another 10 years to become ready for parole, or what more the Board expected he do before they would find his progress "satisfactory." The 120-month FET was thus an

abuse of discretion, unsupported by the record, and must be reversed.

CONCLUSION

For the reasons in Point I, II, and III, the Parole Board's actions violated the APA and constitute an abuse of discretion. This Court must remand for a new hearing absent the factors unvetted by the APA and with a full written explanation for its decision. In the alternative, this Court must remand for the imposition of the presumptive FET.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant-Appellant

BY: s/Morgan A. Birck
MORGAN A. BIRCK
Assistant Deputy Public Defender
Attorney ID: 303052019

Dated: May 18, 2021

EXHIBIT F

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3237-20T2

SEAN P. FARRELL, : CIVIL ACTION
Appellant, : On Appeal from a Final
v. : Decision of the New Jersey
State Parole Board
NEW JERSEY STATE PAROLE BOARD, :
Respondent :
:

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

JOSEPH E. KRAKORA
Public Defender
Office of the Public Defender
Appellate Section
31 Clinton Street, 9th Floor
Newark, NJ 07101
973-877-1200

MORGAN A. BIRCK
Assistant Deputy
Public Defender
Attorney ID: 303052019

Of Counsel and
On the Brief
Morgan.Birck@opd.nj.gov

TABLE OF CONTENTS

PAGE NOS.

PRELIMINARY STATEMENT..... 1

STATEMENT OF FACTS & PROCEDURAL HISTORY..... 4

LEGAL ARGUMENT..... 8

POINT I

FARRELL WAS DEPRIVED OF DUE PROCESS WHEN HE WAS GIVEN A 120-MONTH FUTURE ELIGIBILITY TERM WITHOUT CONSIDERATION OF HIS YOUTH AND WITHOUT ACCESS TO COUNSEL. (Aa 84-87)..... 8

A. Due process requires that juveniles sentenced to a maximum term of life be entitled to counsel at their panel hearing. 14

B. Due process requires that juveniles sentenced to a maximum term of life be entitled to parole hearings at regular intervals. 21

C. Due process requires that the Parole Board consider a juvenile offender's youth and give a reasoned explanation grounded in science and relevant case law for keeping a juvenile lifer incarcerated beyond his parole eligibility date. 26

POINT II

THE PAROLE BOARD ACTED ARBITRARILY AND CAPRICIOUSLY IN ESTABLISHING A FUTURE ELIGIBILITY TERM INCONSISTENT WITH ITS OWN REGULATIONS. (Aa 71-81; 83-86)..... 31

A. The Parole Board's use of "insufficient problem resolution" and "lack of insight" without defining them and their nexus to the ultimate statutory standard constitutes an abuse of discretion that violates the required rulemaking process. 33

TABLE OF CONTENTS

	<u>PAGE NOS.</u>
B. The Parole Board is consistently using the unfettered discretion it has given itself to circumvent its own regulations.	42
C. Even under the administrative standard for extending a FET, the Board failed to show that a FET more than four times the presumptive term was necessary.	43
<u>CONCLUSION</u>	47

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

State Parole Board Notice of Final Agency Decision
Dated May 26, 2021..... Aa 82 to 87

State Parole Board Three-Member Panel Notice of
Decision Dated September 30, 2020..... Aa 67 to 81

INDEX TO APPENDIX

Plea Form..... Aa 1 to 3

Order for Commitment..... Aa 4 to 5

Parole Eligibility Date Calculation..... Aa 6 to 7

Sean Farrell Redacted Face Sheet Report..... Aa 8 to 10

Sean Farrell Redacted Progress Notes Report..... Aa 11 to 42

Sean Farrell 2020 Pre-Parole Report..... Aa 43 to 51

Sean Farrell Inmate Credit Statement..... Aa 52 to 61

Sean Farrell Letter of Mitigation..... Aa 62 to 66

State Parole Board Three-Member Panel Notice of
Decision..... Aa 67 to 81

State Parole Board Notice of Final Agency Decision... Aa 82 to 87

Notice of Appeal..... Aa 88 to 91

Certification of Joseph J. Russo and Parole
Data..... Aa 92 to 104

TABLE OF AUTHORITIES

PAGE NOS.

Cases

613 Corp. v. State, Div. of State Lottery,
 210 N.J. Super. 485 (App. Div. 1986) 38, 41

Diatchenko v. District Attorney for the Suffolk
District, 27 N.E.3d 349 (Mass. 2015) 19

Graham v. Florida, 560 U.S. 48 (2010)..... passim

Greiman v. Hodges, 79 F. Supp. 3d 933 (S.D. Iowa 2015)..... 12

In re Application of Trantino, 177 N.J. Super.
 499 (App. Div. 1981) 8, 17, 31

In re Auth. for Freshwater Wetlands Statewide
Gen. Permit 6, Special Activity Transition Area
Waiver for Stormwater Mgmt., Water Quality Certification,
 433 N.J. Super. 385 (App. Div. 2013) 37

In re Request to Modify Prison Sentences, Expedite
Parole Hearings, & Identify Vulnerable Prisoners,
 242 N.J. 357 (2020) 13, 17

In re Trantino Parole Application, 89 N.J. 347,
 369 (1982) 17

Mathews v. Eldridge, 424 U.S. 319 (1976)..... 9, 13

Matter of Health Care Administration Board,
 83 N.J. 67 (1980) 37

McGowan v. New Jersey State Parole Board,
 347 N.J. Super. 544 (App. Div. 2002) 31, 43

Miller v. Alabama, 567 U.S. 460 (2012)..... passim

Montgomery v. Louisiana, 136 S. Ct. 718 (2016)..... 10

New Jersey State Parole Board v. Byrne,
 93 N.J. 192 (1983) passim

New Jersey State Parole Board v. Cestari,
 224 N.J. Super. 534 (App. Div. 1988) 23

Roper v. Simmons, 543 U.S. 551 (2005)..... 10, 12, 22

Sessions v. Dimaya, 138 S. Ct. 1204 (2018)..... 34

State v. Bass, 457 N.J. Super. 1 (App. Div. 2018)..... 24, 29

State v. Scott, 141 N.J. 457 (1995)..... 27, 28

State v. Tormasi, 466 N.J. Super. 51..... 25

State v. Zuber, 227 N.J. 422 (2017)..... passim

Thompson v. New Jersey State Parole Board,
 210 N.J. Super. 107 (App. Div. 1986) 9

United States v. Davis, 139 S. Ct. 2319 (2019)..... 34

Statutes

N.J.A.C. 10A:71-2.2 (b) 16

N.J.A.C. 10A:71-2.2 (c) 16

N.J.A.C. 10A:71-3.11..... 18, 30, 34, 37

N.J.A.C. 10A:71-3.21..... 31

N.J.A.C. 10A:71-3.21 (a) 15, 25, 42

N.J.A.C. 10A:71-3.21 (a) 31

N.J.A.C. 10A:71-3.21 (a) (1) 15, 25

N.J.A.C. 10A:71-3.21 (d) 31, 36, 43

N.J.S.A. 2A:4A-26.1 (c) 28

N.J.S.A. 2C:11-3 (b) 22

N.J.S.A. 2C:43-2 (e) 23

N.J.S.A. 2C:43-7.2..... 22

N.J.S.A. 2C:44-1 (c) (2) 23

N.J.S.A. 30:4-123.53(a) (2) 44
N.J.S.A. 30:4-123.54(c) 16
N.J.S.A. 30:4-123.56(a) 44
N.J.S.A. 30:4-123.56(b) 44
N.J.S.A. 52:14B-4 33, 37

Constitutional Provisions

N.J. Const. Art. I, Para. 12 passim
N.J. Const., Article V, Sec. 4, Para. 6 37
U.S. Const. Amend VIII passim
U.S. Const. Amend XIV 9

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Parole Act of 1979 8, 31

PRELIMINARY STATEMENT

Sean Farrell was denied due process of law at his parole hearing. Farrell, at 14, had moved from his home in Oklahoma to New Jersey, where he struggled to find friends his own age and desperately wanted to go back home. In an impulsive move, he decided to steal his neighbor's gun to sell for money for a bus ticket back to Oklahoma. When his neighbor discovered him in the midst of the burglary, Farrell panicked and shot his neighbor. These events represent precisely what the U.S. and our Supreme Court have held about children: they are impulsive, impacted by factors out of their control, and often cannot control their bad behavior. Because of this, they are less morally culpable for their actions and guaranteed a meaningful opportunity for release.

