

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000534-24

SHAKIR KELLY,	:	<u>CIVIL ACTION</u>
Plaintiff-Appellant,	:	On Appeal from a Final Decision of the New Jersey State Parole Board
v.	:	
NEW JERSEY STATE PAROLE BOARD,	:	
	:	
Defendant-Respondent.	:	
	:	

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

	<u>PAGE NOS</u>
PRELIMINARY STATEMENT.....	1
PROCEDURAL HISTORY AND STATEMENT OF FACTS	3
LEGAL ARGUMENT	9

POINT I

THE PAROLE BOARD APPLIED THE WRONG LEGAL STANDARD IN ITS FINAL AGENCY DECISION WHEN IT FOUND THAT <i>RES JUDICATA</i> PRECLUDED MR. KELLY FROM LITIGATING THE CAUSE OF HIS ADMINISTRATIVE DISCHARGE FROM THE VOLUNTEERS OF AMERICA ADDICTION PROGRAM.....	9
A. The principle of <i>res judicata</i> —which bars the relitigation of claims or issues that have been finally adjudicated by a court—does not apply in a parole revocation hearing.....	17
a. Factor (1) does not apply.	19
b. Factor (2) also does not apply.	20
c. Factor (3) does not apply.	20
d. Factor (4) does not apply.	20
e. Factor (5) does not apply.	21

TABLE OF CONTENTS (Cont'd.)

PAGE NOS.

POINT II

MR. KELLY DID NOT SERIOUSLY OR PERSISTENTLY VIOLATE THE CONDITIONS OF HIS PAROLE AND REVOCATION WAS NOT DESIRABLE, THUS THE FINAL AGENCY DECISION OF THE PAROLE BOARD MUST BE REVERSED.....	22
CONCLUSION	25

INDEX TO APPENDIX

PAGE NOS

Judgment of Conviction, Indictment No. 19-08-02195, dated June 4, 2021	A001
Conditions of Supervision- Mandatory Supervision, dated May 2, 2023	A007
Parole Eligibility Calculation, dated August 3, 2021	A010
Decision Sheet, dated April 21, 2023	A012
Notice of Imposition of Special Condition, dated October 6, 2023	A013
Administrative Appeal to Full Parole Board, dated July 18, 2024.....	A017
Correspondence from Molly Logan, of the Parole Board Legal Support Unit to Thomas McQuillan, Esq, Acknowledging receipt of Administrative Appeal, dated July 18, 2024.....	A022
Incident Reports, dated March 18, 2024;.....	A023
Shakir Kelly Investigatory Statement, dated March 7, 2024	A024
Notice of Service - Notice of Probable Cause Hearing with attachments, dated March 21, 2024	A026
Notice of Decision, Mandatory Supervision, dated April 24, 2024	A030
Decision Sheet, dated September 25, 2024;.....	A036
Notice of Final Agency Decision, dated September 25, 2024	A037
<u>Rivera v. New Jersey State Parole</u> , Superior Court of New Jersey, Appellate Division. July 18, 2023, 2023 WL 456768	A041

TABLE OF AUTHORITIES

PAGE NOS.

Cases

<u>Acoli v. New Jersey State Parole Bd.</u> , 250 N.J. 431 (2022).....	12
<u>Berta v. New Jersey State Parole Bd.</u> , 473 N.J. Super. 284, 303 (App. Div. 2022).....	12
<u>Brookshire Equities, LLC v. Montaquiza</u> , 346 N.J. Super. 310; 787 A.2d 942 (2002).....	17
<u>California v. Green</u> , 399 U.S. 149 (1970).....	15
<u>In re Taylor</u> , 158 N.J. 644 (1999)	24
<u>In re Vicinage 13 of New Jersey Superior Ct.</u> , 454 N.J. Super. 330, 341 (App. Div. 2018)	19
<u>Lilly v. Virginia</u> , 527 U.S. 116 (1999).....	15
<u>McGowan v. N.J. State Parole Bd.</u> , 347 N.J. Super. 544 (App. Div. 2002).....	24
<u>Morrissey v. Brewer</u> , 408 U.S. 471 (1972).....	passim
<u>N.J. Div. of Youth & Family Servs. v. R.D.</u> , 207 N.J. 88 23 A.3d 352 (2011).....	19, 20, 21
<u>Olivieri v. Y.M.F. Carpet, Inc.</u> , 186 N.J. 511 A.2d 1003 (2006)	19, 20, 21
<u>Perry v. N.J. State Parole Bd.</u> , 459 N.J. Super. 186 (App. Div. 2019).....	12
<u>Pointer v. Texas</u> , 380 U.S. 400 (1965).....	15
<u>Rivera v. New Jersey State Parole</u> , Superior Court of New Jersey, Appellate Division. July 18, 2023 ..	iii
<u>Rivera v. New Jersey State Parole</u> , Superior Court of New Jersey, Appellate Division. July 18, 2023	12
<u>State v. Gonzalez</u> , 75 N.J. 181, 186 A.2d 1128 (1977)	18

<u>State v. Hester</u> , 233 N.J. 381 (2018).....	10
<u>State v. Njango</u> , 247 N.J. 533 (2021).....	10
<u>State v. Riley</u> , 219 N.J. 270 (2014).....	10
<u>White v. New Jersey State Parole Bd.</u> , 136 N.J. Super. 360 (App. Div. 1975).....	14

Statutes

N.J.A.C. 10A:71-7.12(c)(1)	24
N.J.A.C. 10A:71-7.12(c)(2)	24
N.J.S.A 10A:71-6.4	3
N.J.S.A. 30:4-123.60.....	24

Other Authorities

<u>Pardon and Parole</u> § 6 (1987).....	10
Parole is “[t]he conditional release of a prisoner from imprisonment before the full sentence has been served.” <u>Black’s Law Dictionary</u> , (11 th ed. 2019)	10
Vincent Schiraldi, <u>Mass Supervision: Probation, Parole, and the Illusion of Safety and Freedom</u> , at 80 (2023)	3

PRELIMINARY STATEMENT

This is an appeal of a final agency decision revoking plaintiff-appellant, Shakir Kelly's parole, which emanated from four technical violations.

The Parole Board revoked Mr. Kelly's parole, in part, for the technical violation of failing to complete the Volunteers of America Addiction Program. To be clear, Mr. Kelly did not voluntarily terminate his participation in the residential program; instead, he was discharged from the program without the ability to effectively and constitutionally challenge the allegation that he possessed contraband in derogation of the program's rules and regulations. When Mr. Kelly learned of this allegation, he promptly denied it.

In their Final Agency Decision, which is the subject of this appeal, the State Parole Board claims that "The determination of the VOA to discharge Mr. Kelly from the program is *res judicata*, and the Board is not intended to relitigate the cause of Mr. Kelly's disciplinary discharge from the program." As will be explained in detail below, this finding violated Mr. Kelly's rights to due process under the Fourteenth Amendment.

The Parole Board has nearly unfettered power to remove parolees from the community based upon an alleged violation of a technical parole condition. Here, the only obstacle between Mr. Kelly and continued incarceration was a revocation hearing that required due process, as established decades ago by the United States

Supreme Court. This includes the right to counsel, the right to know what evidence will be utilized by Parole, the right of confrontation, and the right to present evidence at a revocation hearing.

PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

Mr. Kelly is serving a term of Mandatory Parole Supervision. (1T 7-12 to 13) Because parole supervision is a continuation of a sentence, Parole can control nearly every aspect of Mr. Kelly's life and punish him for conduct deemed undesirable, whether or not he has engaged in illegality. N.J.S.A 10A:71-6.4.² As a condition of parole, Mr. Kelly was ordered to complete the Volunteers of America Addiction Program (VOA) after he admitted to using cocaine and heroin on March 7, 2024. (1T 9-20 to 10-13) On March 19, 2023, Mr. Kelly was disciplinarily discharged from the VOA. (1T 10-20 to 24) Parole issued a parole violation warrant for Mr. Kelly "due to Mr. Kelly's disciplinary discharge from Liberty VOA." (1T 7-2 to 3)

At the revocation hearing, Parole alleged that Mr. Kelly violated four conditions of his parole, the first being general condition number thirteen by using a controlled dangerous substance on March 4th and 5th of 2024. (1T 11-25 to 12-18) Mr. Kelly pled guilty with an explanation to this violation. (1T 12-21) Additionally,

¹ The facts and procedural history are inextricably bound together in this matter and are offered in a combined presentation for reader ease.

