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July 15, 2024

VIA ECOURTS
Heather Joy Baker, Clerk
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
PO Box 970
Trenton, New Jersey 08625

Re: Fred Krug v. New Jersey State Parole Board
Docket No. 089603
Appellate Division Docket No. A-2875-22T4

On Petition for Certification to the Superior Court, Appellate
Division
Sat Below:
Hon. Arnold L. Natali, Jr., J.A.D.
Hon. Lisa A. Puglisi, J.A.D.

Letter on Behalf of Respondent New Jersey State Parole
Board in Opposition to Petition for Certification

Dear Ms. Baker:

Please accept this letter on behalf of Respondent, New Jersey State Parole Board, in opposition to the petition for certification filed by incarcerated person Fred Krug. The Board relies primarily on its brief and appendix filed in the



Appellate Division, and adds the following.

Krug seeks certification of the Appellate Division's June 24, 2024 decision affirming the Board's decision to deny parole and to establish a thirty-six-month future eligibility term ("FET"). (Ppa1-19).¹

A petition for certification of a final decision of the Appellate Division will be granted only for special reasons. R. 2:12-4. Certification will be denied where the Appellate Division's decision is essentially an application of settled principles to the facts of a case, does not present a conflict among judicial decisions requiring clarification or calling for supervision by the Supreme Court, and does not raise issues of general importance. See Fox v. Woodbridge Twp. Bd. of Educ., 98 N.J. 513, 515-16 (1985) (O'Hern, J. concurring); In re Route 280 Contract, 89 N.J. 1, 2 (1982).

Krug meets none of these requirements. His petition presents no question of general public importance, nor does it conflict with any other decisions of the Court. The Appellate Division recognized that the Board's decision is entitled to deference and applied well-settled legal principles to the factual record developed below. (Ppa1-19).

¹ "Pc" refers to the petition for certification, and "Ppa" refers to the appendix to the petition.

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It is well-settled that the Board has discretionary power to deny parole when, after weighing the mitigating and aggravating factors, it concludes that there is a substantial likelihood that the inmate would commit another crime if released on parole. Trantino v. New Jersey State Parole Bd. (Trantino VI), 166 N.J. 133, 172 (2001). Here, the Appellate Division found that the Board's decision to deny parole and impose a thirty-six-month FET (which was reduced by the application of credits) as within the Board's authority and, in Krug's case, was supported by sufficient credible evidence in the record. (Ppa13-19). The petition raises no question of general public importance because this appeal relates solely to the Board's individualized assessment of Krug based on the unique facts in the record. This matter does not present a question similar to a question raised on another appeal, nor does it conflict with other decisions. And an ample record supports the Appellate Division's decision.

Krug argues that the Court should grant certification to determine whether the Board, in light of the Third Circuit's decision in Holmes v. Christie, 14 F.4th 250 (3d Cir. 2021), violated the federal and state Ex Post Facto clauses by considering "old" information that preceded the Board's prior parole denial, rather than strictly "new" information developed since the prior denial. (Pc12-

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18).² In so doing, Krug mischaracterizes Holmes' holding and its application to his case. Holmes does not, as a matter of law, limit the Board's consideration in Krug's case, or any other pre-1997 case, to solely "new" information obtained since a prior parole hearing. To the contrary, the court found that the 1997 amended parole statute was facially valid. Id. at 260. Its narrow holding was that the defendant could mount an as-applied challenge on ex post facto grounds if discovery showed "that the Board implemented the all-information provision in a way that created a significant risk of prolonging his incarceration," which is a "fact-intensive inquiry." Ibid. (quoting Richardson v. Pa. Bd. of Prob. & Parole, 423 F. 3d 282, 291 (3d Cir. 2005)).

Holmes is also distinguishable because the Third Circuit's consideration was based solely on the pleadings and the allegations raised in the civil 42 U.S.C. § 1983 complaint and the dispositive question was whether Holmes had plead sufficient facts to overcome the Board's motion to dismiss. Holmes, 14 F.4th at 267. By contrast, Krug's case presented itself to the Appellate Division

² In his petition, Krug cites to numerous unpublished Appellate Division decisions involving parole denials in which appellants raised an ex post facto argument, all of which the court rejected, including several appeals decided after Holmes. (Pc14-17). Among those appeals decided after Holmes was W.M. v. New Jersey State Parole Bd., A-0072-19 (App. Div. Dec. 6, 2022) (Pc17; Ppa110), in which the Court denied a petition for certification raising the same ex post facto argument that Krug asserts herein.

with fact-finding having been completed.