Farrell was just 15 years old when he was sentenced to life in prison with a 30-year parole bar and sent to an adult correctional facility. Thirty years later, the New Jersey State Parole Board denied him parole, and added ten additional years of incarceration to his sentence -- more than four times the presumptive future eligibility term ("FET").

However, Farrell was denied due process when he was denied parole and given such a lengthy FET without access to counsel, despite the complex considerations that should have been

presented to the Board regarding Farrell's age, immaturity, and family life that led to the offense. Children who commit crimes have a heightened liberty interest during their parole consideration and have more complicated circumstances due to their age at the time of their offense. Due process thus requires the assistance of counsel at parole hearings for people, like Farrell, who were children at the time of their offense.

Farrell was further denied due process by the lengthy FET itself, because a meaningful opportunity for release requires regular hearings to consider a juvenile's demonstrated maturation and rehabilitation. The Parole Board circumvents this meaningful opportunity for release when it imposes lengthy FETs on juveniles.

Additionally, Farrell was denied due process when the Board failed to consider his offense in the context of his youth and also failed to provide a reasoned decision for why a juvenile, who has lessened culpability compared to adults, must remain in prison.

Finally, in imposing this excessive FET, the Board also used factors that were unvetted through the Administrative Procedures Act, undefined, and have no apparent connection to whether Farrell is likely to commit another crime if released.

Farrell's 120-month FET cannot be sustained by the record. This Court must remand for a new parole hearing with the assistance of counsel and consideration of his youth. Farrell may not be given a FET of more than one year, or in the alternative, not more than the presumptive term.

STATEMENT OF FACTS & PROCEDURAL HISTORY¹

Defendant-appellant Sean Farrell acknowledges that 31 years ago, on July 12, 1990, when he was just 14 years old, he committed a murder when he was caught stealing from his neighbor's home. (Aa 4-5, 76-77)² It is also true that at the time of this offense, Farrell had multiple juvenile adjudications. (Aa 72-73) Farrell further recognizes his institutional record was not perfect: he has had 55 infractions, and 24 "asterisk" (serious) infractions. (Aa 73)

After 30 years -- two-thirds of his life -- in prison, Farrell became eligible for parole for the first time in 2020. He was not represented at the parole hearing and was not told before the hearing that the Board had a representative who was available at the prison to help him prepare for the hearing. (Aa 83, 87) At the hearing, Farrell explained that at the time of the offense, he was angry because he was forced to move from Oklahoma to New Jersey; he was associating with older peers who were not good influences; and he was trying to steal items to

¹ Farrell combines his Statement of Facts and Procedural History for the Court's ease of reading, as they are intertwined for the purposes of this appeal.

² "Aa" refers to the appendix to this brief.
"Aca" refers to the confidential appendix to this brief.
The transcript volume corresponds to the following date:
1T - January 16, 1997 (sentencing)
2T - June 11, 2020 (two-member panel hearing)

sell to buy a bus ticket to return to Oklahoma. (2T 16-7 to 23, 23-1 to 12; Aa 63) When he was discovered during the course of the burglary, he "panicked and [he] picked up the gun and [he] shot" his neighbor who walked in on him. (2T 24-1 to 3, 25-6 to 13; Aa 63) Farrell noted that at the time, he did not understand why his parents "took me from my family and my friends and came up here to somewhere I didn't know." (2T 16-16 to 18) He got into "confrontations with other kids" because of his accent and did not want to be in New Jersey. (2T 16-13 to 14, 20 to 21)

On June 11, 2020, a two-member panel denied Farrell parole and referred his case to a three-member panel to impose a future eligibility term ("FET") outside the presumptive 27-month FET. (Aa 71) On September 16, 2020, the three-member panel imposed a 120-month FET. (Aa 70)

In its checklist of factors found, the three-member Board panel marked as mitigating:

- participation in program(s) specific to behavior;
- participation in institutional program(s); and
- institutional reports reflect favorable institutional adjustment. (Aa 70)

It marked as "reasons for denial":

- the facts and circumstances of offense(s);
- prior offense record is extensive;
- offense record is repetitive;
- prior offense record noted;
- nature of criminal record increasingly more serious;
- prior opportunities on community supervision terminated;
- committed new offenses on community supervision;

- prior opportunities on community supervision failed to deter criminal behavior;
- prior opportunities on community supervision have been violated for technical violations;
- institutional infractions;
- insufficient problem resolution, specifically
 - “minimized conduct” and
 - “other: inmate has not addressed his criminal ways of thinking and behavior. Needs to continue on a path to be successful in being a law-abiding citizen;” and
- the risk assessment evaluation. (Aa 70)

In its narrative opinion, the three-member panel initially just recited the facts of the case. In detailing the “particular reasons for establishing a future eligibility term outside of the administrative guidelines,” the panel again noted the “facts and circumstances of the offense,” simply saying: “that you shot and killed the victim after breaking into their home.” (Aa 71-72) The panel continued its narrative by reciting Farrell’s juvenile record and “asterisk” infractions without further analysis. (Aa 72-76) Finally, the panel found that Farrell had “insufficient problem resolution,” and that he “lack[s] insight into [his] criminal behavior.” (Aa 76-77) The Board panel’s explanation for this factor simply included the facts clear from the record and Farrell’s responses to questions asked of him. Based on these facts and Farrell’s responses, the panel concluded that Farrell “only identified contributing factors to [his] criminal thinking.” (Aa 76-78) The panel found that he “must conduct an introspection into the personality defects that

impelled you to criminal behavior," which will "assist in criminal behavior not occurring in the future." (Aa 79)

In finding a 120-month FET appropriate, the Board gave three reasons:

- (1) Farrell "present[s] as not understanding the dynamics to [his] negative thinking, that resulted in [his] choice to conduct [himself] in a criminal manner" and thus he "need[s] to develop a deeper understanding of [his] criminal thinking as it relates to [his] emotions and personality defects."
- (2) Farrell has not "made adequate progress in the rehabilitative process to ensure criminal behavior and decision-making does not occur again in the future"; he "lack[s] insight and require[s] substantive behavioral programming to possibly provide . . . insight"; and
- (3) Farrell had 55 total, and 24 "asterisk" infractions. (Aa 80)

Farrell appealed to the full Parole Board, which affirmed both the denial of parole and the application of a 120-month FET on May 17, 2021. (Aa 82-87) Its opinion largely reiterated and concurred with the findings of the three-member panel.