² "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. The entanglements of community supervision have gotten so onerous that people sometimes choose incarceration over probation." Vincent Schiraldi, Mass Supervision: Probation, Parole, and the Illusion of Safety and Freedom, at 80 (2023).

Mr. Kelly pled guilty to violating a special condition of his parole by consuming alcohol on two occasions. (1T 14-7 to 18) Parole also alleged that Mr. Kelly violated a special condition of his parole that prohibited contact with Jimena Johnson, who was pregnant with Mr. Kelly's child. (1T 13-21 to 14-2) Mr. Kelly pled guilty with an explanation to this violation. Mr. Kelly explained that Ms. Johnson was pregnant with Mr. Kelly's first child and he texted her to see how she was doing with a myriad of pregnancy-related issues. (1T 33-4 to 34-1).

Finally, Parole alleged that Mr. Kelly violated the special condition of his parole requiring him "to comply with the conditions of and successfully complete RSAP at the Volunteers of America Addiction Treatment Program." (1T 13-4 to 6) Mr. Kelly was ordered to complete the Volunteers of America Addiction Program after he admitted to using cocaine and heroin on March 7, 2024. (1T 9-20 to 10-13) The crux of this alleged violation was the VOA's allegation that Mr. Kelly was in possession of marijuana while at the residential treatment facility. (1T 10-20 to 24). Kyle Henderson, an employee from the VOA asserted that Mr. Kelly was in possession of marijuana on March 19, 2024, which led to Mr. Kelly's discharge from the facility on March 20, 2024. (1T 18-20 to 19-25)

A Final Revocation hearing was conducted on April 12, 2024.³ Mr. Kelly elected to proceed *pro se*.⁴ In support of the violation for failure to comply with the conditions of, and successfully complete the VOA Addiction Program, Parole submitted a one-page incident report. (1T 14-23 to 15-7). The incident report, authored by VOA staff member Kyle Henderson states:

“I observed Mr. Kelly making awkward movements around his assigned bed. When entered room 207 and searched Mr. Kelly’s bed area. When discovered an eye glass case hidden under the sheet. I Mr. Henderson opened the eye glass to examine the contents and discovered a lighter, tobacco, and green nugget cannaboid[sic] substance which resembles marijuana.”⁵

Parole called VOA Staff member, Kyle Henderson as their witness at the revocation hearing. (1T 17-3 to 16) On direct examination, Mr. Henderson testified that on March 19, 2024 he “entered the room and seen another client by Mr. Kelly’s bed.” (1T 19-7 to 8) When Mr. Henderson “walked over to the bed, [he] pulled back the sheet and found an eyeglass case.” (1T 19-8 to 10) Mr. Henderson testified that when he “examined the eyeglass case it had a lighter, tobacco, and looked -- what seemed to be a nugget of green leafy substance, either marijuana or synthetic K2.” (1T 19-10 to 13)

³ Notice of Decision, Mandatory Supervision, dated April 24, 2024, A030

⁴ Notice of Decision, Mandatory Supervision, dated April 24, 2024, A031

⁵ Incident Reports, dated March 18, 2024, A023

On cross examination, conducted *pro se* by Mr. Kelly, Mr. Henderson testified that when he entered the room, he observed Mr. Kelly behind the door “with the dust pan and the broom.” (1T 20-18 to 19) Mr. Kelly asked Mr. Henderson if he observed another person by the bed where the alleged contraband was found. (1T 21-3 to 7) Mr. Henderson testified that he saw the other person by Mr. Kelly’s bed and that the eyeglass case was under the sheet.⁶ (1T 21-5 to 7) Mr. Henderson then asked everyone in the room whose bed it was. Mr. Kelly responded that the bed was his. (1T 21-11 to 13)

Continuing his cross-examination, Mr. Kelly asked Mr. Henderson “And then when you pulled down -- remember when you pulled out that -- that Ziploc bag? It had somebody else’s name and SBI Number on it. Right?” (1T 21-14 to 16) To which Mr. Henderson responded, “It did.” (1T 21-17) At this point in the hearing Parole Officer Jennifer Pfeffer immediately interjects, saying “Sir, I have to interrupt. What is this you’re talking about, a Ziploc bag?” (1T 21-22 to 24) After Parole Officer Pfeffer interrupted Mr. Kelly’s cross examination, Mr. Kelly went on to testify “I don’t wear glasses...I came there with just the clothes I had on.” (1T 22-1 to 3) Mr. Kelly went on to testify that “the Ziploc bag it had a whole person first -

⁶This information is not mentioned in the Incident Reports, dated March 18, 2024 A023

- first initial, his last name, and his SBI. He was in the room with me. I don't wear -
- I never wore glasses a day in my life.” (1T 22-9 to 12)

Hearing Officer Parsons' prepared a hearing summary which included her findings of fact.⁷ Hearing Officer Parsons sustained the violation of the MSV Special Condition pertaining to the VOA. Hearing Officer Parsons wrote in her summary that the “Subject contends that the contraband found was located in a zip lock bag that had the name and SBI number of another resident.”⁸ This finding is not grounded in the testimony since it was Kyle Henderson who testified that the contraband had another person’s name and SBI number on it. (1T 21-14 to 17) Hearing Officer Parsons recommended that Mr. Kelly’s parole be revoked.⁹

On April 24, 2024, the Parole Board panel concurred with the findings of fact made by Hearing Officer Parsons.¹⁰ The Board panel found that “on March 19, 2024, you were found to be in possession of program contraband and received a disciplinary discharge from the VOA.”¹¹ The Board panel found the violations to be serious and that revocation is desirable. Mr. Kelly’s parole was revoked and he was ordered to serve a parole eligibility term of 12 months.¹²

⁷ Notice of Decision, Mandatory Supervision, dated April 24, 2024, A035

⁸ Notice of Decision, Mandatory Supervision, dated April 24, 2024, A035

⁹ Notice of Decision, Mandatory Supervision, dated April 24, 2024, A035

¹⁰ Notice of Decision, Mandatory Supervision, dated April 24, 2024, A030

¹¹ Notice of Decision, Mandatory Supervision, dated April 24, 2024, A030

¹² Notice of Decision, Mandatory Supervision, dated April 24, 2024, A030

On July 18, 2024, Mr. Kelly, through assigned counsel, appealed the Board Panel's decision to revoke his parole. On September 25, 2024, the Parole Board issued a Final Agency Decision affirming the revocation decision. That Final Agency Decision is the subject of this appeal.

In its Final Agency Decision, the State Parole Board addresses Mr. Kelly's argument that he did not violate the special condition requiring his compliance with the VOA Addiction Program. In addressing this argument, the State Parole Board claims that "The determination of the VOA to discharge Mr. Kelly from the program is *res judicata*, and the Board is not intended to relitigate the cause of Mr. Kelly's disciplinary discharge from the program."¹³ Notably absent from the Final Agency Decision is the testimony of Mr. Henderson regarding the fact that the alleged contraband was located next to another individual inside of a Ziplock bag with someone else's name and SBI number on it.

The Office of the Public Defender filed a notice of appeal on October 24, 2024.

