OFFICE OF THE PUBLIC DEFENDER
PAROLE PROJECT

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EXECUTIVE SUMMARY

The Office of the Public Defender (OPD) Parole Project commenced in 2020, primarily to examine ways to challenge and reform New Jersey's flawed parole release process and to address systemic issues in the assignment of Madden[1] counsel in parole revocation cases. The OPD issued an initial report on October 13, 2020, and a revised report on September 24, 2021. This updated Report addresses progress made in changing the parole process and sets forth additional areas of potential reform.

The Parole Project includes dedicated attorneys in the OPD Appellate Section, Conviction Integrity Unit, Trial Regions, Special Litigation Unit, and Parole Revocation Defense Unit. In addressing systemic failures in the parole process, the OPD has collaborated with the Returning Citizens Support Group, Transformative Justice Initiative, Rutgers Law School Constitutional Rights Clinic, Seton Hall University School of Law Center for Social Justice, Charles Hamilton Houston Institute for Race and Justice (Harvard Law School), National Conference of Black Lawyers, Howard University School of Law Movement Lawyering Clinic, New York University Law School, Justice Gary S. Stein Public Interest Center, New Jersey State Bar Association, American Civil Liberties Union, Association of Criminal Defense Lawyers of New Jersey, American Friends Service Committee, and other like-minded partners. These collaborative efforts have illuminated fundamental shortcomings in the parole process and have resulted in reforms that have

[1] Madden v. Delran, 126 N.J. 591 (1992).

improved that process. However, as outlined in this Report, much work remains to be done before New Jersey's system of parole fully comports with due process and fundamental fairness.

The Parole Project was formed based upon two straightforward principles. First, there is an evolving ethical, philosophical, and jurisprudential movement embracing the principle that an attorney's duty to present mitigation and effectively and zealously advocate for clients, should not terminate at sentencing. In recognition of this duty, the OPD has intermittently assisted clients in the parole release process, particularly in recent years where clients have parallel resentencings under new case law.[2] Indeed, the ongoing concerns expressed by OPD attorneys that parole eligible clients were consistently being denied parole despite exemplary institutional records, coupled with Appellate Division per curiam opinions consistently affirming the parole denials of pro se litigants, was validated by data. Through an Open Public Records Act (OPRA) request by the Parole Project, we know that the harshest consequences imposed on clients are directly related to their lack of representation at all stages of the parole release process. The Parole Board consistently fails to release parole eligible applicants, even though the law imposes a presumption of release for anyone who is eligible for parole.[3] The result is that clients remain behind bars beyond what sentencing judges intended, and beyond the completion of the punitive

[2] Miller v. Alabama, 567 U.S. 460 (2012); State v. Zuber, 227 N.J. 422 (2017); State v. Comer, 249 N.J. 359 (2022) (Comer II); State v. Thomas, 470 N.J. Super. 167 (App. Div. 2022).

[3] N.J.S.A. 30:4-123.53(a); N.J. State Parole Bd. v. Byrne, 93 N.J. 192, 205 (1983).

portion of their sentences, regardless of the fact that there is not a substantial likelihood they will reoffend or fail to comply with parole.[4]

Second, the Parole Project was formed from the recognition that parole applicants, many of whom are juvenile "lifers" and/or clients with a history of mental health or cognitive challenges, were thrust in front of the Parole Board to advocate for themselves. Parole applicants are not provided with access to an attorney and the resources that accompany legal representation. They are provided with limited procedural protections, particularly because they are confronted with only some of the evidence used against them; anything the Board deems "confidential" is withheld, and the applicants are unable to rebut incriminating evidence or have complete access to exculpatory evidence. In the rare case where an applicant retains an attorney, they are still unable to review the evidence or discuss it with their attorney, and the attorney is not permitted to be present before the Board. Moreover, if the applicant is indigent, which is the norm, he will not have appointed counsel at any stage of the process, including appeals, because the right to counsel is not constitutionally mandated.

At the release hearing, the Board may claim the applicant "lacks insight into his criminal thinking," "lacks remorse," or has "insufficient problem resolution," even though these factors are not listed among the relevant considerations in the Board's own Administrative Code, and the Board has not linked these subjective factors to bedrock scientific principles or to the applicant's risk of recidivism. The Board may use a risk

[4] Exhibit A, Parole Data.

assessment tool that lacks scientific validity to support its denial of parole. The Board may, and often does, deny parole even if that risk assessment tool does not suggest the applicant is likely to recidivate. Further, it may utilize psychological reports hidden from all except the Board and victim impact statements that the applicant cannot review. Moreover, once parole is denied, the Board may decide to keep the applicant in prison for lengthy periods of time by imposing draconian Future Eligibility Terms ("FETs" or "hits"), which are essentially disguised resentencings. Thus, "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."[5]

The Parole Project is at the forefront in promoting modern due process rights in the parole release process. Prior to the commencement of the Parole Project, the broad discretion of the Board was seldom questioned, creating a system with nominal oversight, minimal due process, a lack of fundamental fairness, and prejudice to indigent pro se litigants. Much remains to be done legislatively, administratively (through the rulemaking process), and through the appellate process. However, through the efforts of the Parole Project, sunlight is beginning to penetrate, and rectify, this fundamentally flawed system. As Justice Brandeis profoundly stated, "sunlight is said to be the best of disinfectants."[6]

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

[6] Louis Brandeis, What Publicity Can Do, Harpers Weekly (December 20, 1913).

Several recent decisions by the Appellate Division and our Supreme Court, and OPD efforts in the administrative rulemaking process, have placed the Board on notice that business as usual is not acceptable. While much remains to be done, there is hope, as reflected in recent published and unpublished cases. The following published cases, all recently decided, are especially noteworthy: Acoli v. New Jersey State Parole Board,[7] Berta v. New Jersey State Parole Board,[8] State v. Thomas,[9] and Holmes v. Christie.[10]

These cases demonstrate the following: (1) When undisputed data exists, such as data related to aging out of crime or the age/crime curve, it must be considered by the Board; (2) The deference given to final Board decisions by appellate courts cannot be blind; (3) The Board cannot engage in a hyper-focus on the underlying crime to justify a denial of parole, unless directly linked to the risk of recidivism; (4) A parole applicant's failure to admit that he committed the underlying crime is not a prerequisite to being granted parole and his assertion of innocence cannot generally serve as a basis to impose an FET above the presumptive term; and (5) In juvenile lifer cases, the Board is not competent to address the so-called Miller factors (mitigating factors specific to youthful offenders), which can only be addressed in an adversarial proceeding in the Law Division of the Superior Court.

[7] 250 N.J. 431 (2022) (OPD served as amicus).

[8] 473 N.J. Super. 284 (App. Div. 2022) (OPD represented Mr. Berta).

[9] 470 N.J. Super. 167 (App. Div. 2022) (OPD represented Mr. Thomas).

[10] 14 F.4th 250 (3d Cir. 2021). OPD represented Mr. Holmes in his direct appeal against the Parole Board, which eventually resulted in his release.

Since the Parole Project Report was last released, the OPD has been actively involved in the administrative rulemaking process. In September 2022, the Special Litigation Unit of the OPD filed a Petition for Administrative Rulemaking, which was denied by the Parole Board. Following this denial, the OPD filed an appeal in the Appellate Division, arguing for significant modifications to the Administrative Code.[11] These proposed changes include urging the Board to consider age and recidivism, youth as a mitigating factor, and changes to the process of withholding confidential records. This appeal remains pending.

Lastly, following the Criminal Sentencing and Disposition Commission (CSDC) recommendation to eliminate pro bono Madden assignments in revocation cases, a sea change occurred. With the unanimous support of the OPD, the Supreme Court Working Group on Attorney Pro Bono Assignments, the New Jersey State Bar Association, the Attorney General, and the Parole Board, S-3772 was passed on June 30, 2023, effective on September 12, 2023.[12] The OPD has commenced representing parolees at revocation hearings for the first time since 1991, resulting in enhanced representation.

This 2024 Parole Project Report updates the 2021 report with significant new and exciting developments. Part I of this Report provides an overview of the parole release process. Part II describes glaring problems in the parole release process and OPD litigation

[11] In the Matter of Petition for Rulemaking to Amend N.J.A.C. 10A:71-3.11 (A-0494-22); In the Matter of Petition for Rulemaking to Amend N.J.A.C. 10A:71-3.11 N.J.A.C. 10A:71-2.2, and N.J.A.C. 10A:71-3.20 (A-1180-22) (consolidated appeals).

[12] L. 2023, c. 157.

challenging those problems. Part III addresses the petitions for administrative rulemaking the OPD has completed to this point and the appeals after the petitions were denied by the Board. Part IV provides recommendations for legislative actions the OPD should pursue to ensure meaningful and systemic change in the parole release process. Finally, Part V describes the initial work of the OPD's Parole Revocation Defense Unit and identifies several issues being litigated 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.[13] 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.[14] 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

[13] See Exhibit B for a graphic illustration of the process.

[14] N.J.S.A. 30:4-123.54(a).

upon release.[15] The report must be filed 120 to 180 days prior to the parole hearing.[16] The applicant receives a copy of that report, but any information classified as "confidential" is redacted or removed.[17]

In addition, an objective risk assessment must be completed by parole staff or some other "appropriate agent."[18] 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."[19] 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."[20]

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[15] 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).

[16] N.J.S.A. 30:4-123.54(a).

[17] N.J.S.A. 30:4-123.54(c).

[18] 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.

[19] N.J.S.A. 30:4-123.52(e).

[20] Ibid.

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.[21] The hearing officer may meet with the applicant or may simply review the written materials.[22] The hearing officer considers the pre-parole report, the risk assessment, and the applicant's statement.[23]

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.[24]

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."[25] If the Board member(s)

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[21] N.J.S.A. 30:4-123.55(a); A Brief Overview of the Parole Process in New Jersey, supra note 18, at 2; The Parole Book, supra note 15, at 13.

[22] The Parole Book, supra note 15, at 13-14.

[23] N.J.S.A. 30:4-123.55(a).

[24] Ibid.

[25] 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.[26]

3. The Panel Hearing

The panel hearing occurs no less than 30 days prior to the PED.[27] Typically, two members of the Parole Board form a panel. Panels hear an average of ten or twelve cases a day inside the prisons. The parole applicant appears before the panel, but counsel is neither provided nor permitted to be present.[28] 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

[26] N.J.S.A. 30:4-123.55(c).

[27] N.J.S.A. 30:4-123.55(c).

[28] The Parole Book, supra note 15, at 15; Puchalski v. N.J. State Parole Bd., 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."[29] The panel hearings can be in person, although they are generally held through video conferencing.[30]

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.[31]

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

[29] 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. N.J. State Parole Bd., No. A-3359-18T4, 2021 WL 270144, at *3 (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. N.J. State Parole Bd., No. A-2179-17T2, 2019 WL 543338, at *4 (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.").

[30] 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.

[31] 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.[32]

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").[33] Among the release factors are whether the

[32] The Parole Book, supra note 15, at 16.

[33] See N.J.A.C. 10A:71-3.11; The Parole Book, supra note 15, 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 an FET,[34] also referred to as a "hit."[35] The Code establishes presumptive terms,[36] which extend how much time the applicant must serve until he or she is reconsidered for parole release.[37] 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.

[34] N.J.A.C. 10A:71-3.21.

[35] The Parole Book, supra note 15, at 16. There is a different FET schedule for offenses committed while paroled. See id. at 52.