The Office of the Public Defender (OPD) filed a notice of appeal as within time on July 14, 2021. (Aa 88-91)

LEGAL ARGUMENT

POINT I

FARRELL WAS DEPRIVED OF DUE PROCESS WHEN HE WAS GIVEN A 120-MONTH FUTURE ELIGIBILITY TERM WITHOUT CONSIDERATION OF HIS YOUTH AND WITHOUT ACCESS TO COUNSEL. (Aa 84-87)

Juvenile offenders who have been sentenced to life have a "heightened" liberty interest in parole at the end of a lengthy parole disqualifier. Therefore, they are entitled to greater due process protections in their parole hearings. This must include the right to counsel; the right to regular reviews of their cases, and thus a prohibition on lengthy FETs; and the right to consideration of youth during the hearing. This last safeguard includes a reasoned explanation, if the juvenile lifer is denied parole, for why this applicant must continue to be incarcerated despite what we know about juveniles. Because Farrell was denied all three of these rights, he was deprived of due process and must get a new hearing.

Under the Parole Act of 1979, a parole applicant "shall be released on parole at the time of parole eligibility unless information supplied or developed . . . indicates that there is a substantial likelihood that the inmate will commit a crime under the laws of this State if released on parole." In re Application of Trantino, 177 N.J. Super. 499, 509-510 (App. Div. 1981) (emphasis added). The law shifted the burden to the State

“to prove that the prisoner is a recidivist and should not be released.” New Jersey State Parole Board v. Byrne, 93 N.J. 192, 205 (1983). Because of this language and burden shift, our Supreme Court has held that there is a “protected expectation of parole in inmates who are eligible for parole,” id. at 206-07, and “a protected liberty interest, rooted in the language of our parole statute, in parole release, and a resulting constitutional right to due process of law.” Thompson v. New Jersey State Parole Board, 210 N.J. Super. 107, 120 (App. Div. 1986).

“Due process is flexible and calls for such procedural protections as the particular situation demands.” Byrne, 93 N.J. at 209. To determine what protections are due, courts apply the Mathews v. Eldridge balancing test. 424 U.S. 319, 335 (1976). This test lays out three factors for courts to consider: (1) “the private interest that will be affected by the official action”; (2) “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 (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” Ibid.

Cruel and unusual punishment is unconstitutional. U.S. Const. Amend VIII, XIV; N.J. Const. Art. I, Para. 12. Under a

series of landmark decisions, this constitutional protection limits the severity of the sentence that may be imposed on a young offender. Thus, an offender who was under eighteen at the time of the offense may not receive the death penalty, Roper v. Simmons, 543 U.S. 551 (2005); may not receive life without parole for a non-homicide offense, Graham v. Florida, 560 U.S. 48 (2010), and may not even receive life without parole for a homicide -- except in the very unusual circumstance that the juvenile offender is incorrigible. Miller v. Alabama, 567 U.S. 460 (2012). This last decision was made retroactive, requiring a resentencing for any prisoner serving a mandatory life-without-parole sentence for homicide. Montgomery v. Louisiana, 136 S. Ct. 718 (2016). Finally, a term of years that would incarcerate a juvenile until old age was equated to life without parole, thus requiring a sentencing that complies with the Miller mandates. State v. Zuber, 227 N.J. 422 (2017).

Because children are still developing, an offense, no matter how awful, committed by a young person generally "reflects unfortunate yet transient immaturity, and [it is] the rare juvenile offender whose crime reflects irreparable corruption." Zuber, 227 N.J. at 440 (citing Miller, 567 U.S. at 479); see also Roper, 543 U.S. at 561 (finding that the differences between juveniles and adults means that the "irresponsible conduct [of juveniles] is not as morally

reprehensible as that of an adult." (internal quotations omitted)).

Consequently, our Supreme Court has held that a lengthy adult sentence cannot be constitutionally imposed on a child without first considering the mitigating qualities of youth, including:

(1) "chronological age and its hallmark features -- among them, immaturity, impetuosity, and failure to appreciate risks and consequences";

(2) "the family and home environment that surrounds [the juvenile offender] -- and from which he cannot usually extricate himself -- no matter how brutal or dysfunctional";

(3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him";

(4) "that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth -- for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and

(5) "the possibility of rehabilitation[.]"

Zuber, 227 N.J. at 445 (quoting Miller, 567 U.S. at 477-78).

The Courts in Zuber and Graham were particularly concerned with the amount of real time juveniles spend in prison compared with their adult counterparts, especially in light of their diminished culpability and greater prospects for reform. Graham,

560 U.S. at 70 (“Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.”); Zuber, 227 N.J. at 429 (“The proper focus belongs on the amount of real time a juvenile will spend in jail and not on the formal label attached to his sentence.”). “[T]he Eighth Amendment prohibition against excessive punishment ‘flows from the basic precept of justice that punishment for crime should be graduated and proportioned to the offense.’” Zuber, 227 N.J. at 437 (quoting Roper, 543 U.S. at 560). Thus, to comply with the Eighth Amendment, the Court in Graham emphasized that juveniles must be given a “meaningful opportunity” for release. 560 U.S. at 75.

“[A]lthough Graham stops short of guaranteeing parole, it does provide the juvenile offender with substantially more than a possibility of parole or a ‘mere hope’” of such release; “it creates a categorical entitlement to ‘demonstrate maturity and reform,’ to show that ‘he is fit to rejoin society,’ and to have a ‘meaningful opportunity for release.’” Greiman v. Hodges, 79 F. Supp. 3d 933 (S.D. Iowa 2015) (quoting Graham, 560 U.S. at 79) (emphasis in original). This entitlement to a meaningful opportunity for release, and not just a mere opportunity for

release, heightens the liberty interest juvenile lifers have in parole, requiring additional due process protections.

These protections must include access to counsel, regular reviews -- and thus no lengthy FETs -- and an analysis by the Parole Board of the impact of their youth on their crime and of their subsequent development.

When evaluating what protections are due, this Court must look to the Mathews v. Eldridge factors. The first factor, the interest affected by the official action, remains largely the same for all three additional necessary procedures. There is a heavy interest in the juvenile offender's release on parole after a lengthy parole disqualifier. A juvenile lifer's "generalized 'liberty interest in being free from physical restraint' is "heightened" by the protections guaranteed in Miller and Zuber. Cf. In re Request to Modify Prison Sentences, Expedite Parole Hearings, & Identify Vulnerable Prisoners, 242 N.J. 357, 387 (2020) ("In re Request to Modify") (quoting Byrne, 93 N.J. at 210) (finding that the COVID-19 crisis "heightened" parole applicant's liberty interest). Juveniles are guaranteed a meaningful opportunity for release because of their unique characteristics, something that is not guaranteed for adult offenders. Juveniles' cases necessarily include complex considerations of these unique characteristics, from a

juvenile's home life and peer influences to his maturity and brain development.

This interest takes on a further constitutional dimension because of U.S. and New Jersey Supreme Court precedent interpreting the Eighth Amendment and N.J. Const. Art. I, Para. 12 as applied to juvenile sentencing. Under these constitutional provisions, it is cruel and unusual to sentence juveniles to life in prison without a meaningful opportunity for release. Zuber, 227 N.J. 422; Miller, 567 U.S. at 480; Graham, 560 U.S. at 48, 75. The interest in releasing less culpable offenders, ensuring they do not spend a disproportionate amount of time in prison, and complying with the mandates of the Eighth Amendment and Art. I, Para. 12 is weighty. Thus, the private interest here weighs heavily, supporting the need for the greater due process protections that follow.