¹³ Notice of Final Agency Decision, dated September 25, 2024, A039

LEGAL ARGUMENT

POINT I

**THE PAROLE BOARD APPLIED THE WRONG
LEGAL STANDARD IN ITS FINAL AGENCY
DECISION WHEN IT FOUND THAT *RES
JUDICATA* PRECLUDED MR. KELLY FROM
LITIGATING THE CAUSE OF HIS
ADMINISTRATIVE DISCHARGE FROM THE
VOLUNTEERS OF AMERICA ADDICTION
PROGRAM.**

In its Final Agency Decision, the Parole Board found that “The determination of the VOA to discharge Mr. Kelly from the program is *res judicata*, and the Board is not intended to relitigate the cause of Mr. Kelly's disciplinary discharge from the program.”¹⁴ This finding violated Mr. Kelly's rights to due process under the Fourteenth Amendment.

Revocation proceedings are meaningless if Parole is allowed to assert that a violation was sustained before the revocation process begins, particularly when the parolee pleads not guilty to the alleged violation. Asserting that *res judicata* applies to an alleged violation of parole is no different than saying Mr. Kelly violated his parole before he even got to the revocation proceeding. If that stands, then the only reason for the revocation proceeding is to determine the punishment for the violation. That is not the law, and the assertion that *res judicata* applies in this

¹⁴ Notice of Final Agency Decision, dated September 25, 2024, A039

context is a violation of Mr. Kelly's rights to due process under the Fourteenth Amendment.

Over a half century ago, the United States Supreme Court made clear that when parolees are facing revocation of parole¹⁵ and reincarceration, due process rights must be provided. There is incontrovertibly a liberty interest in revocation proceedings.¹⁶ Indeed, “the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a grievous loss on the parolee and often on others. . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process . . .” Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

¹⁵ Parole is “[t]he conditional release of a prisoner from imprisonment before the full sentence has been served.” Black’s Law Dictionary, (11th ed. 2019). “The essence of parole is release from prison, before the completion of the sentence, on condition that the prisoner abide by certain rules during the balance of the sentence. Parole is not freedom.” 59 Am. Jur. 2d Pardon and Parole § 6 (1987). This bedrock principle was reaffirmed in State v. Hester, 233 N.J. 381, 393 (2018), and again two years ago, when our Supreme Court reiterated that “parole is in legal effect imprisonment and therefore punishment.” State v. Njango, 247 N.J. 533, 547 (2021). Most relevant to this case is the holding in State v. Riley, 219 N.J. 270, 288-289 (2014), where our Supreme Court affirmed that parole supervision for life is an indefinite punishment.

¹⁶ Over fifty years ago, the United States Supreme Court stated that parolees have a significant interest in maintaining their conditional liberty. Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

Considering this, the Morrissey Court ruled that at both the probable cause hearing and the final revocation hearing, parolees facing the loss of liberty have certain rights.

They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id. at 489.

The Supreme Court's mandate was designed to "assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." Morrissey v. Brewer, 408 U.S. 471, 484, 487 (1972).

Here, the Parole Board's Final Agency Decision found that the legal principle *res judicata* applied to VOA's decision to discharge Mr. Kelly from its program.¹⁷ *Res judicata* does not apply in the parole revocation context as it is the Parole Board's duty to "assure that the finding of a parole violation will be based on verified

¹⁷ Notice of Final Agency Decision, dated September 25, 2024, A039

facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." Morrissey v. Brewer, 408 U.S. 471, 484, 487 (1972).

This issue is a question of law. "Questions of law are reviewed *de novo*." Rivera v. New Jersey State Parole, Superior Court of New Jersey, Appellate Division. July 18, 2023, page 3, 2023 WL 4567681. (See Perry v. N.J. State Parole Bd., 459 N.J. Super. 186, 193-94 (App. Div. 2019)).

As noted by this Court in Berta v. New Jersey State Parole Bd., 473 N.J. Super. 284, 303 (App. Div. 2022): "although we owe substantial deference to the Board, we emphasize that our review is not perfunctory, nor is it our function ... merely to rubberstamp an agency's decision. Rather, we are constrained to engage in a careful and principled consideration of the agency record and findings." (Internal citations omitted) Moreover, as noted by Justice Albin in the seminal case of Acoli v. New Jersey State Parole Bd., 250 N.J. 431, 437 (2022): "The Parole Board's decision is entitled to deference -- but not blind deference." As further noted in Acoli:

Although courts are cautioned not to substitute their judgments for that of the Parole Board, when a parole decision is so far wide of the mark or so manifestly mistaken under the governing statutory standard, intervention is required in the interests of justice. A Parole Board decision that either violates legislative policy, is not supported by substantial evidence in the record, or could not reasonably have been made on a showing of the relevant factors cannot be sustained.

Id. at 455 (Internal citations omitted)

Here, this Court cannot blindly defer to a Final Agency Decision that was premised solely upon the VOA's decision to discharge Mr. Kelly before the revocation process had even begun. Mr. Kelly was placed in parole revocation proceedings, and the parole warrant was issued due to his administrative discharge from the VOA. (1T 6-20 to 7-3) That is the starting point for the revocation process, not the conclusion. The Parole Board cannot rely on the VOA's decision to discharge Mr. Kelly in order to sustain the violation of parole without making its own independent findings of fact. Doing so is a violation of Mr. Kelly's Fourteenth Amendment due process rights.

The Supreme Court's mandate in Morrissey was designed to "assure that the finding of a parole violation will be based on verified facts." Morrissey v. Brewer, 408 U.S. 471, 484, 487 (1972). In other words, the revocation process is designed to ensure that "the finding of a parole violation is based on verified facts." Id. Once the parole warrant is issued, Mr. Kelly has the right to challenge the allegation that he violated the conditions of his parole. The issue at the revocation hearing was supposed to be whether or not Mr. Kelly failed "to comply with the conditions of and successfully complete RSAP at the Volunteers of America Addiction Treatment Program." (1T 13-4 to 6) By deferring to the VOA's decision, the Parole Board

stripped Mr. Kelly of his right to challenge the allegation that he violated that condition of his parole.

Mr. Kelly, and others facing parole revocation, have a right grounded in due process and fundamental fairness to confront the “evidence against him; [] an opportunity to be heard in person and to present witnesses and documentary evidence; [and] the right to confront and cross-examine adverse witnesses.” Morrissey, 408 U.S. at 489. In Mr. Kelly’s case, parole trampled on those rights, resulting in the inability to utilize evidence was exculpatory, and evidence that was utilized to impeach Parole’s key witness. A decision premised upon such a denial of fundamental constitutional rights must be vacated as it cannot be based upon substantial credible evidence in the record.

The Morrissey Court’s deeply rooted holding providing for the fundamental right of confrontation in revocation proceedings is irrefutable. The “opportunity to be heard in person and to present witnesses and documentary evidence [and] the right to confront and cross-examine adverse witnesses” is an indispensable element of this meaningful opportunity “to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.” Morrissey, at 488-489; See also White v. New Jersey State Parole Bd., 136 N.J. Super. 360, 366 (App. Div. 1975). These rights are grounded in the Fourteenth Amendment of the United States Constitution. Without

question, these rights should also be recognized under Art. 1, Paragraph 1 of our State Constitution - - and protected by this Court. The right to confrontation is exercised through cross-examination, which is recognized as the most effective means of testing the State's evidence and ensuring its reliability. Lilly v. Virginia, 527 U.S. 116, 124 (1999); California v. Green, 399 U.S. 149, 158 (1970) (stating that cross-examination is the “greatest legal engine ever invented for the discovery of truth”) (quoting 5 Wigmore § 1367); See, also, Pointer v. Texas, 380 U.S. 400, 404 (1965).

Here, Mr. Kelly denied that he violated parole. He alerted Parole to the existence of evidence that he believed would demonstrate that he was not guilty of the violation. Mr. Kelly alerted Parole to the fact that there was another person sitting on his bed where the alleged contraband was found. Mr. Kelly, through his cross-examination of Kyle Henderson, alerted Parole to the previously unknown fact that there was another person’s name and SBI number on the alleged contraband. Mr. Henderson offered one version of events in his incident report. During the Final Revocation Hearing, Mr. Kelly carefully pointed out how the facts described in the incident report authored by Mr. Henderson were not the facts at all, but, rather, an inaccurate description of what occurred that left out clearly exculpatory facts that heavily favored Mr. Kelly.