[36] Id. at 49.

[37] 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."[38]

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.[39] 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."[40] The three-member Board panel must make such decision unanimously.[41] When Board panels cannot decide how long the FET should be, the case is referred to the full Board.[42]

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[38] N.J.A.C. 10A:71-3.21(c).

[39] 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.

[40] 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.

[41] N.J.A.C. 10A:71-3.21(d)(5).

[42] 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.[43] 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.[44] This provision of the Code has resulted in the Board imposing FETs as long as 30 years,[45] 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,[46] and the Appellate Division "rarely overturn[s] the Board's decision to deny parole and to impose an extended FET.[47]

However, recently, in Berta v. N.J. State Parole Bd., the Appellate Division emphasized that "the Board's obligation to explain the reasons for imposing an FET longer than the presumptive FET is no less important than its obligation to explain the reasons for

[43] 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.").

[44] 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.").

[45] McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 549, 565 (App. Div. 2002).

[46] See, e.g., Abdel-Aziz v. N.J. State Parole Bd., No. A-5790-12T1, 2015 WL 2184046, at *3 (App. Div. May 12, 2015) (upholding a 144-month FET); Williams v. N.J. State Parole Bd., No. A-1201-09T2, 2011 WL 309182, at *4 (App. Div. Feb. 2, 2011) (upholding a 60-month FET); Goodwyn v. N.J. State Parole Bd., No. A-5583-06T3, 2008 WL 4901311, at *5-6 (App. Div. Nov. 17, 2008) (upholding a 108-month FET).

[47] Berta v. N.J. State Parole Bd., 473 N.J. Super. 284, 326 (App. Div. 2022) (Geiger, J., concurring).

overcoming the presumption of parole."[48] The Appellate Division found that the "clearly inappropriate" standard is a "high threshold to vault" and the presumptive terms are "not to be dispensed with for light or transient reasons."[49] Not only does the Board have to explain why the presumptive term is inappropriate, but also why the FET imposed was "necessary and appropriate"; the "Board cannot simply pick a number out of thin air."[50] Berta has been cited by some unpublished cases remanding to the Parole Board for reconsideration of the length of the FET.[51]

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.[52] The Code lays out specific criteria the applicant must meet in order to be eligible for an appeal.[53] Appeals to the full Parole Board should be filed in

[48] 473 N.J. Super. 284, 322 (App. Div. 2022).

[49] Id. at 322-23.

[50] Id. at 323.

[51] See Sabatini v. N.J. State Parole Bd., 2023 WL 4055554 (App. Div. June 19, 2023) (remanding for an explanation for why 180 months was a necessary FET to impose); McLaughlin v. N.J. State Parole Bd., 2023 WL 3806303 (App. Div. June 5, 2023) (same).

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

[53] 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.

writing within 90 days of receipt of a written notice of action or decision, describing the reasons for the appeal.[54] Late appeals will be considered for good cause.[55] The Board generally has 90 days to consider an appeal, and an additional 14 days to provide written notice of its decision.[56]

b. Appeals to the Appellate Division and Supreme Court

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(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.

[54] N.J.A.C. 10A:71-4.2(a).

[55] N.J.A.C. 10A:71-4.2(b).

[56] N.J.A.C. 10A:71-4.2 (c) and (d).

Final state administrative agency decisions can be appealed as of right to the Appellate Division.[57] 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.[58] 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.[59] That same standard applies to the FET determination.[60]

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 reconsideration.[61] However, in Trantino v. N.J. State Parole Bd. (Trantino VI), the Supreme

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[57] R. 2:2-3.

[58] Trantino v. N.J. State Parole Bd. (Trantino IV), 154 N.J. 19, 24 (1998).

[59] Id. at 31.

[60] McGowan, 347 N.J. Super. at 565.

[61] See, e.g., Trantino IV, 154 N.J. at 22-23 (remanding to the Parole Board to "redetermine Trantino's parole eligibility); Perry v. N.J. State Parole Bd., 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. N.J. State Parole Bd., No. A-4935-16T1, 2019 WL 2262200, at *1 (App. Div. May 28, 2019) (vacating the denial of parole and remanding for reconsideration of parole application); Koger-Hightower v. N.J. State Parole Bd., No. A-4659-15T4, 2018 WL 1801654, at *1, *3 (App. Div. Apr. 17, 2018) (remanding for a new FET determination).

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."[62] 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.[63] 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.[64]

B. Data on Release Decisions

1. Data on All Offenses[65]

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,

[62] 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"); Acoli v. N.J. State Parole Bd., 250 N.J. 431, 438 (2022) ("[W]e are compelled to . . . grant Acoli parole, consistent with his established release plan."); Kosmin v. N.J. State Parole Bd., 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"); N.J. State Parole Bd. 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").

[63] Acoli v. N.J. State Parole Bd., 224 N.J. 213, 228, 231 (2016).

[64] Ibid.

[65] These data represent non-NERA cases.

applicants 2,769 cases were granted parole.[66] 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.[67] 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 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.[68] Of those, 32, or about 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.

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[66] 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.

[67] 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.

[68] Exhibit C, Parole Data.

2. Data on Pre-NERA Life Sentences

Data regarding parole release rates for those sentenced to life terms is even more startling.[69] 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 an FET of ten years; and 26, or 6.4%, received an 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.

C. History of OPD Involvement in Parole Release and Revocation Proceedings

The OPD enabling statute of 1974 expressly required the Public Defender to represent indigent parolees during revocation hearings.[70] Until 1991, the OPD's Parole

[69] See Exhibit A, certification of Joseph J. Russo with attached parole data.

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

Revocation Defense Unit represented indigent parolees in 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."[71] Because of this lack of funding, the Public Defender announced that the OPD could no longer represent parolees at revocation hearings.[72] Three years later, the Public Advocate Restructuring Act of 1994 formally repealed the enacting statute's parole revocation provisions.[73] Since 1991, the parole restriction on State funds has been consistently included in the annual appropriations bill.[74] Although the OPD has not had a direct role in representing clients before the Board since 1994, as part of the OPD's continuing obligation to provide effective representation, the OPD has at times assisted clients in parole release proceedings and filed amicus curiae briefs in certain parole appeals.[75] In 2020, in response to the Parole Project Report's research and recognition of the arbitrary and capricious nature of the parole release process, the OPD began taking on limited cases to more broadly challenge certain parole release procedures and policies by filing direct appeals of final agency decisions in the Appellate Division. And in 2023, the

[71] See L. 1974, c. 33, § 2.

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

[73] L. 1994, c. 58 § 70, eff. July 1, 1994.

[74] See, e.g., L. 2020, c. 97, available at: https://www.njleg.state.nj.us/2018/Bills/S2500/2020_I1.HTM ("Notwithstanding the provisions of any law or regulation to the contrary, no State funds are appropriated to fund the expenses associated with the legal representation of persons before the State Parole Board or the Parole Bureau.").

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

Legislature passed a bill, signed into law by the Governor's office in September 2023, that restored the OPD's authority to represent individuals facing parole revocation.[76]

[76] L. 2023, c. 157.

Part II: Court Challenges to Current Parole Release Practices

Since late 2020, the OPD has been representing a select number of parole applicants who were denied parole, particularly those who received lengthy FETs. This section provides an update on the types of issues being raised by OPD attorneys as part of that representation and the new legal landscape after some significant wins in both the New Jersey Supreme Court and Appellate Division.

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."[77] The Board must also disclose to applicants any adverse material or information used at the hearing, except if it is confidential.[78] If disclosure is withheld, the Board must identify the document as confidential and give reasons why it was not disclosed.[79] 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;

[77] 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).

[78] N.J.A.C. 10A:71-2.2(c).

[79] Ibid.

- 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.[80]

[80] 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. N.J. State Parole Bd., held that a "Parole Board rule or policy flatly prohibiting prisoner access to parole files" was no longer "sustainable."[81] 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."[82] Although under this standard the 1986 Administrative 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."[83] 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."[84] If the

[81] 210 N.J. Super. 107, 122 (App. Div. 1986).

[82] Id. at 123-24.

[83] Id. at 126.

[84] Ibid.

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.[85]

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."[86] 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."[87]

The second case, N.J. State Parole Bd. v. Cestari, held without explanation in a footnote, citing Thompson, that there was "no current reason" for a psychological report to remain confidential.[88]

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

[85] Id.

[86] Id. at 125.

[87] Id.

[88] 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 Thompson v. N.J. State Parole Bd., the Appellate Division held that there is a "limited right to disclosure of prison records in parole proceedings."[89] As part of that, the Thompson Court found that any "Parole Board rule or policy flatly prohibiting prisoner access to parole files would no longer be sustainable."[90] Thus, "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."[91]

Yet OPD has found the Board's more recent regulations have created wide swaths of categories of confidential materials, including, apparently, even parts of the parole decision itself.[92] OPD has been arguing that these regulations are precisely the type of regulations the Thompson Court held were "[un]sustainable."

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 W.M. v. New Jersey State Parole Board, 2022 WL 17420146 (App.

[89] 210 N.J. Super. 107, 122 (App. Div. 1986).

[90] Ibid.

[91] Id. at 123-24.

[92] See N.J.A.C. 10A:71-2.2(b) ("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"); N.J.A.C. 10A:71-2.2(a) (listing 10 categories of documents considered confidential in all circumstances).

Div. Dec. 6, 2022), 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 of psychological evaluations, confidential health records, confidential reports considered, and a confidential addendum.[93] The Parole Board responded by again labelling the above documents confidential, but only provided reasons for one: the psychological report.

OPD again argued to the Appellate Division 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. The Appellate Division agreed; it concluded that, under the standard set forth in Thompson, "there is no current reason for . . . the . . . psychological evaluation . . . to remain confidential[.]"[94] The court therefore ordered the Parole Board to provide the psychological evaluation to W.M.'s counsel, and it permitted counsel to share the evaluation with W.M.

In another case, involving a parole applicant represented by the Seton Hall Law School Center for Social Justice, the Appellate Division also ordered that the parole applicant be provided access to his psychological evaluation.[95] The court criticized the Parole Board for "provid[ing] no rationale for withholding the report from" the applicant

[93] Exhibit F, W.M. App. Div. Order, Apr. 9, 2021.

[94] Exhibit G, W.M. App. Div. Order, Oct. 7, 2021 (citing Thompson, 210 N.J. Super. at 116-27).

[95] R.M. v. N.J. State Parole Bd., Docket No. A-0493-20, 2022 WL 16825947, at *6 (App. Div. Nov. 9, 2022).

and noted that "[t]here is nothing to suggest [that] access to the [report] would pose a safety or security concern."[96]

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.[97] Although states are still divided on this issue,[98] 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.[99]

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

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[96] Ibid.

[97] 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").

[98] 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).

[99] Morrissey, 408 U.S. at 482.

to the Board.[100] Even hired counsel cannot be physically present at the hearing, however.[101] 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 vast 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.[102] 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"[103]—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"[104]—the Appellate Division has held, albeit only in unpublished cases, that there is no right to have that representative in the parole hearing.[105]

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[100] The Parole Book, supra note 15, at 15.

[101] Ibid.

[102] Ibid.

[103] N.J.A.C. 10A:71-3.13(g).

[104] N.J.A.C. 10A:71-2.11.

[105] See supra note 29 and accompanying text.

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.[106]

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."[107] The Court then went further, finding that that interest was "heightened by the widespread presence of COVID-19 in jail."[108] 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.