A. Due process requires that juveniles sentenced to a maximum term of life be entitled to counsel at their panel hearing.

Juvenile offenders are unique due to their chronological age and accompanying characteristics, and they are expected to change much more over the course of a prison term than their adult counterparts. This is why they must be given a "meaningful opportunity" for release. Graham, 560 U.S. at 70. To ensure faithful adherence to this mandate under the Eighth Amendment and Art. I, Para. 12 of the N.J. Constitution, due process

requires that juvenile offenders have the right to counsel at their parole hearings.

The first Mathews factor, explained above, is weighty. The second Mathews factor also heavily supports the need for counsel. The current procedures present a great risk that juvenile offenders are continuously incarcerated despite their lessened culpability and the constitutional requirement of a meaningful opportunity for release, a risk that is borne out in data collected pursuant to an Office of the Public Defender (OPD) Open Public Records Act (OPRA) request and here, in Farrell's case. (Aa 92 to 104) The data show that between 2012 and 2019, 91.24 percent of people serving life terms who became parole-eligible for the first time since 2012 were denied parole. (Pa 92 to 104) Of those denied parole, 30.8 percent were given a FET of at least a decade. Less than half received three years or less. (Pa 92 to 104) The presumptive term is 27 months, or two years and 3 months. N.J.A.C. 10A:71-3.21(a)(1). This means that juveniles with life sentences can expect with near certainty that they will be denied parole, and once denied, reasonably may expect they will not get the presumptive term, and in fact, one in three will get at least a decade of additional prison time. The risk is thus great.

And because parole applicants are not allowed to view many of the documents used against them in the parole decision,

though counsel is, the failure to provide counsel denies applicants their right to be heard. N.J.S.A. 30:4-123.54(c); N.J.A.C. 10A:71-2.2(b) and (c). Parole applicants cannot adequately address arguments against their release if they cannot see them. Thus, there is a risk that something that could be addressed through counsel is not addressed, increasing the risk that juvenile offenders continue to be incarcerated despite the statutory presumption of release. And once the decision has been made to deny parole, juvenile offenders have only the opportunity to present a letter of mitigation before a second panel may convene to impose a FET outside of the presumptive term. New Jersey State Parole Board, The Parole Book: A Handbook on Parole Procedures for Adult and Young Adult Inmates 17 (2012) ("The Parole Book").³ Without counsel, again, this letter of mitigation would fail to address issues presented to the panel in confidential documents. The lack of counsel, in combination with the refusal to disclose a wide range of allegedly confidential documents, effectively kneecaps applicants' opportunity to be heard. In the context of a juvenile lifer who has heightened protections and potentially more complex considerations during the hearing, this denial is especially troublesome.

³ Available at:
<https://www.state.nj.us/parole/docs/AdultParoleHandbook.pdf>.

On the other hand, the additional value provided by counsel is plain. The necessary, multifaceted inquiry into a juvenile's decisions and how he has changed over decades in prison necessitates aid from counsel, who has better access to evidence outside of the prison, experts on juvenile development, and other resources not necessarily available to incarcerated parole applicants. Counsel would also be able to view psychological reports and other confidential materials. This would ensure the juvenile has someone who can respond adequately and provide crucial context to those confidential materials, or order independent evaluations focused on relevant considerations of youth and development. The second factor therefore supports the additional safeguard of counsel for juvenile parole applicants.

As to the third Mathews factor, the State's interest here is limited to the "punitive aspect of [the applicant's] sentence" and processing cases under the relevant statutes and regulation. See In re Request to Modify, 242 N.J. at 387; Byrne, 93 N.J. at 211 ("[T]he State's interest here is confined to the relatively straightforward question of whether the punitive aspects of the sentence have been fulfilled[.]"). The State's interest in the punitive aspect is fulfilled upon the completion of the mandatory minimum term. In re Trantino Parole Application, 89 N.J. 347, 369 (1982) (Trantino II).

In terms of processing cases according to the pertinent statutes and regulations, providing counsel would not place too great a burden on the State. Lawyers are already allowed to write letters on behalf of clients -- if the applicant can afford an attorney. See N.J.A.C. 10A:71-3.11; The Parole Book at 15. Thus the Board in some cases already has input from attorneys in some form.

Moreover, the number of applicants with lawyers would not be a burden. The proposed group in this case is limited to juvenile offenders sentenced to a maximum life term. Data on parole decisions imposing FETs greater than the presumptive term collected pursuant to the OPD OPRA request show that from 2012 to 2019, there were only 603 parole cases decided for any offender sentenced to a life term. (Aa 94-104) Thus over the course of seven years, fewer than 90 parole cases a year were decided for any person serving a life term. The number of juvenile offenders serving life terms is certainly much smaller. Therefore, it would not be particularly burdensome to provide counsel for juvenile offenders serving life terms. Compared with the liberty interest that juvenile offenders have in a meaningful opportunity for release, the State's interest in cost savings is limited.

Under these circumstances, juvenile offenders who have been given a maximum term of life are entitled to the due process

protection of the right to counsel. Absent this right, juveniles face an uphill battle in being granted parole. Guaranteeing counsel to these juvenile offenders would provide the due process necessary in these parole decisions. For this reason, the failure to provide counsel to parole-eligible juvenile lifers denies them due process.

The Massachusetts Supreme Court agrees that in order to guarantee a "meaningful opportunity for release," parole applicants who were juveniles at the time of their offense must be given access to counsel, as well as access to funds for counsel and for expert witnesses. Diatchenko v. District Attorney for the Suffolk District, 27 N.E.3d 349, 353 (Mass. 2015). Based on their constitutional provision equivalent to the Eighth Amendment, the Massachusetts Court found a protected liberty interest for juvenile offenders in the parole process. Id. at 357. In evaluating what process was due, the Court noted that the applicant's access to confidential materials may also be restricted -- as here in New Jersey. Id. at 359. Although attorneys could represent applicants serving life sentences in Massachusetts, there was no right to counsel, and thus indigent applicants who could not afford an attorney were denied counsel. Id. at 360.

In holding that due process for juvenile offenders requires the right to counsel, the Massachusetts Court reasoned

that because the circumstances in these cases are "probably far more complex than it is in the case of an adult offender because of the unique characteristics of juvenile offenders," and the hearing "involves complex and multifaceted issues that require the potential marshalling, presentation, and rebuttal of information derived from many sources," an "unrepresented, indigent juvenile homicide offender will likely lack the skills and resources to gather, analyze, and present this evidence adequately." Ibid. The issues here are identical: juvenile offenders' cases are more complex and infused with a constitutional dimension not present in adult offenders' cases. Therefore, due process requires juvenile offenders have a right to counsel at parole hearings.

Farrell, at only 15 years old, entered the New Jersey prison system. He was one of the youngest people to be incarcerated in the adult system at the time. (Pa 18) He has now been incarcerated in this system for more than 30 years and is thus no longer a juvenile. He has spent two-thirds of his life in prison. Yet despite the fact that unique issues are presented in his case due to his youth at the time of his offense, he was denied parole without access to counsel and subsequently given a 120-month FET. Because he was a juvenile sentenced to a maximum term of life, Farrell was guaranteed a meaningful opportunity for release. Without counsel, Farrell could not adequately

represent himself in his parole hearings. Therefore, he was denied due process and he must be granted a new hearing with the benefit of counsel.

B. Due process requires that juveniles sentenced to a maximum term of life be entitled to parole hearings at regular intervals.