If Parole is allowed to rely on an addiction program's decision to administratively discharge someone without making its own independent determination regarding whether the person failed to comply with the rules and regulations of that program, then the rights in Morrisey to confront the evidence, to confront and cross-examine adverse witnesses, and the opportunity to be heard in person and present witnesses and documentary evidence, are meaningless.

The prejudice is clear. The technical violations that Mr. Kelly pled guilty to at the hearing were not deemed serious or persistent prior to his admission to the VOA. That is why Mr. Kelly was not placed in revocation proceedings prior to his discharge from the addiction program. Mr. Kelly was sent to the VOA to address his addiction issues. Within a few days the VOA discharged Mr. Kelly before he was able to confront the allegation that he violated the program's rules. Parole is asking that legal deference be given to the VOA's discharge decision in the form of *res judicata*. That deference has been relied upon to imprison Mr. Kelly and to sustain a finding that he seriously violated the conditions of parole. Parole's actions in this case are a violation of Mr. Kelly's rights to due process under the Fourteenth Amendment. Given the insufficiency of the evidence that led to the revocation finding, and the inability to remedy the prejudice caused by this due process violation, not only must the revocation decision be vacated, but the violation must be dismissed, with prejudice.

A. The principle of *res judicata*—which bars the relitigation of claims or issues that have been finally adjudicated by a court—does not apply in a parole revocation hearing.

Res judicata applies to final judgments issued by courts of competent jurisdiction. Brookshire Equities, LLC v. Montaquizza, 346 N.J. Super. 310; 787 A.2d 942 (2002). A addiction treatment program's decision to terminate a parolee is an internal administrative action, not a judicial ruling. It lacks the procedural safeguards of a court proceeding, such as the right to counsel, the opportunity to present and cross-examine witnesses, and a neutral adjudicator. Because there is no final judicial determination on the merits of the parolee's conduct, the doctrine simply does not apply.

Even if the program reached a conclusion, the Parole Board cannot outsource its constitutional duty to determine whether a technical violation of parole occurred. The Board must conduct its own fact-finding and give the parolee an opportunity to contest the allegations. Due process requires that the parolee be permitted to challenge the credibility, fairness, and circumstances of the program's decision, especially if it was arbitrary, discriminatory, or based on misunderstandings. Programs may terminate clients for reasons unrelated to misconduct—such as administrative error, staffing constraints, or inability to provide necessary clinical care. Termination does not automatically equate to a willful parole violation.

Treating the program’s decision as *res judicata* conflates administrative preference with legal culpability.

Adopting a *res judicata* theory in this context would deny the parolee a meaningful opportunity to be heard—a core due process protection under Morrissey v. Brewer, 408 U.S. 471 (1972). It effectively precludes the parolee from contesting the facts or circumstances that led to termination, turning a revocation hearing into a rubber stamp. *Res judicata* does not and cannot apply to a non-judicial program termination in the parole context, particularly when liberty is at stake and credibility and factual nuance are central to the alleged violation.

Res judicata prevents a party from relitigating for a second time a claim already determined between the same parties. Collateral estoppel (or “issue preclusion”) is “that branch of the broader law of res judicata which bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action.” State v. Gonzalez, 75 N.J. 181, 186, 380 A.2d 1128 (1977) (citations omitted). In assessing whether the doctrine applies, courts consider five factors: (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a

party to the earlier proceeding. [N.J. Div. of Youth & Family Servs. v. R.D., 207 N.J. 88, 115, 23 A.3d 352 (2011) (quoting Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 521, 897 A.2d 1003 (2006)).]

However, “even where these requirements are met, the doctrine, which has its roots in equity, will not be applied when it is unfair to do so.” Ibid. (quoting Olivieri, 186 N.J. at 521–22, 897 A.2d 1003). In re Vicinage 13 of New Jersey Superior Ct., 454 N.J. Super. 330, 341 (App. Div. 2018).

a. Factor (1) does not apply.

Taking these factors in turn, factor (1) clearly does not apply. Factor (1) asks whether “the issue to be precluded is identical to the issue decided in the prior proceeding.”¹⁸ The issue at the final revocation hearing was whether or not Mr. Kelly failed to “comply with the conditions of and successfully complete RESAP at the Volunteers of America, Addiction Program.”¹⁹ That issue was never litigated in any prior proceeding. All that existed prior to the revocation hearing was the VOA’s arbitrary decision to discharge Mr. Kelly from the RESAP Program without a hearing.

¹⁸ N.J. Div. of Youth & Family Servs. v. R.D., 207 N.J. 88, 115, 23 A.3d 352 (2011) (quoting Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 521, 897 A.2d 1003 (2006)).

¹⁹ Notice of Decision, Mandatory Supervision, dated April 24, 2024, A030

b. Factor (2) also does not apply.

Factor (2) asks whether “the issue was actually litigated in the prior proceeding.”²⁰ Again, there was no “prior proceeding”, so the issue could not actually have been litigated.

c. Factor (3) does not apply.

Factor (3) is whether “the court in the prior proceeding issued a final judgment on the merits.”²¹ Simply put, there was no “court”, and a “final judgement on the merits” does not exist. It also bears mentioning that the Parole Board is not a court either.

d. Factor (4) does not apply.

Factor (4) asks whether “the determination of the issue was essential to the prior judgment.”²² The VOA’s decision to discharge Mr. Kelly was based solely on the incident report written by Kyle Henderson. The VOA determined that they would discharge Mr. Kelly based on Kyle Henderson’s recitation of events. The issue in the parole revocation hearing was whether or not Mr. Kelly violated a special

²⁰ N.J. Div. of Youth & Family Servs. v. R.D., 207 N.J. 88, 115, 23 A.3d 352 (2011) (quoting Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 521, 897 A.2d 1003 (2006)).

²¹ Id.

²² Id.

condition of his parole by failing to “comply with the conditions of and successfully complete RESAP at the Volunteers of America, Addiction Program.”²³ That issue is fact sensitive. The Parole Board’s decision to rely on the simple fact that Mr. Kelly was discharged from the program to sustain the parole violation and characterize it as serious violation of his parole deprived Mr. Kelly of his right to “a neutral and detached hearing body.”²⁴ The Supreme Court’s mandate in Morrissey was designed to “assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee’s behavior.” Morrissey v. Brewer, 408 U.S. 471, 484, 487 (1972). Here, the Parole Board, in its Final Agency Decision, relied on the “determination of the VOA to discharge Mr. Kelly from the program” characterizing it as “*res judicata*.”²⁵ Doing so deprived Mr. Kelly of the assurance in Morrissey “that the finding of a parole violation will be based on verified facts.”²⁶

e. Factor (5) does not apply.

Factor (5) asks whether “the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.”²⁷ Mr. Kelly is the party

²³ Notice of Decision, Mandatory Supervision, dated April 24, 2024, A030

²⁴ Morrissey v. Brewer, 408 U.S. 471, 484, 487 (1972).

²⁵ Notice of Final Agency Decision, dated September 25, 2024, A039

²⁶ Morrissey v. Brewer, 408 U.S. 471, 484, 487 (1972).

²⁷ N.J. Div. of Youth & Family Servs. v. R.D., 207 N.J. 88, 115, 23 A.3d 352 (2011) (quoting Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 521, 897 A.2d 1003 (2006)).

against whom the doctrine is asserted. He was a participant in the VOA Addiction Program, however, there was no prior proceeding. Mr. Kelly was administratively discharged from the VOA. The Final Revocation Hearing is the first “proceeding” as it pertains to Mr. Kelly.

POINT II

MR. KELLY DID NOT SERIOUSLY OR PERSISTENTLY VIOLATE THE CONDITIONS OF HIS PAROLE AND REVOCATION WAS NOT DESIRABLE, THUS THE FINAL AGENCY DECISION OF THE PAROLE BOARD MUST BE REVERSED.