Moreover, Krug misinterprets the Holmes opinion as essentially overruling Trantino v. New Jersey State Parole Bd., 331 N.J. Super. 577 (App. Div. 2000) (Trantino V), which found that consideration of all information at subsequent parole hearings did not constitute an ex post facto violation. (Pc14-17). Initially, as noted, Holmes is a federal lawsuit brought pursuant to 42 U.S.C. § 1983 alleging a civil rights violation, while Trantino V is a New Jersey Appellate Division case reviewing a final agency decision of the Board. In Trantino V, this court found that the 1997 amendments were “procedural modification[s]” that lie outside of the ex post facto clause. Trantino V, 331 N.J. Super. at 610. In Holmes, the Board had urged the Third Circuit to adopt this approach to find that the 1997 amendment did not violate the ex post facto clause and affirm the lower court’s dismissal of Holmes’ civil rights complaint. Holmes, 14 F.4th at 264. The Third Circuit chose not to adopt the Appellate Division’s approach, and thus did not affirm on that basis. Id. at 264-65.

As the Board argued below, Holmes does not limit the Board’s consideration only to “new” information obtained since a prior parole hearing, or preclude the Board from considering the facts and circumstances of the offense or insufficient problem resolution in subsequent parole hearings under

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the amended parole statute. Rather, the Third Circuit found that considering “old” information only violates the ex post facto clause if an inmate establishes that the all-information provision permitting the Board’s consideration of old and new information was applied in a way that created a significant risk of prolonging incarceration. Holmes, 14 F.4th at 260.

Krug attempted to establish an as-applied ex post facto challenge by arguing that the Board improperly increased his risk of denying parole by basing its decision on “old” information, which is belied by the record, and which the Appellate Division properly rejected. (Ppa4-11; Ppa15-17; Ppa19). Indeed, as the Appellate Division correctly found, much of the additional information considered by the Board was “new information” and could be considered by the Board even under the pre-1997 version of the parole release statute. Ibid. Despite Krug’s suggestions to the contrary (Pc14-18), the denial of parole was based in large measure on new information developed since his prior hearing. (Ppa4-11; Ppa16-17; Ppa19). This new information included his commission of a serious disciplinary infraction since his last parole hearing, and the 2022 in-depth psychological evaluation that the Board relied upon in deciding his case. Ibid. The new panel interview, and Krug’s responses to the panel’s questions, only further supported the conclusion that Krug had insufficient problem

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resolution, including lack insight into his criminal behavior, minimization of his conduct and a failure to address his criminal behavior. Ibid.

Krug further argues that the Court should grant certification because the Board's finding that he lacked an adequate parole plan to assist him to successfully reintegrate into the community improperly relied upon his "poverty" and inability to secure housing if paroled. (Pc18-20). According to Krug, denying him parole because he is impoverished and does not have an established residence if paroled violates the Equal Protection Clause of the State and Federal Constitutions and their prohibitions against cruel and unusual punishment. Ibid. However, the Appellate Division properly rejected this argument, noting that the Board members, in discussing Krug's parole plans and the availability of community resources, "asked legitimate, probing, substantive questions about Krug's plans for housing, employment and support if he were to be released." (Ppa17). "As the Board pointed out, this area of inquiry was particularly important given Krug's length of time incarcerated and the fact that he committed new crimes while on community supervision in the past." (Ppa17-18).

Furthermore, as the record reflects, Krug was not denied parole because he is impoverished and lacks housing, but rather, because the Board found, after

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considering all of the relevant factors in his case under N.J.A.C. 10A:71-3.11(b), that he was substantially likely to commit a crime if paroled. (Ppa4-11; Ppa18-19). Thus, the Board concluded that Krug was not a suitable candidate for parole, whether to a residential program as he requested, or the community, and it did not base its decision on his financial or housing status. (Ppa17-19).

For these reasons, Krug's petition for certification should be denied.

Respectfully submitted,

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