Due process further requires that juveniles be seen by the Parole Board at regular intervals. Imposing 120-month FETs -- more than four times the presumptive term -- for juvenile lifers defies the case law guaranteeing a meaningful opportunity for release, "elevat[ing] form over substance." See Zuber, 227 N.J. at 446-47 ("It does not matter to the juvenile whether he faces formal 'life without parole' or multiple term-of-years sentences that, in all likelihood, will keep him in jail for the rest of his life."). Imposing lengthy FETs for juvenile lifers is thus contrary to United States and New Jersey case law, the Eighth Amendment to the United States Constitution, and Article I, Para. 12 of the New Jersey Constitution. Due process requires more regular intervals between parole hearings than the many-years-long FETs the Parole Board imposes. This interval should not exceed one year.

First, as noted above, juvenile offenders eligible for parole have a greater liberty interest in parole -- "heightened" by the protections guaranteed in Miller and Zuber. Because juvenile offenders are more likely to change than adult

offenders, there must be more regular intervals to assess the juvenile's maturation and demonstrated change. Without these regular checks, juveniles are denied the meaningful opportunity release, based on maturity and rehabilitation, that they are guaranteed by the Eighth Amendment and Art. I, Para. 12.

Second, the risk is great that a long FET will deprive a reformed juvenile offender of liberty. Juveniles sentenced to a maximum life term are sentenced to a minimum term of thirty years. See N.J.S.A. 2C:11-3(b) (imposing a mandatory minimum of thirty years for first-degree murder); N.J.S.A. 2C:43-7.2 (provision implementing the No Early Release Act, requiring persons convicted of certain first- or second-degree offenses to serve 85 percent of their sentence). A ten-year FET increases the minimum sentence to forty years to life, leaving juvenile offenders at the youngest in their mid-fifties when they are next even eligible for release. By this point, the juveniles will have been incarcerated two to three times longer than they had been alive before they were incarcerated.

But "the signature qualities of youth are transient," and "impetuosity and recklessness . . . can subside' as juveniles mature." Zuber, 227 N.J. at 440 (quoting Roper, 543 U.S. at 570). Because juveniles' brains mature, they are "more capable of change than are adults," Graham, 560 U.S. at 68, and have "greater prospects for reform." Miller, 567 U.S. at 471. This

ability to change requires the Parole Board to reevaluate juvenile lifers' cases at more regular intervals.

As juveniles already face long parole disqualifiers, the use of FETs beyond the presumptive term makes a juvenile's sentence increasingly disproportionate to their offense. See Zuber, 227 N.J. at 442; Graham, 560 U.S. at 70-71. In order to abide by Miller and Zuber's mandates, the Parole Board must evaluate the juvenile offender at regular intervals. Setting lengthy FETs is shirking its duty under these cases, violating the Eighth Amendment and Art. I, Para. 12 of the New Jersey Constitution. The risk of failing to provide these protections thus includes serious deprivations of constitutional rights.

The risks also include the Parole Board usurping the sentencing judge's authority. Under the Code of Criminal Justice, judges must consider parole in "determining the appropriate term of imprisonment." N.J.S.A. 2C:44-1(c)(2); N.J.S.A. 2C:43-2(e). Accordingly, much of parole decision making is under the authority of the "judiciary as a function of its sentencing authority." New Jersey State Parole Board v. Byrne, 93 N.J. 192, 205 (1983) (noting that the new Code shifted the burden onto the State to prove the parole applicant was a recidivist in order to deny parole); see also New Jersey State Parole Board v. Cestari, 224 N.J. Super. 534, 547 (App. Div. 1988). To the extent that a judge considers a juvenile's

heightened potential for growth and the presumption of release on parole as factors in his or her sentencing decision, the Parole Board usurps the sentencing judge's authority when it gives juveniles lengthy FETs and fails to regularly review the juvenile's case.

In contrast, the value added of having reviews every year is that the juvenile offender spends no more time in prison than is necessary for him to show that he has "demonstrated maturity and rehabilitation." Graham, 560 U.S. at 75. The Parole Board can see in real time the changes the juvenile has made over the year and ensure that the juvenile's sentence is actually proportional to his culpability. The Board could provide guidance to the applicant on how to demonstrate their maturity. This would protect a juvenile's sentence from being in violation of the Eighth Amendment and Art. I, Para. 12. Thus, the second Mathews factor supports a need for one-year reviews of juvenile offenders sentenced to a maximum of life.

Regarding the third Mathews factor, the State's interest includes providing procedures that are constitutionally required. In New Jersey, the parole process itself is the only mechanism to apply Miller and Zuber to release decisions. See State v. Bass, 457 N.J. Super. 1, 14 (App. Div. 2018) (finding that for a defendant with a 35-year parole bar, consideration of maturation "is exclusively the province of the parole board");

State v. Tormasi, 466 N.J. Super. 51, 68-69 (declining to consider challenges to the parole process in a collateral attack on defendant's sentence because the issues were not ripe). Thus, as this Court has held, the Parole Board's decisions are crucial in the Miller/Zuber process, in that the Parole Board decides whether release will actually occur at the opportunity. While Miller and Zuber set substantive limits on the length of time juveniles may serve, the Parole Board sets the procedures necessary to ensure this meaningful opportunity when the time comes for release. Extending lengthy FETs means the Parole Board is shirking its duty under Miller and Zuber. Providing yearly reviews by the Parole Board fulfills the State's interest in following the law.

Moreover, the presumptive future eligibility term for juveniles serving a maximum term of life is 27 months, or two years and 3 months. N.J.A.C. 10A:71-3.21(a)(1). Reviewing a case every year instead of every two years -- as the Board should presumably be regularly doing -- is not a burdensome change. This is especially true in light of the limited number of cases of juveniles serving maximum life terms, as noted in Subpoint A. In the alternative, the Board should be prohibited from imposing a FET above the presumptive 27-month term. This alternative would put no greater burden on the Parole Board than its current regulations provide, but still allow more regular review of

juveniles' cases than the decade-long FET the Board often gives to those serving life terms. (Aa 94-104)

Therefore, due process requires that juveniles serving a maximum life term be given yearly parole hearings. Because Farrell, who was merely 14 at the time of his offense, was given a ten-year FET, he was denied due process and his guaranteed meaningful opportunity for release. He must be given a new hearing date and subsequently may not be given an FET of more than one year, or, in the alternative, 27 months.

C. Due process requires that the Parole Board consider a juvenile offender's youth and give a reasoned explanation grounded in science and relevant case law for keeping a juvenile lifer incarcerated beyond his parole eligibility date.

Juvenile offenders are more likely to change than adult offenders. The Parole Board must take into account a juvenile offender's maturity and brain development, and how he has changed over decades in prison, as informed by the brain science and unique characteristics of juveniles. If it denies the applicant parole, the Board must provide a reasoned explanation as to why this juvenile must remain in prison despite what we know about juveniles and their development.

The interests on behalf of juvenile applicants remain the same as explained above. As for the second Mathews factor, there is again heavy support for the need for the Parole Board to consider the applicant's youth and subsequent development to

avoid depriving a reformed offender of liberty. The risk in failing to take into account maturation and youth is that the Parole Board weighs too heavily the nature and circumstances of the offense or the juvenile's prior criminal history -- precisely what happened in Farrell's case. The Board failed to put the crime and criminal history in its proper context, and thus ignored some of the strongest reasons for Farrell's actions: his impulsivity and risk-taking behavior that were the result of his undeveloped brain. In fact, the Board ignored that to a large extent, scientists believe that those in their teens cannot help their misbehavior. Elizabeth Scott et al., Bringing Science to Law and Policy: Brain Development Social Context, and Justice Policy, 57 Wash. U. J.L. & Pol'y 13, 28-30 (2018); Alexandra O. Cohen et al., When Does a Juvenile Become an Adult? Implications for Law and Policy, 88 Temp. L. Rev. 769, 785-87 (2016); Catherine Lebel & Christian Beaulieu, Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood, 31 J. Neuroscience 10937, 10943 (2011).