At the revocation hearing, Parole alleged that Mr. Kelly violated four conditions of his parole, the first being general condition number thirteen by using a controlled dangerous substance on March 4th and 5th of 2024. (1T 11-25 to 12-18) Mr. Kelly pled guilty with an explanation to this violation. (1T 12-21) Additionally, Mr. Kelly pled guilty to violating a special condition of his parole by consuming alcohol on two occasions. (1T 14-7 to 18) Parole also alleged that Mr. Kelly violated a special condition of his parole that prohibited contact with Jimena Johnson, who was pregnant with Mr. Kelly’s child. (1T 13-21 to 14-2) Mr. Kelly pled guilty with an explanation to this violation. Mr. Kelly explained that Ms. Johnson was pregnant with Mr. Kelly’s first child and he texted her to see how she was doing with a myriad

of pregnancy-related issues.²⁸ (1T 33-4 to 34-1). It is important to note that Ms. Johnson told parole that she wanted this no contact condition to be removed during her pregnancy with Mr. Kelly's child. Parole did not deem these violations to be serious or persistent in March of 2024 which is why parole did not commence with revocation proceedings at that point in time. The violations that Mr. Kelly pled guilty to at the revocation hearing are the ones that led to Mr. Kelly's placement in the VOA Addiction Program.

Mr. Kelly denied that he violated the special condition of his parole mandating his compliance with the VOA Addiction Program. He alerted Parole to the existence of evidence that he believed would demonstrate that he was not guilty of the violation. Mr. Kelly alerted Parole to the fact that there was another person sitting on his bed where the alleged contraband was found. Mr. Kelly, through his cross-examination of Kyle Henderson, alerted Parole to the previously unknown fact that there was another person's name and SBI number on the alleged contraband. Mr. Henderson offered one version of events in his incident report. During the Final Revocation Hearing, Mr. Kelly carefully pointed out how the facts described in the incident report authored by Mr. Henderson were not the facts at all, but, rather, an inaccurate description of what occurred that left out clearly exculpatory facts that heavily favored Mr. Kelly.

²⁸ Shakir Kelly Investigatory Statement, dated March 7, 2024, A025

Parole did not demonstrate clear and convincing evidence that Mr. Kelly seriously or persistently violated the conditions of his parole at the revocation hearing. N.J.S.A. 30:4-123.60. There is no support in the record for the Board's finding that Mr. Kelly violated the special condition of his parole mandating his compliance with the rules and regulations of the VOA Addiction Program. Further, there is no support in the record for the finding that the other sustained violations were either serious or persistent and that revocation was desirable. See, N.J.A.C. 10A:71-7.12(c)(1); N.J.A.C. 10A:71-7.12(c)(2). To be clear, revocation proceedings only commenced when the VOA discharged Mr. Kelly from its addiction program.

The Parole Board's decision was not supported by "sufficient credible evidence. . . in the record" considering "the proofs as a whole." In re Taylor, 158 N.J. 644, 656 (1999) (Internal citations omitted). In Mr. Kelly's case, the Parole Board's decision was "arbitrary, unreasonable [and] capricious" necessitating reversal. McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002).

CONCLUSION

In view of the above, the Parole Board's Final Agency Decision must be reversed and the parole violation for failure to "comply with the conditions of and successfully complete RESAP at the Volunteers of America, Addiction Program"²⁹ must be dismissed, with prejudice.

Further, given that the sustained violations of parole were not serious or persistent, and revocation was not desirable, the decision of the Parole Board must be reversed.

Respectfully submitted,

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²⁹ Notice of Decision, Mandatory Supervision, dated April 24, 2024, A030

SHAKIR KELLY,
Plaintiff/Appellant,
v.
NEW JERSEY STATE PAROLE
BOARD,
Defendant/Respondent.

SUPERIOR COURT OF NEW
JERSEY APPELLATE DIVISION
DOCKET NO. A-534-24

Civil Action

On Appeal from a Final Decision of
the New Jersey State Parole Board

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT, NEW JERSEY
STATE PAROLE BOARD

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TABLE OF CONTENTS

Table of Authorities	3
Procedural History and Counterstatement of Facts	4
A. The Circumstances of Kelly's Present Crimes.....	5
B. Kelly's Prior Criminal History	6
C. Kelly's Prison Disciplinary History	6
D. Kelly's Parole Review.....	6
E. Discharge from VOA	9
F. Parole Revocation Hearing.....	10
G. Final Revocation Hearing	14
ARGUMENT	16
THE BOARD'S REVOCATION OF PAROLE AND ESTABLISHMENT OF A TWELVE-MONTH TERM OF INCARCERATION SHOULD BE AFFIRMED BECAUSE IT IS SUPPORTED BY SUFFICIENT, CREDIBLE EVIDENCE IN THE RECORD.....	16
A. The Board's decision is supported by substantial credible evidence.....	16
B. The Board is required to consider institutional infractions as <i>res judicata</i>	22
CONCLUSION	25

TABLE OF AUTHORITIES

CASES

<u>Acoli v. N.J. State Parole Bd.</u> , 224 N.J. 213 (2016).....	16, 17
<u>Avant v. Clifford</u> , 67 N.J. 496 (1975).....	22
<u>Beckworth v. N.J. State Parole Bd.</u> , 62 N.J. 348 (1973).....	17
<u>City of Newark v. Nat. Res. Council, Dep't of Env't Prot.</u> , 82 N.J. 530 (1980).....	16
<u>Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex</u> , 442 U.S. 458 (1981)	18
<u>Greenwood v. State Police Training Ctr.</u> , 127 N.J. 500 (1992).....	16
<u>Hobson v. N.J. State Parole Bd.</u> , 435 N.J. Super. 377 (App. Div. 2014).....	17
<u>In re AG Law Enf't Directive Nos. 2020-5 & 2020-6</u> , 246 N.J. 462 (2021).....	15, 18
<u>In re Carter</u> , 191 N.J. 474 (2007).....	16
<u>Morrissey v. Brewer</u> , 408 U.S. 471 (1972)	22
<u>New Jersey State Parole Bd. v. Woupes</u> , 184 N.J. Super. 533 (App. Div. 1981).....	22
<u>State v. Morales</u> , 120 N.J. Super. 197 (App. Div. 1972).....	22

REGULATIONS

N.J.A.C. 10A:4-4.1	5
N.J.A.C. 10A:71-2.10	21
N.J.A.C. 10A:71-3.11	24
N.J.A.C. 10A:71-7.1(c).....	17
N.J.S.A. 30:4-123.47(a)	16
N.J.A.C. 10A:71-7.12(c)(1)	16
N.J.A.C. 10A:71-7.15(c).....	16

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

Appellant, Shakir Kelly, is serving a five-year sentence, with three years parole supervision, pursuant to the No Early Release Act (NERA), for two counts of second degree aggravated assault, and second degree resisting arrest. (Pa1-6).² Kelly appeals the New Jersey State Parole Board's (Board) September 25, 2024 Final Agency Decision which revoked mandatory supervision status and imposed of a twelve-month parole eligibility term. The salient facts related to the Board's decision are as follows.

¹ Because the procedural history and counterstatement of facts are closely related, they are combined for efficiency and the court's convenience.

² “Pa” refers to Kelly’s appendix. “Ra” Refers to the Board’s appendix. “Ca” refers to the Board’s confidential appendix. “T” refers to the hearing transcript. “Pb” refers to Kelly’s brief.

A. The Circumstances of Kelly's Present Crimes

On May 23, 2019, Newark police officers on patrol on South 10th Street observed a black car parked illegally in a crosswalk. (Ca3). The officers' check of the registration revealed the car was stolen from Matawan, and soon after, they witnessed a man, later identified as Kelly, enter the vehicle. Ibid. The officers activated their lights and sirens, but Kelly drove off, evading the officers by ramming the stolen car into their police cruiser and driving away at a high rate of speed. Ibid.

On the same day, Newark police officers received a report of a robbery. (Ca5). The officers met with the victim, who stated she was taking out the trash when Kelly approached. Ibid. After the victim told Kelly that she had a boyfriend, Kelly struck her with a closed fist on the left side of her head and took two phones from her. Ibid. Later that day, Newark police located Kelly, and after a foot-chase, eventually detained and arrested him. (Ca3).