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

[107] 242 N.J. at 387 (quoting N.J. State Parole Bd. v. Byrne, 93 N.J. 192, 210 (1983)).

[108] Id.

The W.M. case described above raised the right to counsel issue in the context of parole applicants with cognitive disabilities. There, the OPD argued 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."[109] W.M. 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 argued that these intellectual disabilities affect W.M.'s "cognition, communication, and self-advocacy," and therefore his due process rights could be protected only through a new parole hearing with counsel present.

In an unpublished opinion, the Appellate Division rejected the OPD's argument.[110] The court relied on prior cases "establish[ing] [that] there is no right to counsel in parole proceedings." However, the cases that the court relied upon interpreted the 1948 Parole Act, under which parole was highly discretionary, and not the 1979 Parole Act, under which the Parole Board must grant release unless it finds a likelihood of recidivism. The court also did not analyze the OPD's argument about whether there should be a right to counsel in particular cases involving special or unusual circumstances. The OPD filed a Petition for Certification asking the New Jersey Supreme Court to review this decision, but

[109] Exhibit E, W.M. Brief in Support.

[110] W.M. v. N.J. State Parole Bd., No. A-0072-19, 2022 WL 17420146 (App. Div. Dec. 6, 2022).

the Petition was denied. However, because the Appellate Division's decision was unpublished and the Supreme Court chose not to hear the case, the decisions do not have binding precedential effect on any future challenges regarding the right to counsel in parole release proceedings.

In another case, Farrell v. N.J. State Parole Bd.,[111] the Appellate Division rejected OPD's argument 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 release" guaranteed by Graham v. Florida,[112] Miller v. Alabama,[113] and State v. Zuber.[114] The Appellate Division held that New Jersey does not recognize a "heightened liberty interest" for juvenile offenders, and thus regular due process protections apply.[115] As there is no due process right to counsel for adult offenders, the same applies to juvenile offenders. This case is also unpublished, however, so it holds no precedential value.

C. Non-Code Factors

1. Background

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

[111] 2022 WL 17258822 (App. Div. Nov. 29, 2022).

[112] 560 U.S. 48 (2010)

[113] 567 U.S. 460 (2012).

[114] 227 N.J. 422 (2017).

[115] Farrell, 2022 WL 17258822 at *3.

should consider when determining an applicant's suitability for parole.[116] 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.[117] 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.[118]

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.

[116] N.J.A.C. 10A:71-3.11(b).

[117] 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").

[118] See, e.g., 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, 347 N.J. Super. 544.

The Appellate Division has in one unpublished decision rejected the argument that the Parole Board has violated the APA in applying factors not enumerated in the Administrative Code.[119] There, the panel found "the non-exhaustive list of factors in N.J.A.C. 10A:71-3.11 flexible enough to accommodate both phrases without a formal amendment through the APA."[120] However, another Appellate Division panel, though eventually dismissing the case as moot because the parole applicant had been released since his appeal was filed, did find that these arguments were "significant . . . given that ["insufficient problem resolution" and "lack of insight"] are not among those [factors] listed in N.J.A.C. 10A:71-3.11(b)."[121] That panel further noted that it was "acutely aware of the difficulty another inmate denied parole would encounter mounting such a challenge without counsel." Thus, this issue remains ongoing.

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. N.J. State Parole Bd., the New Jersey Supreme Court found that the Parole Board's use of a "changed story" to deny parole was a canard based on the Board's own questioning that asked Mr. Acoli to speculate about who fired the fatal shots that killed a police officer, the offense

[119] Pujols v. N.J. State Parole Bd., 2022 WL 702132 (App. Div. Mar. 9, 2022).

[120] Id. at *4.

[121] Stout v. N.J. State Parole Bd., 2022 WL 663060, at *4 (App. Div. Mar. 7, 2022).

leading to Mr. Acoli's arrest.[122] Importantly, the Supreme Court also recognized that "[e]ven if Acoli's recollection had faltered after six hours of questioning about events that occurred almost fifty years ago, that would hardly be shocking given that seventy-nine-year-old Acoli expressed concern earlier in the hearing about his 'memory loss' and fear of possibly having Alzheimer's."[123] The Court emphasized that "[a]s we stated in Trantino VI, an inmate's inadequate or inaccurate recollection of the specifics of his crime does not directly bear on whether there is a substantial likelihood that he will reoffend today and cannot form the basis for denying parole."[124]

The Acoli decision was recently cited by the Appellate Division in an unpublished case, Kiett v. N.J. State Parole Bd., to remand the case for a new parole hearing.[125] The Kiett panel found that the Board did not provide an adequate basis for why Kiett's inability to remember the crime or inaccuracy in doing so showed he was substantially likely to commit another offense.[126] It further found that, like in Acoli, the Board itself invited speculation about the details of the crime, and that in doing so, the Board "fail[ed] to

[122] 250 N.J. 431, 462 (2022).

[123] Id. at 462-63.

[124] Id. at 463 (citing Trantino VI, 166 N.J. at 177-78).

[125] Kiett v. N.J. State Parole Bd., 2023 WL 4571436, at *13-14 (App. Div. July 18, 2023).

[126] Id. at *14.

distinguish between 'consistent accounts that [Kiett] had given based on his recollection and the speculation that the Board demanded.'"[127]

c. Intellectual Impairments

Further, those with cognitive or intellectual disabilities may not be able to fully comprehend the reasoning behind their actions. The OPD is challenging the use of this factor in at least one case as violating the federal Americans with Disabilities Act (ADA) and New Jersey's Law Against Discrimination (LAD) by using an applicant's disability to keep him behind bars. In W.M., the Parole Board denied parole in part because it concluded that the parole applicant "lack[ed] insight into [his] negative behavior and decision-making." The OPD argued that the Board failed to consider whether this inability to articulate insight was a product of W.M.'s intellectual disabilities, which in turn would require the Board to make a "reasonable modification" by relying on indicators other than lack of insight to determine whether W.M. was likely to recidivate if denied parole.

The Appellate Division rejected this argument, holding that the Parole Board could rely on the mental health treatment provided to W.M. during incarceration, but it did not address the argument about whether reasonable modifications were appropriate given the intellectual impairments that W.M. has even with those treatments.[128] The OPD filed a Petition for Certification requesting that the New Jersey Supreme Court address this issue,

[127] Ibid. (quoting Acoli, 250 N.J. at 462).

[128] W.M. v. N.J. State Parole Bd., Docket No. A-0072-19, 2022 WL 17420146, at *8-9 (App. Div. Dec. 6, 2022).

but the Court denied the Petition. However, because the Appellate Division's decision was unpublished and the Supreme Court chose not to hear the case, the decisions do not have binding precedential effect on any future challenges regarding violations of the ADA or LAD in parole release proceedings.

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 they see it.[129] 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.[130] 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.[131] Relatedly, "[r]eading remorse across racial, ethnic, or cultural lines is fraught with the possibility of error."[132] Importantly, there is little evidence to support any correlation between remorse and future good behavior, and thus, reliance on this factor is arbitrary.[133]

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[129] 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.

[130] Id. at 16.

[131] 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.

[132] Id. at 23.

[133] Bandes, Remorse and Criminal Justice, supra note 129, at 17.

e. Innocence

These factors also harm those who maintain their innocence. In Berta, the Appellate Division held that the Parole Board's use of Berta's refusal to acknowledge guilt was arbitrary and capricious because it did not explain how that "translates into a substantial likelihood that he would re-offend."[134] Although it declined to adopt a per se rule that an assertion of innocence is insufficient to demonstrate a substantial likelihood of re-offense, it "reiterate[d] that an admission of guilt is not a prerequisite to parole, and thus ongoing refusal to admit guilt cannot be treated as a categorical bar to parole."[135] "Nor is the refusal to admit guilt a talisman before which the statutory presumption of parole evaporates."[136] The Appellate Division did not dispute that in cases where someone maintains his or her innocence, the applicant must either lie to the Parole Board or be penalized for lacking remorse or insight into a crime they did not commit.[137] Thus, it found that if the Board is to use someone's refusal to admit guilt to deny parole, it must explain why this refusal shows that the person is substantially likely to commit another offense.

Similarly, in Acoli, the New Jersey Supreme Court chastised the Board for having "taken refuge in threadbare findings that Acoli lacks insight into the conduct that led him to his involvement in the crimes he committed in 1973 and that he still refuses to take

[134] 473 N.J. at 319.

[135] Id. at 318.

[136] Ibid.

[137] Id. at 317.

responsibility for his acts."[138] There, where Acoli has consistently maintained he was not the shooter, but has taken responsibility for his actions otherwise, the Supreme Court acknowledged his remorse and responsibility for his actions.

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.[139] 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.[140]

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

[138] Acoli, 250 N.J. at 460.

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

[140] 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.[141] 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.[142] The New Jersey Supreme Court recognized as early as 1984 that "age, as a demographic variable, has consistently been found to be strongly related to subsequent criminal activity."[143] The DOC's own statistics have repeatedly shown the low rate of reoffending as a person gets older, as well as national studies of recidivism rates and age.[144] Thus, people generally "age out" of crime.

2. OPD Litigation

a. Juvenile Offenders

In Farrell, the Appellate Division rejected the argument that imposing excessive FETs is unconstitutional under the 8th Amendment to the U.S. Constitution and Art. I, Para. 12 of the New Jersey Constitution. It characterized the "challenge[to] the life sentence

[141] 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).

[142] 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).

[143] State v. Davis, 96 N.J. 611, 618 (1984) (citing Cocozza & Steadman, Some Refinements in the Prediction of Dangerous Behavior, 131 Am. J. of Psychiatry 1012 (1974)).

[144] N.J. Dep't of Corrections, 2015 Release Cohort Outcome Report: A Three-Year Follow Up 19 (2018); N.J. Dep't of Corrections, 2016 Release Cohort Outcome Report: A Three-Year Follow Up 20; N.J. Dep't of Corrections, 2017 Release Cohort Outcome Report: A Three-Year Follow-Up 17; National Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences 155 (Jeremy Travis, Bruce Western, & Steve Radburn eds., 2014).

with a thirty-year parole bar imposed upon him as a juvenile" as "cloaked as a challenge to the FET."[145] It found the "mere possibility of release does not create a liberty interest," and that "the principles articulated in Miller and Zuber concern the application of the Eighth Amendment to the sentencing of a juvenile offender, and guarantee no more than a possibility of release, whether supervised or unsupervised."[146]

The Appellate Division has recognized the inadequacy of the parole process to vindicate juvenile offenders' rights under Miller and Zuber in State v. Thomas.[147] The Parole Board cannot provide Miller/Comer relief as the process stands. The Thomas Court noted that "parole hearings fall far short of providing an adversarial hearing for defendant to demonstrate the degree of maturity and rehabilitation he has achieved while incarcerated."[148] For example, the Board entirely fails to take into consideration the Miller factors and does not assess the question of "incorrigibility." Moreover, there is no right to cross-examination, confrontation, or even the ability to review the full record before the Board.[149] Finally, the court noted that the deferential standard of review for final Board decisions is in conflict with the de novo standard for courts deciding whether a

[145] Farrell, 2022 WL 17258822, at *3.

[146] Ibid.

[147] 470 N.J. Super. 167, 194-95.

[148] Id. at 194.