Conversely, the value added to the process in requiring an analysis of the juvenile's youth, maturity, and development is immense. The juvenile's actions would be placed in their proper context. For example, here, Farrell was 14 years old when he committed the murder for which he is presently incarcerated for a life term. If he had committed the offense today, it would not

be legally possible to waive him up to adult court, and his sentence could not exceed ten years total -- the term that has now been added to his sentence by the Parole Board. N.J.S.A. 2A:4A-26.1(c).⁴ Farrell explained that he was angry because he was forced to move from Oklahoma to a place he did not know and in response, attempted to steal items to sell to buy a bus ticket to return to Oklahoma. (2T 16-7 to 23, 23-1 to 12; Aa 63) When he was discovered during the burglary, he "panicked and [he] picked up the gun and [he] shot" the neighbor who walked in on him. (2T 24-1 to 3, 25-6 to 13; Aa 63) This comports precisely with what Miller and the supporting brain science says juveniles do: make impulsive decisions and fail to recognize the risks involved. Miller, 567 U.S. at 477.

Farrell also noted that he did not understand why his parents "took me from my family and my friends and came up here to somewhere I didn't know." (2T 16-16 to 18) As a child, Farrell could not control where he lived, the schools he went to, or the environments he was in -- he could not "extricate himself" from his environment. See Miller, 567 U.S. at 477. Thus, his actions reflected this lack of control and reaction to it as a child.

⁴ Farrell committed this offense before the waiver age was increased to 15 years old. See State v. Scott, 141 N.J. 457, 463 (1995) (discussing the waiver statute at the time, which allowed a 14-year-old to be waived to adult court).

None of these facts were discussed in this context by the Parole Board, which found Farrell's offense and prior juvenile history as reasons for his denial. The Board also found he lacked insight into his offense, without discussing how his youth and subsequent aging affected his insight and his risk of recidivism. And, as noted in Subpoint B, the Parole Board has the sole responsibility to ensure adequate procedures to guarantee Farrell and other lifers their meaningful opportunity for release. See Bass, 457 N.J. Super. at 14. As Farrell's case shows, the risks of failing to account for youth in juvenile cases undermines applicants' entitlement to a meaningful opportunity for release. In contrast, taking the facts into consideration places a juvenile's actions in context and allows for a more accurate analysis of whether the juvenile is likely to reoffend.

Finally, the State's interest supports taking into consideration youth, and the burden this would impose is minimal. The State has an interest in ensuring those who are unlikely to recidivate are released on parole. This would save the State and its taxpayers substantially: the average annual cost to incarcerate someone in the Department of Corrections is \$50,590. Legislative Fiscal Estimate to A. 4369 2 (July 29, 2020). The cost for a parolee for a year is \$6,181. Ibid.

Considering youth also ensures that the State is abiding by the law and releasing applicants who are unlikely to recidivate.

On the other hand, it is a minimal burden for the Board to take into consideration something that is highly relevant to the question of whether a parole applicant is likely to recidivate. In fact, there is a new factor the Parole Board may consider under its regulations: "Subsequent growth and increased maturity of the inmate during incarceration." N.J.A.C. 10A:71-3.11(b)(24). Thus, part of the required analysis is already a factor the Board is directed to consider under its regulations.

To make the promise of Miller a reality, additional procedural protections are necessary when a juvenile lifer comes up for parole after appending many years in prison. Without counsel, regular hearings, and a reasoned decision that considers the developmental science, the juvenile opportunity for release is not truly meaningful. Because the Board failed to do provide these crucial protections in Farrell's case, his case must be remanded for a new hearing with counsel and the proper context of his youth considered.

POINT II

THE PAROLE BOARD ACTED ARBITRARILY AND CAPRICIOUSLY IN ESTABLISHING A FUTURE ELIGIBILITY TERM INCONSISTENT WITH ITS OWN REGULATIONS. (Aa 71-81; 83-86)

Even if the FET did not violate Miller and Zuber, the FET cannot be sustained because the Board's decision failed to satisfy the statutory standard and violated the administrative code.

As noted in Point I, under the Parole Act of 1979, a parole applicant must be released unless there is a substantial likelihood that he will commit a crime if released on parole. Trantino, 177 N.J. Super. at 509-10. The sole question before the Board then, is whether the applicant is likely to be a recidivist. Byrne, 93 N.J. at 205. Similarly, when determining a FET, the Board must "focus its attention squarely on the likelihood of recidivism." McGowan v. New Jersey State Parole Board, 347 N.J. Super. 544, 565 (App. Div. 2002).

N.J.A.C. 10A:71-3.21 governs the schedule of future parole eligibility dates for prisoners by the Parole Board. It provides that "a prison inmate serving a sentence for murder . . . shall serve 27 additional months." N.J.A.C. 10A:71-3.21(a). Here, the Parole Board deviated from the presumptive FET of 27 months by establishing an FET of 120 months. Farrell is aware of the provision of N.J.A.C. 10A:71-3.21(d) which provides:

A three-member Board panel may establish a future parole eligibility date which differs from that required by the provisions of (a) or (b) and (c) above if the future parole eligibility date which would be established pursuant to such subsections is clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior.

But the increased FET imposed in this case suffers from fatal defects: failure to articulate in any meaningful or reviewable way the basis and reasons for the discretionary departure from the presumed norm and circumvention of the required rulemaking process. While Farrell's crime was undoubtedly serious, it was for that very reason that he is subject to the presumptive 27-month FET in the first place. Thus, there must have been something additional that dictated that he be given a FET of ten additional years of incarceration. At a minimum, this Court should give clear direction to the Board that its decisions must be undergirded by reasoning, so that the judiciary may, when necessary, perform its constitutional function of engaging in appropriate review.

Even under its own standards, however, the Board abused its discretion in imposing a 120-month FET on Farrell. The Board should remand for the imposition of FET of the presumptive term.

A. The Parole Board's use of "insufficient problem resolution" and "lack of insight" without defining them and their nexus to the ultimate statutory standard constitutes an abuse of discretion that violates the required rulemaking process.

The Board has created a presumptive 27-month FET for those convicted of the most serious crimes under the Code. However, the Board has given itself unfettered discretion to circumvent the required rulemaking process and allow for increasingly excessive FETs. In doing so, the Parole Board is engaging in improper ad hoc rulemaking that renders its application of 120-month FETs an abuse of discretion. The Board's decision to exceed the presumptive term without adequate explanation or reviewable standards cannot support Farrell's 120-month FET.

The use of "insufficient problem resolution" and "lack of insight" to justify a departure from the presumptive term is improper, as neither term has been defined or related to the ultimate statutory standard. The vagueness of the terms used in Farrell's case and the lack of connection to the criteria render their use an abuse of discretion.

In using "insufficient problem resolution" and "lack of insight" as bases to impose an excessive FET, the Parole Board applied factors that are unvetted and unpromulgated through the notice-and-comment process required under the Administrative Procedures Act ("APA"), N.J.S.A. 52:14B-4, constituting ad hoc

decision making and denying Farrell, and other parole applicants, due process.