Kelly pleaded guilty to two counts of second degree aggravated assault, and one count of second degree resisting arrest. (Pa1; Pa4). On July 9, 2021, the court sentenced Kelly to five years of incarceration with eighty-five percent parole ineligibility per NERA, with three years parole supervision post release, all to run concurrently. (Pa1-6).

B. Kelly's Prior Criminal History

As a juvenile, Kelly accumulated four prior adjudications. (Ca6). As an adult, Kelly has seven prior indictable convictions, including convictions for resisting arrest, possession of CDS, receiving stolen property, and burglary. (Ca7-11). At the time of his sentencing in 2021, Kelly served seven sentences of probation, and during those periods had three violations of probation. (Ca17).

C. Kelly's Prison Disciplinary History

During his periods of incarceration, between October 21, 2022, and June 30, 2024, Kelly committed five disciplinary infractions, including four “asterisk” (serious) offenses.³ (Ra17-18). He committed an assault of a staff member on June 2, 2024, and then later the same month, was disciplined for possession of narcotics and being intoxicated. Ibid.

D. Kelly's Parole Review

Kelly was released to mandatory supervision on August 21, 2023, and while he did report to the Newark Office for his first visit on October 4, 2023, he did not attend his scheduled intake at the Greater Essex Counseling Center for drug counseling three weeks later. (Pa10; Pa31-32; Ca19-21). During his initial visit at the District Office, Kelly admitted that he spent the previous night away from his approved residence with his sister and became verbally combative

³ Asterisk charges are considered the most serious charges by the Department of Corrections and result in the most severe sanctions. See N.J.A.C. 10A:4-4.1.

with staff members. (Pa31-32; Ra2; Ca21). Two days later, on October 6, 2023, Kelly's girlfriend reported to Parole that he had choked her to the point of unconsciousness the previous day. (Pa35; Ca22). As a result, Parole issued a no contact special condition that prohibited Kelly from contacting her. (Pa31; Ra2).

On October 8, 2024, Newark Police officers responded to an in-progress domestic violence call from Kelly's girlfriend who stated that Kelly forced himself into her residence by taking the window off the frame, ran after her as she tried to escape, and placed her in a head lock. (Ra2). Newark Police also reported that Kelly threatened his girlfriend, stating, "I'm finna get the gun." (Ra2).

Kelly failed to report to parole as scheduled on October 20, 2023, and then again October 24, 2023. (Ra2). On October 25, 2023, the Newark Police Department arrested Kelly on an outstanding warrant for burglary, simple assault, and terroristic threats. (Ra2).

Kelly reported to the Newark Office on November 1, 2023, where he failed a urine test and admitted to using alcohol on October 31, 2023. (Pa31-32). Kelly was afforded an opportunity to continue counseling at the Greater Essex Counseling Center but it was mandated that Kelly comply with GPS

electronic monitoring and a 9:00 p.m. to 7:00 a.m. curfew, which he agreed to. (Pa32; Ra2-8).

During a home visit about three months later, Kelly tested positive for alcohol again but was given a second chance to continue with counseling services with an increase in the level of care, namely placement on lockdown for the night and an updated exclusion zone. (Pa32; Ca31-32).

On March 5, 2024, Newark Police arrested Kelly for possession of CDS, resisting arrest, and obstruction after observing him making transactions in an open-air drug market. (Pa32; Ca33). During these transactions, Kelly was driving a vehicle registered to his girlfriend, with whom, as noted above, he was prohibited from having contact with. (Pa32; Ca34).

Kelly was released from custody two days later and reported to the Newark Office where he tested positive for cocaine, opiates, and fentanyl. (Pa32; Ca35). Kelly admitted to using heroin and cocaine just a couple days prior and provided a written statement admitting to the drug usage and having contact with his girlfriend. (Pa24-25; Pa32). A search of his cellphone revealed evidence confirming the contact with his girlfriend. (Pa32).

As a result of his noncompliance, Kelly was referred to a residential treatment facility with a more structured setting, the Volunteers of America (VOA). (Pa32; Ra45-47).

E. Discharge from VOA

Upon arrival at the VOA on March 13, 2024, Kelly was transported to the Newark Police Department for processing on charges related to his March 5, 2024 arrest. (Pa32; Ca39; Ca42). Kelly returned to the VOA three days later, and within three days was written up for two major program violations. (Pa32; Ca46-47).

First, on March 18, 2024, staff member Clayton Neal reported that Kelly had disrespected him. (Pa23). Neal reported that Kelly approached him at the front desk and requested to change his phone time, but when Neal advised that the rules forbid changing his time, Kelly “verbally assault[ed]” Neal, calling him a “Bitch Ass,” and refused to walk away when asked to, threatening, “What you gonna do if i don’t[?]” Ibid.

The next day, Shift Supervisor Sarah Quann reported that treatment assistant Kyle Henderson was conducting observational rounds on the second floor when he observed Kelly making “awkward movements” around his assigned bed in room 207. (Pa23; Pa32). Henderson entered the room and searched Kelly’s bed area, where he found an eye glass case hidden under the sheet, inside of which he discovered “a lighter, tobacco, and green nugget cannaboid substance which resembles marijuana.” (Pa18; Pa23).

A parole warrant was issued on March 19, 2024, and a Probable Cause Hearing was scheduled regarding the following supervision violations Kelly accumulated:

1. General Condition 13(i)—failure to refrain from the unlawful use or possession of any controlled dangerous substances (CDS) for the admitted use of heroin on March 4, 2024;
2. General Condition 13(i)—failure to refrain from the unlawful use or possession of any controlled dangerous substances (CDS)—for the admitted use of cocaine on March 5, 2024;
3. Special Condition—failure to comply with the conditions of and successfully complete the RESAP Addiction Treatment program at the VOA—for the discharge on March 20, 2024;
4. Special Condition—failure to refrain from contact with girlfriend—for the admissions on March 7, 2024; and
5. Special Condition—failure to refrain from the possession or use of alcohol—for the admissions dated October 31, 2023, and February 19, 2024.

[Pa26-28].

On March 20, 2024, Kelly was taken into custody at the VOA and transported to the Atlantic County Jail. (Ra40; Pa29).

F. Parole Revocation Hearing

Hearing Officer LaTisha Parsons conducted a final Revocation Hearing on April 12, 2024. (T; Pa30). Kelly acknowledged receipt of the Notice of Probable Cause Hearing, which contained the alleged violations and their

respective evidence, and his rights with respect to the hearing process and procedure. (Pa31). Kelly elected to represent himself. (T4:24-25; Pa31).

Upon reading the above violations into the record, Kelly pleaded guilty with an explanation to violations 1 and 2 (General Condition 13), stating that he started getting high because they canceled the mental health program in Rutgers that he was going to and he couldn't get his mental health medications. (T12:19-21; T30:2-6). As to the fourth violation, the Special Condition requiring him to refrain from unauthorized contact with his girlfriend, Kelly pleaded guilty with an explanation, stating that he knew it was wrong, but that he was "checking on her" during her pregnancy. (T14:3-5; T33:15-21). Kelly pleaded guilty to the fifth violation, the Special Condition requiring Kelly to refrain from the use of alcohol. (T14:16-18).

Kelly pleaded not guilty to violation 3, the Special Condition requiring Kelly to comply with the conditions of and complete the VOA Addiction Treatment Program. (T13:17-19). Parole Officer Pfeffer produced the VOA discharge papers and the incident report. (T14:23-T15:12).