[149] Id. at 194-95.

sentence is illegal as unconstitutional.[150] Thus, the Appellate Division concluded, "[b]y any measure, parole hearings are a poor substitute for a procedure that would afford defendant a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'"[151]

Based on this conclusion, trial courts cannot rely on the Parole Board to ensure the guaranteed meaningful opportunity for release because the parole process is ill-equipped to address what Miller and Zuber require. Moreover, even when the Board is asked to take the Miller factors into account, they often point to the courts as the correct venue to address those issues. Because the Parole Board is not considering the question of incorrigibility or demonstrated maturity and rehabilitation and is only determining whether someone will commit another offense, the parole process has a different scope than a Miller/Zuber resentencing. Rehabilitation and maturity may be a part of deciding recidivism, but the ultimate questions addressed in a Miller/Zuber resentencing are different than those in a parole release application. Because the parole process in New Jersey is inadequate to address the Miller question, it is entirely up to the trial courts to decide the issue.

Thus, Thomas effectively forecloses a trial court's reliance on the Parole Board to adequately protect clients' rights under either the federal or state constitutions and caselaw.

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[150] Id. at 195-96.

[151] Id. at 196 (quoting Zuber, 227 N.J. at 452). See also, 228 N.J.L.J. 296 (Feb. 7, 2022) where the New Jersey Law Journal, based upon what it observed to be an egregious miscarriage of justice by the Parole Board in Thomas, advocated for substantial reform of the parole process so that it affords fundamental due process protections.

This means the trial courts themselves must address the Miller factors and decide at that point whether the person has proven "incorrigible."

b. Aging Out

The OPD has been involved in several recent parole cases that discuss "aging out" of criminal behavior. In Acoli, the New Jersey Supreme Court explained that "Acoli's advanced age—seventy-nine at the time of the hearing . . . is another highly relevant factor in determining whether the Board abused its discretion in denying parole."[152] The Court described evidence, including studies from the National Research Council, the United States Sentencing Commission, and the Parole Board itself, "show[ing] that as individuals age, their propensity to commit crime decreases and, in particular, that elderly individuals released from prison tend to recidivate at extremely low rates."[153] The Supreme Court concluded that the Parole Board had erred in part because "[n]othing in the Parole Board's decision suggests that the Board considered in any meaningful way the studies on the age-crime curve in denying parole to Acoli."[154]

In Berta, the Appellate Division applied Acoli's reasoning to the person seeking parole in that case, who was seventy-one years old at the time he was denied parole.[155] The panel explained that "[a]lthough Berta is significantly younger than Sundiata Acoli,

[152] Acoli, 250 N.J. at 469.

[153] Ibid.

[154] Id. at 470.

[155] Berta, 437 N.J. Super. at 289.

he is nonetheless old enough that his age is a relevant consideration in predicting the likelihood of recidivism."[156] In remanding the matter to the Parole Board, the Court instructed the Board "to account specifically for Berta's age, along with all relevant mitigating circumstances, in determining whether—and, if need be, explaining why—the preponderance of the evidence establishes a substantial likelihood that he will re-offend."[157]

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."[158] Thus, "old" information—information about the applicant's crimes or information available to the Board at the time 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."[159] This change substantially expanded the grounds on which the Board could deny an applicant parole.

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[156] Id. at 321-22.

[157] Id. at 322.

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

[159] N.J.S.A. 30:4-123.56(c) (1997).

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).[160] 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 (Trantino V), 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.[161]

However, the Third Circuit Court of Appeals, in Holmes v. Christie, explained in detail why the reasoning in Trantino V is erroneous and violates the principles in the U.S. Supreme Court cases Garner v. Jones,[162] California Dept. of Corrections v. Morales,[163] and Collins v. Youngblood.[164] Trantino V never cites Garner, despite being published about

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

[161] 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 VI, 166 N.J. 113 (2001).

[162] 529 U.S. 244 (2000).

[163] 514 U.S. 499 (1995).

[164] 497 U.S. 37 (1990).

two months after Garner was decided. Yet Garner's reasoning completely undermines the principles in Trantino V.

In Morales, the Supreme Court emphasized that not every retroactive procedural change that may affect an incarcerated person's terms or conditions of confinement is prohibited.[165] The controlling inquiry was whether a retroactive change created "a sufficient risk of increasing the measure of punishment attached to the covered crimes."[166] The Supreme Court found that there was not a sufficient risk in that case, and thus there was no ex post facto violation.[167]

In Garner, the Supreme Court noted that the California law in Morales did not "alter the standards for determining either the initial date for parole eligibility or an inmate's suitability for parole."[168] The law only affected a limited class of people, did not mandate a longer "future eligibility term" (though not using that phrase), did not prohibit requests for earlier reconsideration, and statistics showed for the vast majority of people, incarceration was not prolonged by the change.[169] Thus, the Morales Court found, altogether these factors "create only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered

[165] Morales, 514 U.S. at 508-09.

[166] Id. at 509.

[167] Ibid.

[168] Garner, 529 U.S. at 250.

[169] Id. at 250-51.

crimes."[170] The Morales Court made no mention of "substantive" versus "procedural" changes. In fact, the Court's discussion exemplifies how procedural change may in fact create a significant risk of prolonging incarceration, it just does not always do so. As the Court found, the question is "a matter of 'degree.'"[171]

Five years later in Garner, the Court again emphasized the Morales inquiry: the "question is whether the amended Georgia Rule creates a significant risk of prolonging respondent's incarceration."[172] Nowhere does the Garner Court discuss the distinction between "substantive" and "procedural" changes; instead, it is only whether the change, be it substantive or procedural, increases the risk of prolonged incarceration impermissibly.[173]

Trantino V itself did note how the new law was designed to, and in fact did, grant the Parole Board broader discretion to deny parole.[174] In 1996, Governor Whitman created a Study Commission on Parole for that very purpose.[175] The Commission found that under the 1979 standard, "'the Board is effectively required to grant parole, even though the inmate may not be rehabilitated.'"[176] The Commission continued: "'In essence, this statute

[170] Morales, 514 U.S. at 509.

[171] Ibid.

[172] 529 U.S. at 251.

[173] Id. at 250-51 ("Retroactive changes in laws governing parole of prisoners, in some instances," may violate the Ex Post Facto Clause.).

[174] 331 N.J. Super. at 608-09.

[175] Id. at 608.

[176] Id. at 609 (emphasis in original) (quoting Commission's recommendation).

treats an initial denial of parole as "punishment" rather than as recognition that an inmate has not earned an early release.'"[177] Based on this recommendation, the Legislature deleted the word "new" as a qualifier on the kind of information the Board may consider at successive eligibility dates.[178] As the Holmes Court pointed out, the 1997 Parole Act introduces an entirely "different set of evidentiary rules" to govern successive parole hearings.[179] Before 1997, the Board could not consider old information and successive parole decisions were made based "'strictly on information developed since the previous denial of parole.'"[180] "In practice, this prevented the Board from taking account of inmates' criminal history—often the most damaging aspect of their records—after the initial hearing."[181]

Despite the recognition of the change, because the Trantino V Court considered this change "procedural" and not a "substantive" change in the standard for parole eligibility, it held the change did not violate the Ex Post Facto Clause.[182] But as the Holmes Third Circuit panel points out, this is the entirely wrong analysis under Morales and Garner. In fact, the "substantive" versus "procedural" difference has been explicitly disavowed by the

[177] Ibid. (quoting Commission's recommendation).

[178] Id. at 609.

[179] Holmes, 14 F.4th at 255.

[180] Ibid. (quoting Assembly Law and Public Safety Committee, Statement to Assembly Bill No. 21 (Mar. 3, 1997)).

[181] Ibid.

[182] Trantino V, 331 N.J. Super. at 610.

U.S. Supreme Court since at least 1990.[183] And in Garner, the U.S. Supreme Court made clear that procedural changes in parole contexts are the same as in other ex post facto contexts, and that it is a matter of degree, rather than category, that may make so-called procedural changes impermissible. As the Holmes Court aptly wrote: "a challenged rule's constitutionality hinges on its effect, not its form."[184] Indeed, "[t]ime and again, the [U.S. Supreme] Court has refused 'to define the scope of the Clause along an axis distinguishing between laws involving "substantial protections" and those that are merely "procedural."'"[185] Thus, the Trantino V Court ignored both longstanding and contemporaneous U.S. Supreme Court caselaw in dismissing the ex post facto challenge on the basis of this distinction.

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, especially in light of the Holmes v. Christie Third Circuit opinion. Thus far, the Appellate Division has skirted the issue in most cases. The Berta Court specifically declined to

[183] Collins v. Youngblood, 497 U.S. 37, 45 (1990) ("Respondent correctly notes, however, that we have said that a procedural change may constitute an ex post facto violation if it affect[s] matters of substance . . . by depriving a defendant of substantial protections with which the existing law surrounds the person accused of crime . . . or arbitrarily infringing upon substantial personal rights.") (internal quotations omitted).

[184] Holmes, 14 F.4th at 264.

[185] Id. at 265 (quoting Carmell v. Texas, 529 U.S. 513, 539 (2000)).

address whether Holmes "overruled" Trantino V.[186] However, recently, one panel found in an unpublished opinion that while Holmes "sharply criticizes Trantino V," there is "nothing in the Holmes decision that expressly overrules Trantino V."[187] The Kiett Court found that because the Holmes remand is still ongoing, there still has been no showing of an Ex Post Facto Clause violation.[188] However, this reading of the Holmes decision misunderstands the factual remand in Holmes, which was limited to the issue of whether "old information" affected the Board's decision to deny parole to Mr. Holmes himself, such that he was affected by the constitutional violation. The import of the Third Circuit's opinion in Holmes is that as a legal matter, the Trantino V decision is currently in contradiction of U.S. Supreme Court caselaw on a federal constitutional right. The New Jersey Supreme Court 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

[186] Berta, 473 N.J. Super. at 317.

[187] Kiett, 2023 WL 4571436, at *12 .

[188] Ibid.

inmate."[189] 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."[190] If the date of the FET differs from the established schedule, "the board panel shall include particular reasons therefor."[191]

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.[192]

[189] N.J.S.A. 30:4-123.56(a).

[190] N.J.S.A. 30:4-123.53(a)(2).

[191] N.J.S.A. 30:4-123.56(b).

[192] N.J.A.C. 10A:71-3.21(a).

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."[193] 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.[194]

As discussed in Part I.A., in the Berta case, the Appellate Division noted that most parole cases "focus on the propriety of the Board's decision to deny parole," and not on the FET.[195] But the Berta Court emphasized that "the Board's obligation to explain the reasons for imposing an FET longer than the presumptive FET is no less important than its obligation to explain the reasons for overcoming the presumption of parole."[196] The Court also made clear that the "clearly inappropriate" standard is a "high threshold to vault" and the presumptive terms are "not to be dispensed with for light or transient reasons."[197] In order to vault that threshold, first the Board must explain why the presumptive term is

[193] N.J.A.C. 10A:71-3.21(c).

[194] 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 inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior.").

[195] 473 N.J. Super. at 322.

[196] Ibid.

[197] Id. at 322-23.

inappropriate.[198] Second, the Board must then explain why the FET that is to be imposed is "necessary and appropriate."[199] As the majority stated: "Board cannot simply pick a number out of thin air."