It is a basic tenet of due process, both under the Fourteenth Amendment and under New Jersey constitutional and administrative law, that someone subject to the law's constraints must have fair notice of the standards by which their liberty is to be granted or withheld. As Justice Neil Gorsuch recently wrote for the United States Supreme Court, "In our constitutional order, a vague law is no law at all." United States v. Davis, 139 S. Ct. 2319, 2323 (2019) (striking down phrase "crime of violence" as unconstitutionally vague in defining criminal offense); accord Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

Through the rulemaking process, the Parole Board has adopted rules and regulations implementing and giving definition to the 1979 statutory standard. Thus, N.J.A.C. 10A:71-3.11(b) delineated 23 factors⁵ that hearing officers, panels, and the full Board must consider in making parole decisions:

1. Commission of an offense while incarcerated;
2. Commission of serious disciplinary infractions;
3. Nature and pattern of previous convictions;
4. Adjustment to previous probation, parole and incarceration;

⁵ At the time of Farrell's parole hearing, there were 23 factors. Since then, the Parole Board has adopted a 24th factor based on "maturation."

5. Facts and circumstances of the offense;
6. Aggravating and mitigating factors surrounding the offense;
7. Pattern of less serious disciplinary infractions;
8. Participation in institutional programs which could have led to the improvement of problems diagnosed at admission or during incarceration. This includes, but is not limited to, participation in substance abuse programs, academic or vocational education programs, work assignments that provide on-the-job training and individual or group counseling;
9. Statements by institutional staff, with supporting documentation, that the inmate is likely to commit a crime if released; that the inmate has failed to cooperate in his or her own rehabilitation; or that there is a reasonable expectation that the inmate will violate conditions of parole;
10. Documented pattern or relationships with institutional staff or inmates;
11. Documented changes in attitude toward self or others;
12. Documentation reflecting personal goals, personal strengths, or motivation for law abiding behavior;
13. Mental and emotional health;
14. Parole plans and the investigation thereof;
15. Status of family or marital relationships at the time of eligibility;
16. Availability of community resources or support services for inmates who have a demonstrated need for same;
17. Statements by the inmate reflecting on the likelihood that he or she will commit another crime; the failure to cooperate in his or her own rehabilitation; or the reasonable expectation that he or she will violate conditions of parole;

18. History of employment, education, and military service;
19. Family and marital history;
20. Statement by the court reflecting the reasons for the sentence imposed;
21. Statements or evidence presented by the appropriate prosecutor's office, the Office of the Attorney General, or any other criminal justice agency;
22. Statement or testimony of any victim or the nearest relative(s) of a murder/manslaughter victim;
23. The results of the objective risk assessment instrument.

The same 23 factors are used to determine if the presumptive future eligibility term schedule is "clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior." N.J.A.C. 10A:71-3.21(d). In reviewing the Parole Board's decision, therefore, this Court must consider whether its findings and conclusions are sufficient to satisfy the ultimate statutory standard, the likelihood of recidivism, as informed by the factors contained in the regulation that reasonably interpret that standard.

This Court should thus not endorse Parole Board findings or conclusions that are not facially directed towards the promulgated standard, particularly when those findings or conclusions are based on factors that have not been vetted appropriately through the rulemaking procedures under the APA,

N.J.S.A. 52:14B-4. Indeed, ultimately, the New Jersey Constitution requires that the public be given fair notice of regulations that affect the public:

No rule or regulation made by any department, officer, agency or authority of this state, except such as relates to the organization or internal management of the State government or a part thereof, shall take effect until it is filed either with the Secretary of State or in such other manner as may be provided by law. The Legislature shall provide for the prompt publication of such rules and regulations.

[N.J. Const., Article V, Sec. 4, Para. 6.]

While the Parole Board's exercise of discretion is entitled to substantial deference, an administrative agency's discretion to act in "selecting the appropriate procedures to effectuate their regulatory duties and statutory goals . . . is not absolute." In re Auth. for Freshwater Wetlands Statewide Gen. Permit 6, Special Activity Transition Area Waiver for Stormwater Mgmt., Water Quality Certification, 433 N.J. Super. 385, 413 (App. Div. 2013). Hence, "it is fundamental that administrative regulations must not only be within the scope of the delegated authority, but also must be sufficiently definite to inform those subject to them as to what is required." Matter of Health Care Administration Board, 83 N.J. 67, 82 (1980).

The 23 factors contained in N.J.A.C. 10A:71-3.11(b), having been vetted through the notice and comment process required under the APA, may be presumed to be reasonably relevant in

considering whether the parole applicant is substantially likely to commit a new offense. However, insufficient problem resolution and lack of insight are not listed among those factors.

Acceptance of such amorphous terms as "insufficient problem resolution" and "lack of insight," without the definitional clarity that the rulemaking process would hopefully bring injects unbridled administrative discretion into the parole process. This constitutes an abuse of discretion and is insufficient to sustain FETs above the presumptive term.

As this Court found in another procedural context in 613 Corp. v. State, Div. of State Lottery, 210 N.J. Super. 485 (App. Div. 1986), inclusion of extraneous subjective factors not included in formal rule violates the APA. In 613 Corp., 3 adult bookstore corporations challenged the denial of state lottery licenses by the Division of State Lottery allegedly based on the appropriate ground that there was a "sufficiency of existing agents in its area." Id. at 489. This Court found that the agency's denial of the licenses was based not only on the approved factor of proximity to other licensees, but also on other factors, such as the controversial nature of their businesses, which had not been the subject of rulemaking. Id. at 502, 504.

One of the primary concerns this Court expressed was that by injecting this new criterion, the agency's review of lottery

applications was now "fraught with indicia of subjectivity." Id. at 502. Although multiple factors were considered in their determination, the agency officials "were unable to even approximate a formula delineating the relative weight given to each factor." Ibid. The procedural guidelines for analyzing applications -- a one page document -- were not made available to the person actually analyzing these applications, and the decision "boiled down to the investigator's 'gut reaction' based upon asserted subjective knowledge of a given area." Ibid. Under this system, "[t]he absence of published standards to ensure fair and consistent application of eligibility requirements has resulted in a procedure which vests unfettered discretion in the Director and his staff in violation of the principles which structure such discretionary actions." Ibid.

According to this Court, the most "disturbing" part of the "unbridled discretion" at play was that "the affected public cannot fairly anticipate or address the procedure as there is no specific provision in the statute or regulations which describe the determination process." Id. at 503. The public could not know what factors the agency relied on or how heavily they relied on certain factors, and "no one has any way of predicting the inferences that can be drawn from the Commission's actions in future application denials." Ibid. Ultimately, as this Court recognized, "[t]here can be no public confidence in a system that

awards licenses based only on an individual's 'gut reaction' or subjective impressions. Such a system breeds suspicion and fosters contempt and corruption." Ibid. The approval of "vague, unpublished sufficiency standards" in the case was held to be an abuse of discretion, and the agency's decision reversed. Id. at 504. The court remanded to give the agency the opportunity to go through the proper rulemaking process. Ibid.

So too, here, the vesting of unfettered discretion in the officers of the Parole Board to use the undefined concepts of "insufficient problem resolution" and "lack of insight" to support whatever conclusion they wish to reach fatally undermines the validity of the Board's ultimate conclusion.