The VOA discharge report recounts two incidents warranting discharge. (Ra30). First, there is Shift Supervisor Quann's incident report, stating that on March 19, 2024, Henderson's search of Kelly's room uncovered an eye glass case hidden under the sheet with a lighter, tobacco and a green nugget

cannabinoid substance inside. (Ra30; Pa23). Second, there is the incident report of the day before, March 18, 2024, describing Kelly's verbal assault of staff member Neal—calling him “Bitch Ass,” and threatening, “What you gona do if i don't?” when asked to walk away. (Ra30; Pa23). The report indicates that, in light of these incidents, Kelly proved to be “unable to meet treatment needs due to disciplinary actions . . . [and for] [n]eglecting to adhere the P.R.O.M.I.S.E. rules and regulation.” (Ra31-32). The report “recommended for him to return to close custody.” (Ra31-32).

Kelly argued that he should not have been discharged because “if I was found with some type of illegal substance I was, at least, supposed to get a drug test to state that I was using these things.” (T25:22-25). He also challenged the report because it did not include information that there was a bag with another person's information on it. (T26:1-4; Pa33). Still, acknowledging that Henderson told the “absolute truth” during his testimony, Kelly stated that he couldn't say who the eyeglasses case belonged to because he was put on the spot in front of all the other residents. (T27:14-T28:8). Lastly, Kelly stated that “there's more drugs in that program than anywhere I ever been” and that the program “is not a good program” because they are not helping him. (T28:11-12; T29:4-8).

In his closing statement, Kelly simultaneously blamed his parole officer for “totally neglect[ing]” him and took accountability for his actions while pleading that he could be put in another program. (T35:18-T36:9).

Hearing Officer Parsons ultimately considered: (1) Kelly’s violent criminal history, including the most recent offense, marking his eighth felony conviction; (2) Kelly’s inability to comply with the conditions of his supervision, including three probation violations; (3) that Kelly had been afforded several opportunities to gain compliance after violating his conditions; (4) that Kelly admitted to several violations; and (5) that a parole warrant was issued. (T36:14-T37:6). Hearing Officer Parsons found that Kelly would likely reoffend and present a risk to public safety if he were permitted to return to the community. (T37:3-6). Thus, Hearing Officer Parsons recommended revocation. (T37:7-10).

On April 24, 2024, the Parole Board panel concurred with the findings of fact made by Hearing Officer Parsons and found that clear and convincing evidence demonstrates that Kelly violated the following conditions: (1) General Condition 13, prohibiting the unlawful use or possession of any controlled dangerous substances; (2) Special Condition, prohibiting contact with Kelly’s girlfriend; (3) Special Condition, prohibiting alcohol use; and (4) Special Condition, requiring completion of the VOA Treatment Program. (Pa30). The

Board panel concluded that, based on seriousness of the violations and the fact that Kelly pleaded guilty, revocation is desirable. (Pa35). Thus, the Board unanimously revoked Kelly's parole and ordered him to serve a parole eligibility term of twelve months. Ibid.

G. Final Revocation Hearing

Kelly appealed to the full Parole Board on July 18, 2024. (Pa17). Kelly, now represented by counsel, argued that the Board panel failed to consider material facts, including: (1) the fact that Henderson's testimony at the hearing was "inconsistent" with his written report; and (2) facts that go toward Kelly's innocence regarding the alleged violation of the Special Condition requiring his compliance with the conditions of the VOA treatment program. (Pa17). Specifically, Kelly argued that the zip lock bag containing the synthetic marijuana had someone else's name and SBI number on it. (Pa17-18). Kelly's appeal did not address any of the other violations.

The Board considered these arguments but ultimately sustained the Board panel's findings and conclusions, noting that the issues regarding the zip lock bag and Henderson's testimony were addressed and considered at the hearing. (Pa36-40). Thus, the Board considered Kelly's "contention that the Board panel failed to consider the material facts in this matter, to be without merit." (Pa39). The Board found that Henderson testified to key information regarding the

violation, namely, that he is familiar with Kelly; he noticed suspicious activity in Kelly's room during an observational round; he entered the room and saw another client by Kelly's bed; he pulled back the sheet on Kelly's bed and saw an eyeglass case; the case contained a lighter, tobacco, and a nugget of a green leafy substance; he then notified his shift supervisor and escorted Kelly out of the room. (Pa38). In addition, the Board noted that Kelly testified that he does not wear glasses; that he did not have any property; that the eyeglasses case that contained tobacco and "weed" had another person's name and SBI number on it; that the other persons name should have been on the incident report, and that he should have been drug tested. (Pa39). Lastly, the Bard noted that the VOA Discharge Summary supports the allegation that Kelly violated his Special Condition requiring him to comply with the conditions of and successfully complete program and that Henderson's witness testimony supports the serious and or persistent nature of the violation. Ibid.

Importantly, the Board found no issue regarding whether Kelly was discharged from the VOA Program—something that the Board does not control. (Pa39). Further the Board noted that the decision to revoke Kelly's mandatory supervision status was based on four violations, not just one. Ibid.

This appeal followed on October 24, 2024.

ARGUMENT

THE BOARD'S REVOCATION OF PAROLE AND ESTABLISHMENT OF A TWELVE-MONTH TERM OF INCARCERATION SHOULD BE AFFIRMED BECAUSE IT IS SUPPORTED BY SUFFICIENT, CREDIBLE EVIDENCE IN THE RECORD.

Kelly makes two arguments on appeal. First, he argues that the Board applied the wrong legal standard in its final agency decision finding he violated the Special Condition requiring completion of the VOA Addiction Treatment program. (Pb9). Second, he argues that the record does not show that the violations were serious or persistent. (Pb22-23). For the reasons set forth below, the Board's decision should be affirmed.

A. The Board's decision is supported by substantial credible evidence.

Judicial review of administrative agency determinations is limited to evaluating whether the agency acted arbitrarily or abused its discretion in rendering its decisions. In re AG Law Enf't Directive Nos. 2020-5 & 2020-6, 246 N.J. 462, 489 (2021). In conducting this limited review, courts accord agency actions presumptions of validity and reasonableness, and the burden is on the challenging party to show that the agency's actions were unreasonable. Ibid. This deferential standard, which “recognizes the ‘agency’s expertise and superior knowledge of a particular field,’” is consistent with “the strong presumption of reasonableness that an appellate court must accord an

administrative agency's exercise of statutorily delegated responsibility." Ibid. (first quoting In re Carter, 191 N.J. 474, 483 (2007), and next quoting City of Newark v. Nat. Res. Council, Dep't of Env't Prot., 82 N.J. 530, 539 (1980) (additional citations omitted)).

In applying this standard, "courts do not consider what they might have done in the agency's place or substitute their judgment for the agency's." Ibid. (citing Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)). This is especially true where the Legislature has delegated to the Board—a body of individuals "[a]ppointed by the Governor with the advice and consent of the Senate" because of their specialized "expertise in 'law, sociology, criminal justice or related branches of the social sciences'"—the "exceedingly difficult" responsibility of making predictive pronouncements about an individual's likelihood to reoffend. Acoli v. N.J. State Parole Bd., 224 N.J. 213, 222, 226 (2016) (citing N.J.S.A. 30:4-123.47(a)).

Under N.J.A.C. 10A:71-7.12(c)(1) and N.J.A.C. 10A:71-7.15(c), revocation of parole must be supported by clear and convincing evidence. Clear and convincing evidence persuades the fact finder "that the truth of the contention is 'highly probable.'" Hobson v. N.J. State Parole Bd., 435 N.J. Super. 377, 387 (App. Div. 2014) (quoting In re Perskie, 207 N.J. 275, 290 (2011) (additional citations omitted)). It is well-settled that the Board has the

discretionary power to revoke parole when it finds, by clear and convincing evidence, that a parolee seriously or persistently violated the conditions of parole, and that revocation of parole is desirable. N.J.A.C. 10A:71-7.1(c).

In Hobson, 435 N.J. Super. at 382, the Appellate Division noted, “[t]he Legislature did not further define the type of conduct it intended to capture within the statutory standard—‘seriously or persistently violated.’ And the Board has not adopted a regulation to guide exercise of its expertise to distinguish cases in which parole should and should not be revoked.” Accordingly, this determination falls to the Board’s “highly predictive and individualized discretionary appraisals.” Acoli, 224 N.J. at 222 (quoting Beckworth v. N.J. State Parole Bd., 62 N.J. 348, 359 (1973)).