The Berta panel stressed that (1) "an FET must not be imposed as a form of punishment" and (2) "the decision to impose an FET beyond the presumptive FET, like the underlying decision to deny parole, must be tied directly to the goal of reducing the likelihood of future criminal behavior."[200] Thus, the FET may be increased only when the presumptive term is "clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future [criminal] behavior."[201]

In his concurring opinion, Judge Geiger wrote separately to address the FETs imposed. Judge Geiger emphasized that the Board's imposition of excessive FETs have had "cumulative real-time consequences that effectively extend[] [Berta's] parole ineligibility[.]"[202] Judge Geiger stressed that "[t]he role of the Board is not to modify sentences. Similarly, the intended purpose of imposing a FET is not punishment."[203] Yet, Judge Geiger points out, "for seemingly marginal reasons, the Board's actions appear to

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[198] Id. at 323.

[199] Ibid.

[200] Ibid.

[201] Id. at 323-34 (emphasis in original) (citing N.J.A.C. 10A:71-3.21(d)).

[202] Id. at 326 (Geiger, J., concurring).

[203] Ibid.

cross those boundaries."[204] Judge Geiger notes the "procedural framework" of these decisions, wherein a parole applicant is denied access to counsel, the ability to cross-examine the Board's experts, present his own expert testimony, see the contents of confidential psychological evaluations, or participate in an adversarial proceeding.[205] This, Judge Geiger contends, in conjunction with the degree of discretion given to the Board, may implicate parole applicants' due process rights.[206] Even more so when the imposed FET "far exceeds the ordinary twenty-seven-month FET limit for murder cases under N.J.A.C. 10A:71-3.21(a)(1) and is well beyond the additional nine months that may [be] added to an FET under N.J.A.C. 10A:71-3.21(d)."[207] For these reasons, Judge Geiger suggests it may be necessary to either (1) provide parole applicants greater procedural rights or (2) review lengthy FETs with a less deferential standard of review.[208] Without either change being implemented, the imposition of these lengthy FETs may violate the doctrine of fundamental fairness.[209]

[204] Id. at 326-27.

[205] Id. at 327.

[206] Ibid.

[207] Ibid.

[208] Ibid.

[209] Ibid.

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.[210] 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.

After the Berta opinion, the OPD has been successful in securing remands for new hearings both from the Appellate Division and from the Board voluntarily remanding based on that case. OPD is also seeking to implement Judge Geiger's suggestions of either greater procedural protections or closer scrutiny of Board decisions to impose excessive FETs.

G. Compassionate Release

1. Background

In 2020, the New Jersey Legislature enacted the Compassionate Release Act ("CRA").[211] It was "designed to expand the use of compassionate release."[212] Previously,

[210] See, e.g., Klingebiel v. N.J. State Parole Bd., No. A-5341-04T1, 2008 WL 4661401, at *7 (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.").

[211] N.J.S.A. 30:4-123.51e.

[212] State v. A.M., 252 N.J. 432, 438 (2023).

under N.J.S.A. 30:4-123.51(c), enacted in 1997, the Parole Board could grant "medical parole" to an applicant who was "so debilitated or incapacitated" by a "terminal condition, disease or syndrome" that he was "permanently physically incapable of committing a crime if released on parole." The new CRA, effective February 1, 2021, was created in response to concerns that under the former system, "very few of our gravely ill inmates m[e]t the strict eligibility requirements" to obtain medical parole.[213]

The CRA states that "the court may release an inmate who qualifies under this section for compassionate release at any time during the term of incarceration."[214] The statute directs the Commissioner of Corrections to create and maintain a process for incarcerated people to obtain a medical diagnosis by two licensed physicians that includes: (1) a description of the (a) terminal condition, disease, or syndrome, or (b) permanent physical incapacity; (2) a prognosis about the likelihood of recovery; (3) a description of the physical incapacity, if appropriate; and (4) a description of the type of ongoing treatment necessary if release is granted.[215] If there is a medical diagnosis of "a terminal condition, disease or syndrome, or permanent physical incapacity," the DOC must issue a "Certificate of Eligibility for Compassionate Release" and the person's attorney or the

[213] Off. of the Governor, Press Release: Governor Murphy Signs Sentencing Reform Legislation (Oct. 19, 2020) (quoting a joint statement by Assemblypersons Gary Schaer and Verlina Reynolds-Jackson).

[214] N.J.S.A. 30:4-123.51e(a).

[215] N.J.S.A. 30:4-123.51e(b).

OPD must be notified to begin the process of petitioning for compassionate release.[216] If there is a medical diagnosis of a "grave medical condition," the person's attorney or the OPD must be notified, but a petition for compassionate release cannot be filed until the incarcerated person receives a terminal or permanent physical incapacity diagnosis.[217]

The Legislature defined "grave medical condition" as a prognosis by the designated licensed physicians that the person has between six and twelve months to live or has a medical condition that did not exist at the time of sentencing and "for at least three months has rendered the inmate unable to perform activities of basic daily living, resulting in the inmate requiring 24-hour care."[218] "Terminal condition, disease or syndrome" means a prognosis by the designated licensed physicians that the person has less than six months to live.[219] "Permanent physical incapacity" means a prognosis by the designated licensed physicians that the person has a "medical condition that renders the inmate permanently unable to perform activities of basic daily living, results in the inmate requiring 24-hour care, and did not exist at the time of sentencing."[220]

Release may be granted by a court if the court "finds by clear and convincing evidence that the inmate is so debilitated or incapacitated by the terminal condition, disease

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[216] N.J.S.A. 30:4-123.51e(d).

[217] N.J.S.A. 30:4-123.51e(d)(1).

[218] N.J.S.A. 30:4-123.51e(l).

[219] Ibid.

[220] Ibid.

or syndrome, or permanent physical incapacity as to be permanently physically incapable of committing a crime if released."[221] In the case of a permanent physical incapacity, the person, if released, must also not pose a threat to public safety.[222]

The Supreme Court has had two opportunities to interpret this statute. It has narrowly construed "activities of basic daily living" as a "limited number of rudimentary tasks," including "eating, mobility, bathing, dressing, using a toilet, and transfers," and "exclud[ing] instrumental activities such as shopping, house cleaning, food preparation, and laundry."[223] It also requires that a person be permanently unable to perform "two or more activities of basic daily living."[224] Further making it difficult, the Court has interpreted "physically incapable of committing a crime if released" to mean not only whether the person himself or herself could commit a crime, but also whether he could solicit another to commit a crime.[225] The Court did, however, focus the recidivism assessment on the same crime or crimes of which the person was previously convicted or those similar to those for which he or she was convicted: "The court thus determines

[221] N.J.S.A. 30:4-123.51e(f)(1).

[222] Ibid.

[223] State v. F.E.D., 251 N.J. 505, 529 (2022).

[224] Id. at 531.

[225] Id. at 532.

whether the inmate's physical incapacity precludes his ability to engage in criminal conduct in the same general category as the conduct that led to his convictions."[226]

As to the standard for trial courts to follow, even if a petitioner can satisfy both the medical and public safety requirements for compassionate release, trial courts still have discretion to deny release.[227] Because the statute also requires the judges to assess "any harm suffered by victims and their family members," "the law affords judges discretion to deny relief, in exceptional circumstances, even if" the petitioner has a qualifying medical condition and poses no threat to public safety.[228] Thus, when evaluating petitions for compassionate release, trial judges must consider (1) "whether there is clear and convincing evidence that an inmate 'is so debilitated' by a specific medical condition 'as to be permanently physically incapable of committing a crime if released;'" (2) "whether, in the case of an inmate with a 'permanent physical incapacity,' there is clear and convincing evidence that the inmate 'would not pose a threat to public safety' if released under the conditions imposed;" and (3) "testimony or statements from victims and family members about 'any harm' they 'suffered.'"[229]

However, the Court also noted that the CRA specifically eliminated the statutory bar that had formerly barred people convicted of certain serious offenses from obtaining

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[226] Id. at 532-33.

[227] A.M., 252 N.J. at 438.

[228] Ibid.

[229] Id. at 456-57.

medical parole.[230] Thus, "courts may not exercise discretion in a way that creates de facto categorical bars to release," i.e., "judges cannot deny compassionate release on the ground than an inmate committed a 'serious offense.'"[231] Thus, petitioners may not be denied compassionate release unless trial judges find one more "extraordinary aggravating factors," including whether: (1) the offense involved "particularly heinous, cruel, or depraved conduct;" (2) there was a "particularly vulnerable victim, based on the person's advanced age, youth, or disability;" (3) the offense was "an attack on the institutions of government or the administration of justice;" or (4) "release would have a particularly detrimental effect on the well-being and recovery process of victims and family members."[232] The last factor includes an standard of objective reasonableness. The Supreme Court emphasized that the above standard is high, and "are limited to exceptional and rare circumstances."[233]

2. OPD Ligation

OPD continues to challenge denials of compassionate release. The statute, as written, as well as the narrow interpretation, has made it difficult for petitioners to successfully obtain release.

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[230] Id. at 458.

[231] Id. at 459.

[232] Id. at 460.

[233] Id. at 461.

Currently, in State v. M.R., the OPD is requesting a remand where the DOC refused a Certificate of Eligibility after only a review of the petitioner's paper medical records, without doing any in-person medical evaluation.

And in State v. C.P., the OPD is challenging the trial court's denial of compassionate release, despite C.P. otherwise being eligible for release, based on "extraordinary aggravating factors." It is the first case to apply these factors after A.M.

Note

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

Part III: Administrative Challenges to Current Parole Release Regulations

In addition to challenging the Parole Board's practices through individual parole appeals, the OPD has also undertaken efforts to require the Board to make changes in its Administrative Code so that it comports with the legal standards governing parole release decisions. The procedure for requesting the Parole Board to amend its regulations is called a Petition for Rulemaking, which is permitted under the New Jersey Administrative Procedure Act (APA).[234] That law allows any person to request that the Parole Board (or any other state agency) adopt new rules or amend or repeal existing rules. In September 2022, the OPD filed a Petition for Rulemaking with the Parole Board asking it to change its rules in three different ways. The Parole Board denied that Petition, and the OPD is appealing the denial in the Appellate Division. The OPD also represents Ronald Robbins, an incarcerated person who filed his own Petition for Rulemaking in June 2022, which was denied and is now being appealed. The issues raised in these petitions are discussed in detail below.

A. Age and Recidivism

Both Robbins and the OPD petitioned the Parole Board to include the inverse relationship between age and recidivism as a consideration in its regulations governing parole release decisions. As described above (Part II.D.), the New Jersey Supreme Court's opinion in Acoli and the Appellate Division's opinion in Berta both recognized that people

[234] N.J.S.A. 52:14B-4(f).

released on parole at advanced ages are unlikely to recidivate once released. The Acoli opinion, in particular, cited studies on the "age-crime curve," which goes beyond specific elderly individuals and instead relies on data showing that as a general matter, individuals are less likely to recidivate the older they get. New Jersey courts have also recognized that the age-crime curve is not limited to elderly persons, because it "shows 'that more than 90% of all juvenile offenders desist from crime by their mid-20s.'"[235] The OPD Petition also referenced numerous other studies demonstrating that recidivism rates decrease throughout aging in the middle adult years.[236]

Robbins and the OPD therefore both requested that the Parole Board amend the regulation that delineates the factors considered in parole release decisions, N.J.A.C. 10A:71-3.11(b), to add a factor accounting for the fact that the likelihood of recidivism decreases as people age. The Parole Board rejected these requests; it took the position that Acoli and Berta are limited to elderly individuals, and that it uses its "catch-all factor" in N.J.A.C. 10A:71-3.11(b) to consider age "when appropriate." Robbins and the OPD are appealing the Parole Board's denial of their petitions in the Appellate Division, asking the court to order the Parole Board to amend its rules.