If the Parole Board is not held accountable for its invention of the conclusory terms "insufficient problem resolution" and "lack of insight" without intervening public notice and comment, then deference to the Parole Board's decisions will have crossed the line to unquestioning judicial acquiescence to the Parole Board's determinations. There would be no basis for the courts to examine the validity of the Parole Board's conclusions, or any way for parole applicants to adduce evidence to rebut the claim. In the absence of judicial oversight, the Parole Board could continue using these terms, without any definition, connection to the ultimate statutory

standard, or explanation of their use in the parole decision process.

Moreover, there was no explanation of how each factor was weighed, just as in 613 Corp. The full Board panel, as well as the initial panels, summarily stated that "Mr. Farrell does not understand the dynamics of his negative thinking that resulted in the choice to conduct himself in a criminal manner and he needs to develop a deeper understanding of same as it relates to his emotions and personality." (Aa 80, 85) The panels further added that he "has failed to make adequate progress in the rehabilitative process to ensure that his criminal behavior does not occur in the future," and that "it is clear that he lacks insight and requires substantive behavioral programming to possibly provide insight into his criminal thinking." (Aa 80, 85) However, the Board never explained why they came to these conclusions, or how the conclusions themselves contribute to a finding of likelihood of recidivism.

Therefore, the Parole Board's "approval of the vague, unpublished" "insufficient problem resolution" and "lack of insight" factors constitutes an abuse of the Board's discretion. 613 Corp., 210 N.J. Super. at 504. The Parole Board's decision must be reversed, and the matter remanded for a new parole hearing without the use of such factors and to give the Board an opportunity to adopt the proper rules. Ibid.

B. The Parole Board is consistently using the unfettered discretion it has given itself to circumvent its own regulations.

The presumptive FET of 27 months in N.J.A.C. 10A:71-3.21(a) itself reflects the gravity of Farrell's offense. Yet the Board's departure from the presumptive term is unsupported by reviewable standards that show why a departure more than four times that term is necessary. In fact, there is no benchmark that the Parole Board refers to in determining just how large a departure it should make from the presumptive term. The Board has given itself unfettered discretion in not only denying parole based on unvetted factors, but also using those factors to apply FETs with essentially no limits.

The data collected from the OPD OPRA request demonstrate just how effectively the Parole Board has circumvented the required rulemaking process. The data show that from January 1, 2012 through December 31, 2019, of those who were sentenced to a maximum of life and denied parole in their first appearance before the Board since 2012, 30.8 percent were given an FET of at least a decade. (Aa 94-104) More than a quarter -- 28.8 percent -- were given an FET of between 4 and 9 years. Less than half -- 40.4 percent -- received 3 years or less, the presumptive term. (Aa 94-104) The Parole Board is thus more often than not ignoring the presumptive term that they themselves have set for themselves through the rulemaking process. Indeed, in one of

every three cases, the Board is not just doubling or tripling the presumptive term, but more than quadrupling the term. In some cases, the Board is applying 20- or 30-year FETs, 8.9 and 13.3 times the presumptive FET, respectively. (Aa 94, 96, 99, 100); see also McGowan, 347 N.J. Super. at 549.

The lack of any standards by which the Board applies these excessive FETs, and the rate at which it is doing so, shows that the Board is acting arbitrarily and contravening the APA's mandates. The imposition of these extreme FETs is wholly improper, and Farrell's case must be remanded for the imposition of the presumptive term.

C. Even under the administrative standard for extending a FET, the Board failed to show that a FET more than four times the presumptive term was necessary.

Even under the standard promulgated in N.J.A.C. 10A:71-3.21(d), however, the Parole Board did not show that the ordinary FET was "clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior" and that a FET four times the presumptive term was necessary in Farrell's case.

The Board was tasked with "develop[ing] a schedule of future parole eligibility dates for adult inmates denied release at their eligibility date," the schedule of which is dependent heavily on the "severity of the offense for which he was denied parole" and the "characteristics of the offender, such as, but

not limited to, the prior criminal record of the inmate and the need for continued incapacitation of the inmate." N.J.S.A. 30:4-123.56(a). When imposing a FET, the Board is required to give reasons for a particular FET, "specifically providing an explanation of why and how the board panel or board determined the amount of time an inmate is required to wait for a subsequent parole hearing." N.J.S.A. 30:4-123.53(a)(2); see also N.J.S.A. 30:4-123.56(b) ("If such a date differs from the date otherwise established by the schedule, the board panel shall include particular reasons therefor.").

Here, the Board failed to provide the required explanation of how and why ten full years was necessary for Farrell to serve before being eligible for parole again. While the three-member panel used a checklist to check off reasons, there was no analysis of these reasons and why each reason led to the decision that ten years, more than four times the presumptive term, was appropriate. Despite the "eleven (11) page narrative" the full Board noted the three-member panel wrote, (Aa 83) much of the "explanation" is simply writing, in full sentences, the factors from the checklist. (Aa 71-81) For example, the narrative explanation for the first factor, facts and circumstances of the offense, reads: "The Board panel notes the facts and circumstances of the offenses. Namely, that you shot and killed the victim after breaking into their home." (Aa 72)

This rote restatement of facts is not an adequate explanation of how these facts and circumstances relate to the ultimate standard, risk of recidivism. Thus, the Board panel's "narrative" falls short of the required particular explanation necessary for a FET outside the guidelines.

The panel's explanation for the 120-month FET specifically is also insufficient to sustain the excessive FET. The Board's first and second reasons related to Farrell's "understanding the dynamics to your negative thinking," and "lack of insight." (Aa 80) First, as explained above, these vague assertions have no definitional clarity -- what does it mean to understand one's negative thinking, or have adequate insight? Second, there is no explanation of how and why these factors relate specifically to Farrell's risk of recidivism, why ten years is necessary to counter that risk, and no indication that either factor is an accurate assessment of recidivism risk at all. Finally, the use of his vocational programming as proof of "lack of insight" is arbitrary and capricious, particularly as the panel marked in the checklist as mitigating "participation in program(s) specific to behavior" and "participation in institutional program(s)," and did not mark "recommended program(s) not completed" as aggravating. (Aa 70, 80, 86) Moreover, the two-member panel noted during the hearing that Farrell had completed "some programming, mostly vocational, an enrichment," (2T 3-18

to 19) and that he was "on the waiting list for several other programs." (2T 3-21 to 22) Thus the use of programming to indicate a lack of insight was arbitrary and capricious and cannot sustain a ten-year FET.

Finally, despite Farrell's institutional infraction history, again, the Board simply listed the number of infractions and failed to explain why these infractions necessitated the specific FET in this case. (Aa 80)

In its final parole denial, the full Board panel simply re-listed the same factors that were checked in the three-member panel notice of decision. There was no additional explanation for how the Board determined the length of the FET.

It is entirely unclear why the Parole Board believed that it would take Farrell another ten years to become ready for parole, or what more the Board expected he do before they would find his progress "satisfactory." The 120-month FET was thus an abuse of discretion, unsupported by the record, and must be reversed.

CONCLUSION

For the reasons in Point I, the Parole Board denied Farrell due process, and this Court must remand for the Board Panel to hold a new hearing with counsel present, and full consideration of his youth and maturation. If the Board again denies Farrell parole, they must provide an explanation of why a juvenile lifer should not be released based on relevant science and case law and may not impose a FET of more than one year, or, in the alternative, 27 months. For the reasons in Point II, the Parole Board abused its discretion and violated the APA in imposing a 120-month FET on Farrell, and the case must be remanded for a new hearing, or, in the alternative, the imposition of the presumptive term.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant-Appellant

BY: *Morgan A. Birck*
MORGAN A. BIRCK
Assistant Deputy Public Defender
Attorney ID: 303052019

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