The Board’s specialized expertise is critical because it is obligated to make such “highly predictive and individualized discretionary appraisals” in assessing an incarcerated person’s suitability for parole, which are “inherently imprecise.” Ibid. These “discretionary assessment[s]” turn on “a multiplicity of imponderables,” of which many are “purely subjective appraisals by the Board members based on their experience with the difficult and sensitive task of evaluating the advisability of parole release.” Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1, 9-10 (1981). One of these “imponderables” concerns a prediction about an incarcerated person’s future

behavior, a highly subjective determination mandating broad discretion in the Board's decision-making process. Acoli, 224 N.J. at 222.

Here, the Board's decision is amply supported by clear and convincing evidence and is consistent with the controlling law. Kelly argues the Board did not demonstrate by clear and convincing evidence that he seriously or persistently violated the conditions of his parole at the revocation hearing because there is no support in the record for the finding that: (1) he violated the Special Condition of his parole mandating his compliance with the rules and regulations of the VOA Addiction Program; and (2) the other sustained violations were either serious or persistent and that revocation was desirable. (Pb24). Kelly offers no support for either argument.

Courts accord agency actions presumptions of validity and reasonableness, and the burden is on the challenging party to show that the agency's actions were unreasonable. In re AG Law Enf't Directive Nos. 2020-5 & 2020-6, 246 N.J. at 489. Kelly, however, provides no support for his argument that the Board acted arbitrarily or abused its discretion in rendering its decision. First, it is undisputed that Kelly was discharged from the VOA program in violation of a Special Condition of his parole. (Ra30-31). Second, Kelly pleaded guilty to every other violation that the Board considered. (T12:15-21; T30:2-6; T14:3-5; T14:16-18; T33:15-21).

Specifically, Kelly admitted to: (1) the use of heroin on March 4, 2024; (2) the use of cocaine on March 5, 2024; (3) improperly contacting his girlfriend on March 7, 2024; and (4) the use of alcohol October 31, 2023, and February 19, 2024. (Pa24-25; Pa26-28). In addition, the evidence in the record reflected that Kelly verbally assaulted a VOA staff member on March 18, 2024, and was discharged from the program the next day for possession of program contraband. (Ra30-33). The record confirms that the Board considered this evidence in light of the totality of the circumstances. The Board further noted the fact that Kelly was serving a term of mandatory supervision for second degree robbery and two counts of second degree aggravated assault, and that less than two months after being released, on October 6, 2023, a no contact Special Condition was imposed after his girlfriend reported that she was the victim during a domestic dispute and was choked to the point of unconsciousness. (Pa30). Then, between October 31, 2023, and March 19, 2024, Kelly accumulated seven additional violations. (Pa32-33).

Despite these violations, the Board afforded Kelly numerous opportunities to reform. For example, after report of the domestic violence incident in October 2024, Kelly was afforded an opportunity to continue counseling at Greater Essex Counseling Center but mandated the comply with GPS electronic monitoring and a curfew. (Ra2-8; Pa32; Ca22). Three months later, Kelly tested positive

for alcohol but was given a second chance to continue with counseling services with an increase in the level of care. (Pa32; Ca31-32). Then, on March 5, 2024, Kelly was arrested for possession of CDS, resisting arrest, and obstruction after police officers observed him making transactions in an open-air drug market, while utilizing a vehicle registered to his girlfriend, with whom he was prohibited from having contact. (Pa32; Ca33-34). Upon his release from custody two days later, Kelly tested positive for cocaine, opiates, and fentanyl. (Pa32; Ca35). Still, the Board provided Kelly another chance to comply and referred him to a residential treatment facility with a more structured setting. (Ra45-47; Pa32). On March 16, 2024, Kelly returned to the VOA, and within three days, was written up for two major program violations—verbally assaulting a staff member and possession of program contraband. (Ra30-31; Pa32).

This cumulation of evidence of Kelly's persistent noncompliance supported the Board's decision that, despite its attempts to assist Kelly with re-entry and rehabilitation, his conduct demonstrated "poor coping and decision-making skills and a willful disregard towards the conditions of [his] supervision." (Pa30). The Board's decision to revoke Kelly's parole and impose a twelve-month term of incarceration was both consistent with applicable law

and supported by sufficient credible evidence in the record. Accordingly, this court should affirm the Board's imposition of those sanctions.

B. The Board is required to consider institutional infractions as res judicata.

Next, Kelly argues that the Board violated his due process by not relitigating the VOA's decision to discharge him from the Addiction Treatment Program. (Pb17). This argument is contrary to law. The Board is required to consider the institutional infractions as res judicata:

(a) The Board panel or Board shall consider the final decision of the Department's officials responsible for adjudication of institutional infractions to be res judicata.

....

(c) When the basis for the rescission hearing or the alteration of the parole eligibility date is an institutional infraction, the Board panel or hearing officer reviewing the case shall consider aggravating and mitigating circumstances relating to the infraction but shall not consider evidence relating to the inmate's guilt or innocence of the commission of the institutional infractions.

[N.J.A.C. 10A:71-2.10.]

Our courts are clear that "a parolee cannot relitigate issues determined against him in other forums." New Jersey State Parole Bd. v. Woupes, 184 N.J. Super. 533, 537 (App. Div. 1981) (quoting State v. Morales, 120 N.J. Super. 197, 202 (App. Div. 1972)).

In Woupes, 184 N.J. Super. at 535, the appellant argued that the Board denied him due process by accepting the courtline decision as res judicata and using it as the sole basis for his rescission. The appellant asserted that the refusal to permit re-litigation before the Board of the administrative finding on the intoxication charge was a denial of fundamental fairness of constitutional dimension. Ibid. The court disagreed, relying on Avant v. Clifford, 67 N.J. 496 (1975), and Morrissey v. Brewer, 408 U.S. 471, 490 (1972), the latter holding, “[o]bviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime.” The court followed Morrissey in Morales, 120 N.J. Super. at 202, writing, “[t]o now require a remand for an evidentiary hearing would be an exercise in futility.”

Woupes, 184 N.J. Super at 537-38, agreed, holding that because “the Board does not sit as an appellate tribunal for inmates to relitigate factual determinations made at prison disciplinary hearings . . .” and since due process safeguards were present at the initial adjudication, “application of administrative res judicata meets no constitutional obstacle.”

Here, as in Woupes, Kelly’s argument fails. First, unlike the appellant in Woupes, Kelly’s case is even weaker because parole was revoked not just for the program termination, but for four additional violations: his failure to refrain

from the unlawful use or possession of any CDS, based on the admitted use of heroin on March 4, 2024, and the admitted use of cocaine on March 5, 2024; his failure to refrain from contact with his girlfriend; and his failure to refrain from the possession or use of alcohol, based on the admissions dated October 31, 2023, and February 19, 2024. (Pa26-28). Even more, Kelly's discharge from the VOA occurred as a result of two separate incidents: (1) Kelly disrespected a VOA staff member by calling him a "Bitch Ass," and refusing to walk away when asked to, threatening, "What you gonna do if I don't?"; and (2) when a VOA treatment assistant discovered "a lighter, tobacco, and green nugget cannaboid substance which resembles marijuana" in Kelly's possession. (Pa23). Kelly makes no argument concerning the first incident giving rise to his discharge.

Importantly, even if the VOA was mistaken about the ownership of the contraband, it is undisputed that Kelly was nonetheless discharged from the program on March 20, 2024, in violation of a Special Condition of his parole. (Ra30-32). The Board is required to consider the VOA's institutional finding of guilt to be res judicata when evaluating an inmate for parole, and thus it rightly considered Kelly's discharge itself as one of the factors when determining whether Kelly's parole should be revoked pursuant to N.J.A.C. 10A:71-3.11. Accordingly, this court should affirm.

CONCLUSION

For the foregoing reasons, the Board's decision should be affirmed.

Respectfully submitted,

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