[235] State v. Comer, 249 N.J. 359, 399 (2022) (quoting Laurence Steinberg, The Influence of Neuroscience on U.S. Supreme Court Decisions about Adolescents' Criminal Culpability, 14 Neuroscience 513, 516 (2013)).

[236] See, e.g., Robert J. Sampson & John H. Laub, Life-Course Desisters? Trajectories of Crime among Delinquent Boys Followed to Age 70, 41 Criminology 301, 330 (2003), available at: https://scholar.harvard.edu/files/sampson/files/2003 crim laub 1.pdf.

B. Youth as a Mitigating Factor

The OPD Petition to the Parole Board also requested amendments to its rules that would prevent it from using youth as an aggravating factor. In 2021, the Parole Board added a factor that requires it to account for "[s]ubsequent growth and increased maturity of the inmate during incarceration" in its release decisions.[237] But the Parole Board also reserved the right to consider youth as an aggravating factor because, it claimed, "[w]hether a factor is a mitigating or aggravating factor is a determination to be made by the Board panel in the assessment of the inmate's case."[238] The OPD argued that the Board could therefore use youthful misconduct as an aggravating factor, even though such conduct is mitigated by the qualities of youth that are described in Comer and other cases. Indeed, a recent criminal case from the New Jersey Supreme Court held that in sentencing, "youth may be considered only as a mitigating factor in sentencing and cannot support an aggravating factor."[239]

The OPD further argued that holding youthful misconduct against people seeking parole is particularly inappropriate given neuroscientific research that demonstrates delayed cognitive development for people who are incarcerated. Thus, the Board's reliance on a person's prison disciplinary infractions from the period prior to the age of maturity—which is approximately age 25, or later for those who have been incarcerated prior to age

[237] 53 N.J.R. 250(c) (Feb. 16, 2021) (adopting N.J.A.C. 10A:71-3.11(b)(24)).

[238] Ibid.

[239] State v. Rivera, 249 N.J. 285, 303 (2021).

25—would also inappropriately penalize the person seeking parole for conduct that is the product of youthful immaturity, and not an indication of future risk of recidivism or noncompliance with parole conditions. The OPD thus requested that the Board revise its rules to limit the weight placed on disciplinary infractions incurred before the age of maturity and to refrain from using lack of growth and maturity as a youth as an aggravating factor.

The Parole Board rejected this proposal, asserting in part that the OPD had not identified a case in which it erred in this way. However, the Appellate Division's recent decision in Kiett v. N.J. State Parole Bd.[240] shows exactly how the Board improperly denies parole based on youth. The Appellate Division reversed the Board's denial of parole in part because it "focused on the circumstances of the crime" and did not consider "Kiett's youth at the time he committed the crime and his subsequent growth and maturity during his incarceration."[241] The court explained that "youth must be considered as a relevant factor in determining whether the Board abused its discretion in denying parole" and found error where "nothing in the Board's decision suggests that the Board considered in any meaningful way Kiett's youth when he committed the murder and his subsequent growth and maturity during his incarceration."[242]

[240] 2023 WL 4571436.

[241] Id. at *15.

[242] Ibid.

The OPD is now appealing the Parole Board's denial of its proposed rulemaking in the Appellate Division.

C. Withholding of Confidential Records

The OPD requested that the Parole Board modify its rules governing the confidentiality of records. As explained above, Part II.A, the Board's rules classify a broad swath of materials, including psychological assessments, as "confidential," and then refuse to provide any of these confidential materials to people while they are seeking parole.

The OPD argued that this per se rule withholding confidential materials is inconsistent with the Appellate Division's decision in Thompson v. N.J. State Parole Bd.[243] That opinion established "a limited right to disclosure of prison records in parole proceedings," under which materials could be withheld, but only when confidentiality is required to ensure "the safe operation of a prison" and to avoid "[d]isclosures threatening to institutional security," such as "evaluations and anonymous reports of fellow prisoners and of custodial staff members," or to avoid "[d]isclosure of therapeutic matters . . . if it would interfere with prisoner rehabilitation and relationships with therapists."[244]

Although the rules upheld in Thomspon achieved that goal, the Board's current rules are different. Previously, the Board's rules required "disclosure of adverse material considered at a hearing," subject to the following exceptions: (1) "such material is not classified as confidential by the Department"; (2) "disclosure would not threaten the life or

[243] 210 N.J. Super. 107 (App. Div. 1986).

[244] Id. at 121, 123.

physical safety of any person"; (3) "disclosure would not . . . interfere with law enforcement proceedings"; and (4) "disclosure would not . . . result in the disclosure of professional diagnostic evaluations which would adversely affect the inmate's rehabilitation or the future delivery of rehabilitative services."[245] Those rules changed over time, partially to make sure that an incarcerated person's private information could not be accessed by the public under the Open Public Records Act (OPRA). The current rules therefore do not contain the limiting provisions of the prior rules that restrict a parole seeker's access to confidential materials only in particular cases that affect institutional security or rehabilitation; instead, under the current rules, all confidential materials are not provided to a person when they are seeking parole.[246]

The OPD therefore requested that the Parole Board revise its rules to align with Thompson's requirements. Instead, the Board rejected that proposal, insisting that its current regulations are consistent with Thompson. In part, the Board relied upon the appellate procedure established in Thompson, through which the Appellate Division reviews the Board's decision to classify materials as confidential and then discloses them if it finds that the Board's classification was incorrect.[247] But the due process right established at Thompson does not only apply on appeal; instead, the law provides for "a

[245] Id. at 118 (quoting then-operative language of N.J.A.C. 10A:71-2.1(c)).

[246] N.J.A.C. 10A:71-2.2(c).

[247] Thompson, 210 N.J. Super. at 126.

limited right to disclosure of prison records in parole proceedings."[248] The Board also relies on its practice of providing psychological assessments to counsel pursuant to a consent protective order that prohibits the lawyers from sharing the assessments with their clients. But Thompson also rejected a proposed rule of sharing confidential documents with attorneys but not their clients because "counsel cannot effectively evaluate materials purporting to report on the client without consulting the client about them."[249]

The OPD is now appealing the denial of its proposed rule amendments in the Appellate Division.

[248] Id. at 121 (emphasis added).

[249] Id. at 125.

Part IV: Additional Legislative Steps to Improve the System of Parole Release

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

In order to achieve lasting and expansive changes in the parole process, legislative action is necessary. Recently, with support from all interested parties, the New Jersey Legislature passed a bill to direct the OPD to establish a unit to provide legal representation to parolees charged with a violation of parole or under consideration for revocation of parole.[250] This is a significant step in providing adequate representation for parolees in their parole revocation hearings and mirrors the ability of juveniles to have counsel during parole revocation hearings.[251] There is a further template for reform to parole for adult applicants and parolees: 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."[252] There are also more frequent reviews of the parolee's status—at least every three months—which are required to be sent to the parolee's counsel.[253] Any post-incarceration term of parole is limited to six months,

[250] 2022 N.J. S.B. 3772 (2023).

[251] See N.J.S.A. 2A:4A-44(e).

[252] N.J.S.A. 2A:4A-44(d)(2).

[253] N.J.S.A. 2A:4A-44(d)(6).

with a possible six-month extension, and may only be imposed if "necessary to effectuate the juvenile's rehabilitation and reintegration into society."[254] 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.

A. Guarantee Applicants' Right 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 proceedings.[255] 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.

[254] N.J.S.A. 2A:4A-44(d)(5).

[255] See supra, Part II.B.1; notes 28 and 29 and accompanying text.

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.

B. Expand the OPD Enabling Statute

When parole applicants have the right to counsel, enforcing that right requires assigned representation of indigent applicants. As noted above, recently the Legislature passed legislation creating a unit within the OPD to handle parole violation and revocation hearings. The OPD should advocate for additional legislation to explicitly provide for OPD involvement at all levels of the parole process, including release.

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 the release process. The OPD enabling statute does not disallow representation of parole applicants before the Parole Board, and the annual appropriations bill now allows funds for OPD to directly represent parolees facing revocation before the Board. To ensure representation at the parole release stage, the OPD should advocate for additional funding for representation at all stages of the parole process, and for an explicit mandate to represent applicants in parole release proceedings.

C. Guarantee Applicants' Right 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."[256] 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,

[256] Fisher v. Bd. of Parole & Post-Prison Supervision, 245 P.3d 671, 675 (Ore. App. 2010).

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.[257] Thus 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.[258] Guaranteeing an applicant's right to view confidential materials would help to address these concerns.

D. 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

[257] See, e.g., Brent L. Smith & Kathryn Morgan, The Effect of Victim Participation on Parole Decisions: Results from a Southeastern State, 8 Crim. Just. Pol'y Rev. 57, 65 (1997); see also Julian V. Roberts, Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole, 38 Crime & Just. 347, 395-97 (2009).

[258] N.J.A.C. 10A:71-2.2(a)(10); Roberts, supra note 257, at 393.

prosecutors.[259] The OPD should advocate for a notice requirement for the applicant's attorney and family.

[259] 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).

Part V: Recent Developments in Parole Revocation

A. Administrative and Legislative Changes Impacting OPD Involvement in Parole Revocation Proceedings

1. OPD Representation in Juvenile Parole Revocation Proceedings

On December 20, 2021, the Administrative Code was amended to provide for OPD representation in juvenile parole revocation proceedings.[260] Specifically, N.J.A.C. 13:96-4.7 states that "[i]n all cases, the juvenile parolee shall be represented by counsel. Such counsel shall include, but shall not be limited to, private counsel at the juvenile parolee's expense or a public defender from the New Jersey Office of the Public Defender."[261] As a result of this amendment, OPD juvenile defenders are now representing juveniles in parole revocation proceedings.

2. OPD Representation in Adult Parole Revocation Proceedings

The Criminal Sentencing and Disposition Commission (CSDC) unanimously recommended legislation expanding the OPD enabling statute thereby ensuring that parolees are represented by competent and experienced counsel during the revocation process, not inexperienced pro bono counsel assigned from the so-called "Madden list."[262] The CSDC recognized that the practice of assigning appointed counsel to represent

[260] N.J.A.C. 13:96-4.7.

[261] Ibid.

[262] Madden v. Delran, 126 N.J. 591 (1992) (requiring Assignment Judges to assign pro bono counsel to indigent persons in cases where there is a right to counsel but no legislative provision requiring appointment of a public defender).

indigent parolees at revocation hearings provides insufficient protections for parolees. Indeed, it was clear to the CSDC that assigned Madden counsel are ill-equipped to offer competent representation for parolees who are faced with the "grievous loss" of parole revocation.[263]

The March 2023 CSDC Report states:

> There are compelling reasons underlying this recommendation. Individuals facing parole revocation have substantial liberty interests at stake. Reducing the number of unrepresented parolees in revocation hearings will undoubtedly result in a fairer process with a greater consistency of outcomes. Counsel assigned from the Madden list rarely, if ever, have experience handling criminal matters in general, much less parole matters specifically. That lack of experience often manifests itself in inadequate representation for the parolees. Parole revocation hearings involve significant strategy decisions depending, among other things, on the nature of the alleged parole violation, the underlying facts related to whatever the parolee has allegedly done, and the availability of mitigating evidence. Representation by OPD attorneys with expertise in these matters will ensure that the process is a fair one that balances the interests of the parolee against public safety concerns. It will also ensure that fewer parolees will decide to represent themselves solely because of the substantial delay in Madden cases. Assignment of counsel by the OPD will be immediate and the attorneys will be skilled in the work.
>
> Another factor worth consideration is that the OPD will almost certainly be representing the parolee if the alleged violation is based on a new criminal charge brought against him while on parole. Access to information about the facts and circumstances surrounding that new charge can be critical to effective representation in the parole revocation hearing. Unlike Madden attorneys, OPD attorneys will have that

[263] Criminal Sentencing and Disposition Commission Report (March 2023), available at: https://pub.njleg.gov/publications/reports/CSDC Third Report.pdf [hereinafter CSDC Report].

> important information through the discovery process in the criminal case.[264]

Following the CSDC recommendation, with the support of the Public Defender, the New Jersey State Bar Association, the Attorney General, and the Parole Board, on June 30, 2023, S-3772 was passed and signed into law on September 12, 2023.[265] The legislation supplements Chapter 158A of Title 2A and states: "There is hereby established, within the Office of the Public Defender, a unit which shall provide for the legal representation of any person on parole from a correctional institution of this State or otherwise under the parole supervision of this State who is charged with violation of that parole or who is under consideration for revocation of parole."

As a result of this legislation, on October 2, 2023, through the Parole Revocation Defense Unit (PRDU), the OPD commenced representing parolees at revocation hearings for the first time since 1991. Significantly, the parole restriction on State funds, which has been included in the annual appropriations bill since 1991, has been deleted.[266]

B. PRDU Data from October 2, 2023 through January 10, 2024

As set forth above, on October 2, 2023, the OPD's newly created PRDU commenced representation of parolees in revocation proceedings. From October 2, 2023,

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[264] Id. at 24-25.

[265] 2022 N.J. S.B. 3772 (2023); L. 2023, c. 157.

[266] See L. 2023, c. 74, available at: https://pub.njleg.state.nj.us/Bills/2022/AL23/74_.PDF (pg. 225, deleting language preventing allocation of funds for legal representation of persons before the Parole Board).

through January 10, 2024, the PRDU opened 182 cases. Of these 182 cases, 122 were based upon technical violations (67%) and 60 were based upon new arrests (33%).[267]

A review of the PRDU data, special conditions of parole, and the standard conditions of parole, leads to the inescapable conclusion that over-conditioning of parolees is a substantial issue in New Jersey. The total number of pure technical violations (67%) perpetuates the carceral state, mass supervision, and systemic racism. Decades ago, a parole expert noted that "parole conditions should be reduced to an indispensable minimum; their boundless extension breeds the parole violator."[268] This remains true today. For example, in 2015, the former commissioner of probation in Massachusetts, Ronald Corbett, published a research paper where he conducted a survey of general and special conditions to which probationers throughout the United States must adhere:

> He found an alarming growth in the number of conditions placed on people, averaging eighteen to twenty conditions per person, regardless of their offenses and the individual circumstances of their lives. The mushrooming of often irrelevant and burdensome rules had turned probation officers' jobs into a game of cat and mouse in which the focus was increasingly on surveillance and apprehension rather than assistance and guidance—what we in the business call "trail 'em, nail 'em, and jail 'em" supervision. One probation officer put it succinctly, "Most of our violations are technical . . . I mean, if you can't write up a report, and cite at least a technical violation, you're not really struggling very hard, because there

[267] The new arrest cases are actually hybrid cases because every rearrest is accompanied by technical violations.

[268] Hans von Hentig, Degrees of Parole Violation and Graded Remedial Measures, 33 J. Crim. L. & Criminology 363, 370 (1943).

> are so many conditions. There's got to be something that the guy didn't do right, right?"[269]

The proliferation of over-conditioning in the parole context is no different than the probation context. "This maze of conditions, each coming with the threat of revocation and loss of liberty, takes a heavy toll on those on probation or parole."[270] As a result, many people, especially Blacks, sometimes choose "incarceration over probation" or parole.[271]

The rigidity of the present parole system in New Jersey, with an emphasis on over-conditioning and technical violations, must be reimagined. More must be done to keep parolees in the community unless they pose a legitimate and serious risk to public safety. The statistics are staggering. "In 1972, the year Morrissey [v. Brewer, 408 U.S. 471 (1972), which granted due process protections to people facing parole revocation proceedings,] was decided, a total of 196,092 people were incarcerated in U.S. prisons. In 2017, 265,605 people entered U.S. prisons solely owing to violations of probation and parole."[272] Therefore, it is not a far stretch to conclude, based upon the PRDU data, that over-conditioning and technical parole violations are far too common in New Jersey, contributing to mass incarceration. This is not surprising given that since 2001 New Jersey sworn uniformed parole officers, all of whom graduated from the Police Academy,

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[269] Vincent Schiraldi, Mass Supervision: Probation, Parole, and the Illusion of Safety and Freedom 78 (2023) (internal citation omitted).

[270] Id. at 80.

[271] Id. at 80.

[272] Id. at 67.

"supervise and monitor parolees."[273] This is a punitive law enforcement supervision model, not a rehabilitative model. Indeed, parole officers in New Jersey wear bullet proof vests and carry weapons.[274]

The DOC Cohort data corroborates the preliminary data of the PRDU that technical parole violations are common in New Jersey:

> The 3-year rates of rearrest, reconviction, and reincarceration declined between 2007 and 2017. Approximately 29.2% of all incarcerated persons released in 2017 were reincarcerated within three years. This represents the lowest reincarceration rate within the past decade. Of all releases, 13.0% were reincarcerated for a technical parole violation and 2.4% were reincarcerated for a new offense. For those persons who were readmitted to a DOC facility within three years of release, nearly 23.0% were the result of a new commitment and 64.0% were due to technical parole violations (TPVs). New commitments decreased 30.2% between 2013 and 2017 while readmissions for TPV's increased nearly 20.0%.[275]

Data on alleged parole violators' race and ethnicity compiled by the PRDU from October 2, 2023, through January 10, 2024, is as follows: Sixty-three percent (63%) of PRDU clients are Black, twenty-one percent (21%) are White, fifteen percent (15%) are Hispanic, and 1% are Asian. The DOC data corroborates the data of the PRDU that parole violations perpetuate racial inequalities in New Jersey: "Fifty-nine percent (59%) of New

[273] 2017 Release Cohort Outcome Report, supra note 144, at 20.

[274] One paroled lifer at a Returning Citizens Support Group poignantly differentiated the supervision model today versus decades ago: "In the 70's my parole officer wore a 3-piece suit and caried a briefcase. Today, my parole officer wears a bullet proof vest and carries a 9-millimeter handgun."

[275] 2017 Release Cohort Outcome Report, supra note 144, at 1 (emphases added).

Jersey Department of Corrections incarcerated persons are Black, 22% White, 14% Hispanic, and 1% Asian."[276] Thus, 73% of incarcerated persons in New Jersey State Prisons are Black and Hispanic. The PRDU data highlights these disturbing statistics and reveals that 78% of parole revocation clients are Black or Hispanic, a 5% increase from the DOC data.

The DOC and PRDU data must be contextualized against the backdrop of the Sentencing Project data relied upon in the CSDC Report. The CSDC stated: "New Jersey incarcerates Black people at twelve-and-a-half times the white incarceration rate—the highest disparity of any state in the nation—and incarcerates Hispanic people at double the white incarceration rate. Whether intended, or not intended, the inequities that we have described cry out for reform."[277] The PRDU data follows these disturbing statistics, leading to the inescapable conclusion that parole revocation cases are a contributor to mass incarceration and perpetuate racial inequities in the New Jersey State Prison population.

C. Legal Challenges to the Parole Board's Uniform Practice of Detention Pending Revocation

In the 182 cases assigned to the PRDU, every parolee has been incarcerated following the execution of the parole warrant, regardless of dangerousness to public safety. This sweeping pattern and practice of the Parole Board is unconstitutional. As indicated, 67% of PRDU clients are charged with technical violations. Clients charged with technical

[276] New Jersey Department of Corrections, Population Characteristics Report, Highlights (2023), available at: https://www.nj.gov/corrections/pdf/offender_statistics/2023/Highlights_2023.pdf.

[277] CSDC Report, supra note 263, at 20.

violations, and clients charged with violating parole based upon a rearrest, should be incarcerated pending a final determining only if a neutral hearing officer determines that the person "poses a danger to the public safety or . . . may not appear at the revocation hearing."[278] But parolees remain incarcerated even where that standard is clearly not met—for example, in cases where they are released from detention by a Superior Court Judge on the rearrest case, where the Court has ordered, based on clear and convincing evidence, that the parolee should be released because they are not a danger.[279] The PRDU has argued that this is in derogation of due process under the Fourteenth Amendment of the United States Constitution, Article I, Paragraph 1 of the New Jersey Constitution, and violates the doctrine of fundamental fairness articulated in Doe v. Poritz.[280]

The United States Supreme Court in Morrissey v. Brewer,[281] established due process requirements in parole revocation proceedings. Not squarely addressed in the majority opinion was whether a parolee, on a technical violation, must be imprisoned during the pendency of revocation proceedings. Justice Douglas addressed this issue in his partial dissent, stating that "[i]f a violation of a condition of parole is involved, rather than the commission of a new offense, there should not be an arrest of the parolee and his return to the prison or to a local jail. Rather, notice of the alleged violation should be given to the

[278] See N.J.A.C. 10A:71-7.9(c)(2).

[279] See State v. Robinson, 229 N.J. 44, 55 (2017) (describing N.J.S.A. 2A:162-15).

[280] 142 N.J. 1 (1995).

[281] 408 U.S. 471 (1972)

parolee and a time set for a hearing."[282] Justice Douglas cited with approval Hyser v. Reed[283]: "Where serious violations of parole have been committed, the parolee will have been arrested by local or federal authorities on charges stemming from those violations. Where the violation of parole is not serious, no reason appears why he should be incarcerated before [the] hearing."[284] Under this analysis, when the alleged violations are not serious, and the parolee is not a danger to public safety, or a risk of flight, it is a violation of due process to remain in custody pending the outcome of the revocation proceedings.[285]

The New Jersey Administrative Code[286] provides greater rights to parolees than outlined by the majority opinion in Morrissey, stating: "The parole officer shall request that a parole violation warrant be issued when the parole officer has probable cause to believe that the parolee has seriously or persistently violated parole conditions by conduct other than new criminal charges and where evidence indicates that the parolee poses a danger to the public safety or may not appear at revocation proceedings." A blanket statement of dangerousness by a parole officer, without a specific finding by a neutral hearing officer, is insufficient to deprive a parolee of liberty pending a final revocation hearing.

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[282] Id. at 497 (Douglas, J., dissenting in part).

[283] 318 F.2d 225 (D.C. Cir. 1963).

[284] Id. at 262 (Wright, J. concurring in part and dissenting in part).

[285] See N.J. Const. art. I, ¶ 1.

[286] N.J.A.C. 10A:71-7.2(a).

Further, the New Jersey Administrative Code does not define what "evidence" is sufficient to constitute "a danger to the public safety" and what "evidence" is sufficient to determine the risk of non-appearance at revocation proceedings. Simply stated, there are no standards in the Code setting forth what constitutes dangerousness to warrant the incarceration of parolees during the pendency of revocation proceedings. This is critical because the Code makes a distinction between technical violations and violations based upon a new arrest. Subsection (a) of N.J.A.C. 10A:71-7.2 only applies to "conduct other than new criminal charges." Implicit in this provision is a presumption that in technical violation cases, the parolee cannot be incarcerated during the pendency of revocation proceedings. Therefore, at least in technical violation cases, absent a finding of dangerousness, "notice of the alleged violation should be given to the parolee and a time set for a hearing."[287]

Moreover, detaining all parolees during the pendency of their revocation proceedings violates the doctrine of fundamental fairness, which is an integral part of the due process guarantee of Article I, Paragraph 1 of the New Jersey Constitution. As recently noted by the Appellate Division:

> The fundamental fairness doctrine is an integral part of the due process guarantee of Article I, Paragraph 1 of the New Jersey Constitution, which protects against arbitrary and unjust governmental action." State v. Njango, 247 N.J. 533 (2021); accord Jamgochian v. N.J. State Parole Bd., 196 N.J. 222, 239 (2008). "The doctrine serves as 'an augmentation of existing constitutional protections or as an independent source of protection against state action.'" State v. Melvin, 248 N.J. 321

[287] Morrissey, 408 U.S. at 497 (Douglas, J., dissenting in part).

> (2021) (quoting Doe v. Poritz, 142 N.J. 1, 108 (1995)). It advances "fairness and fulfillment of reasonable expectations" relating to "constitutional and common law goals." Njango, 247 N.J. at 549 (quoting State v. Vega-Larregui, 246 N.J. 94, 132, (2021)).[288]

Thus, the PRDU has taken the position that governmental action by parole authorities that deprives a parolee of liberty without a finding by a neutral hearing officer of dangerousness is arbitrary, unjust, and in derogation of the fundamental fairness doctrine. Simply stated, it is unconscionable that every parolee is detained pending final revocation.

D. Issues Related to Compliance Credits in Adult Parole Revocation Cases

Under N.J.S.A. 30:4-123.55e, eligible parolees may earn one day of compliance credit for every six days they are subject to supervision in the community. These compliance credits are forfeited upon revocation of parole. Forfeiture of compliance credits could result in a significant adjustment to a parolee's maximum release date.

The statute also permits the forfeiture of compliance credits awarded for conduct that violated supervision and resulted in the initiation of parole revocation proceedings but did not lead to the revocation of parole. Parole and the Department of Corrections have taken the position that the initiation of parole revocation proceedings warrants forfeiture of all compliance credits, even in the absence of probable cause that there was a serious or persistent violation. Upon the completion of a preliminary hearing, the maximum date is

[288] State v. Thomas, 470 N.J. Super. 167, 200 (App. Div. 2022).

adjusted to reflect the forfeiture of compliance credits. To date, parole has failed to limit forfeiture to credits awarded during the timeframe the alleged violation occurred. Forfeiture of compliance credits in the absence of a finding by clear and convincing evidence that a violation occurred, including forfeiture of compliance credits earned prior to the alleged violation, is arbitrary, capricious, and unreasonable and raises due process concerns under Article 1, Paragraph 1 of the New Jersey Constitution and concepts of fundamental fairness.

Currently there are no regulations, standards, or guidelines for the forfeiture of compliance credits. There have been no Appellate Division cases addressing the issuance or forfeiture of credits. These issues are ripe for further administrative appeal, appellate review, and/or legislative action to address ambiguities in N.J.S.A. 30:4-123.55e.

E. Discharge from Lifetime Parole under the 1979 Parole Act

One of the most pressing issues for returning citizens is that despite exemplary behavior while on parole, early discharge from a lifetime of parole is rare. Any individual who received a life sentence in their criminal case, and is later released on parole, is subjected to lifetime parole unless granted discharge from parole. This issue most frequently arises for two sets of individuals. The first is those who were convicted of murder and sentenced to life imprisonment for conduct occurring before the passage of the Code of Criminal Justice in 1979; those individuals generally became eligible for parole after 25 years.[289] The second set of individuals are those who were convicted of murder

[289] See N.J.S.A. 30:4-123.51(b).

and sentenced to life imprisonment for acts prior to the 2002 amendments to the No Early Release Act (NERA), for whom the courts ruled that the minimum term of parole ineligibility (except for certain circumstances requiring imposition of lifetime imprisonment without parole) was 30 years.[290]

The statute governing discharge under the Parole Act, N.J.S.A. 30:4-123.66, and the administrative code provision governing discharge, N.J.A.C. 10A:71-6.9, do not adequately articulate a standard for parole discharge, implicating both procedural and substantive due process concerns under the Fourteenth Amendment of the United States Constitution; Article 1, ¶ 1 of our State Constitution; and the fundamental fairness doctrine.

N.J.S.A. 30:4-123.66 provides:

> Except as otherwise provided in subsection c. of section 2 of P.L.1994, c. 130 (C.2C:43-6.4), the appropriate board panel may give any parolee a complete discharge from parole prior to the expiration of the full maximum term for which he was sentenced or as authorized by the disposition, provided that such parolee has made a satisfactory adjustment while on parole, provided that continued supervision is not required, and provided the parolee has made full payment of any fine or restitution.

The Board's regulation regarding parole discharge, N.J.A.C. 10A:71-6.9 provides:

> (a) The appropriate Board panel may grant any parolee a complete discharge from parole prior to the expiration of the maximum term for which he or she was sentenced, provided that:

[290] See State v. Manzie, 335 N.J. Super. 267 (App. Div. 2000), aff'd by an equally divided court, 168 N.J. 113 (2001). In response to Manzie, the Legislature amended NERA such that a person sentenced to life imprisonment for murder must serve at least 63.75 years (85% of a 75-year sentence) before being eligible for parole. L. 2001, c. 129, § 1; N.J.S.A. 2C:43-7.2.

> 1. Such parolee has made a satisfactory adjustment while on parole; and
>
> 2. Continued supervision is not required;
>
> 3. The parolee has made full payment of any fine or restitution and the parolee has made full payment or, in good faith, established a satisfactory payment schedule for any assessment, penalty, or lab fee; or
>
> 4. In the opinion of the Board panel, continued supervision is not warranted or appropriate based upon a review of the facts and circumstances considered pursuant to N.J.A.C. 10A:71-7.10, 7.11, 7.12, 7.16, and 7.17.

N.J.A.C. 10A:71-6.9(b)(1) requires that in order to be discharged from a lifetime of parole, seven years must elapse, and the parolee must be on "advanced supervision status for the final two years." Noteworthy, "advanced supervision" is not defined in the statute or Administrative Code, resulting in unfettered Board discretion. Consequently, parolees do not have guidance on the specific requirements for discharge.[291] Furthermore, it is not clear whether a parolee can move for early discharge or if that process is entirely within the jurisdiction of the district supervisor. Indeed, neither N.J.S.A. 30:4-123.66 nor N.J.A.C. 10A:71-6.9 provide guidance regarding the procedural safeguards necessary at discharge hearings, such as the evidence required, the extent to which favorable evidence must be

[291] In one appeal, the Board indicated the existence of a "Division of Parole Administrative Manual" that contains "internal procedures governing early discharge from parole." The Board refused to disclose the manual to the person seeking early discharge, instead claiming that the manual was "deemed confidential." The Appellate Division, in an unpublished opinion, criticized the Board for its "cursory reasoning" in denying disclosure of the manual and said that it "should have provided further explanation as to how the release of the manual would jeopardize safety or compromise investigations." However, the court declined to order disclosure of the manual in that case due to "the overwhelming reasons for denying parole discharge." Thomas v. N.J. State Parole Bd., 2018 WL 1748262 (App. Div. Apr. 12, 2018).

considered, who is mandated to testify, and the protocol for release of documents designated as confidential.[292]

Significantly, there are no published cases that interpret N.J.S.A. 30:4-123.66 or N.J.A.C. 10A:71-6.9. In addition, there are no published cases that address the important constitutional issues implicated with early discharge. This is unfortunate given that a person on parole "at all times remain[s] in the legal custody of the Commissioner of Corrections,"[293] and the United States Supreme Court and New Jersey Supreme Court have consistently held that parole constitutes punishment and a continuation of the underlying sentence.[294]

There are three unpublished cases which address a parolee's eligibility for early discharge.[295] One of them, Nelson, is particularly instructive. There, the Board conceded,

[292] "A decision to discharge an adult parolee serving a sentence for murder shall be rendered by the Board. And the Board may require an adult parolee to appear for an interview before the Board prior to a decision being rendered." N.J.A.C. 10A:71-6.9(h).

[293] N.J.S.A. 30:4-123.59(a).

[294] See State v. Franklin, 175 N.J. 456, 470 (2003) ("Parole is the conditional release of an inmate from confinement for conviction of an offense, subject to the terms set forth by the New Jersey State Parole Board."); State v. Riley, 219 N.J. 270, 288 (2014) ("Community supervision for life and its corollary parole supervision for life are merely indefinite forms of parole" and are classified as punishment.); State v. Schubert, 212 N.J. 295, 308 (2012) (parole supervision for life "is punitive rather than remedial at its core."); Anderson v. Corall, 263 U.S. 193, 196 (1923) (Parole "is, in legal effect, imprisonment.").

[295] Muhammad v. N.J. State Parole Bd., 2020 WL 4459419 (App. Div. Aug. 4, 2020); Thomas v. N.J. State Parole Bd., 2018 WL 1748262 (App. Div. Apr. 12, 2018); Nelson v. N.J. State Parole Bd., 2012 WL 2865760 (App. Div. July 13, 2012).

relying upon Greenholtz,[296] that "any liberty interest in early discharge from parole entitles an inmate to due process protection of fair consideration for such relief."[297] Significantly, Mr. Nelson "challenge[d] the absence of any rules or regulations to guide the board's actions when discharge from parole is sought, other than N.J..S.A. 30.4-123.66 and N.J.A.C 10A:71-6.9." The Appellate Division stated that Mr. Nelson had "accurately note[d] the inapplicability of the regulations regarding parole revocation set forth in N.J.A.C. 10A:71-6.9(a)4 as guidance for a parole discharge decision."[298] Nelson further explains that subsection (a)4 of the regulation is problematic because the cross-references refer to procedures in parole revocation proceedings.[299] The court "suggest[ed]" that the Board "reexamine" subsection (a)4.[300] Needless to say, no substantive revisions have been made in the nearly twelve years since Nelson was decided.

There is currently an appeal pending in Antoine D'To Hayes v. New Jersey State Parole Board (A-002630-22), in which Mr. Hayes is challenging the Board's decision to deny him discharge from parole. That case may give the Appellate Division an opportunity to address some of the issues raised in this section.

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[296] Greenholtz v. Nebraska, 442 U.S. 1, 12-16 (1979).

[297] Nelson, 2012 WL 2865760, at *7.

[298] Ibid.

[299] Ibid.

[300] Ibid.

CONCLUSION

The Parole Project is at the forefront in promoting modern due process rights in the parole process. Prior to the commencement of the Parole Project, the broad discretion of the Board was seldom questioned, creating a system with nominal oversight, minimal due process, a lack of fundamental fairness, and prejudice to indigent pro se litigants.

Much remains to be done legislatively, administratively (through the rulemaking process), and through the appellate process. However, as a result of the unrelenting efforts of the Parole Project, sunlight is beginning to penetrate this fundamentally flawed system. Several recent decisions by the Appellate Division and our Supreme Court, and OPD efforts in the administrative rulemaking process, and the parole revocation process, have placed the Board on notice that business as usual is no longer acceptable.

As outlined in this Report, further judicial, administrative, and legislative changes are required to strengthen due process protections in the parole process and to truly reform the broken parole system in New Jersey.