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December 6, 2024

Honorable Chief Justice and
Associate Justices of the
Supreme Court of New Jersey
P.O. Box 970
Trenton, NJ 08625

Re: Krug v. New Jersey State Parole Bd.
App Div. Docket No. A-2875-22
S.C. Docket No. 089603

Honorable Justices:

Please accept this letter brief in lieu of a formal brief in support of plaintiff-petitioner Fred Krug's motion to strike the Parole Board's respondent brief pursuant to Rule 2:6-4(b) for relying almost exclusively on an improperly raised argument or, in the alternative, to accept this brief as a substantive response to an argument that Mr. Krug has never had the opportunity to address.

I. The Parole Board's respondent brief should be stricken because it relies almost exclusively on an argument that was never raised in the administrative appeal or Appellate Division.

In response to Mr. Krug's supplemental brief, the State filed a brief that did not directly respond to any of the arguments raised therein. Instead, the Board raised, for the first time ever, a novel argument that inmates whose offenses predate the enactment of the 1979 Parole Act cannot raise ex post facto arguments about subsequent amendments to that law. (The brief appears to fairly concede that inmates whose offenses fall between the 1979 and 1997 acts may raise valid ex post facto claims on this issue.) Beyond the myriad reasons why this argument is legally and practically untenable, this Court should not entertain an argument raised for the first time in the Supreme Court that is contrary to the Board's earlier positions in this case and all related litigation on this issue.

When Mr. Krug was denied parole, that denial was analyzed under the standards set forth by the 1979 Parole Act. (Pa51).[1] Then when he first raised the pertinent ex post facto argument in his administrative appeal, the Board did not respond by saying the 1948 Act was the governing standard, but only asserted it was no longer bound by certain 1979 strictures following the passage of the 1997 Act. (Pa66). When this issue eventually made its way to the Superior

[1] Pa = plaintiff's appellant appendix
Pma = plaintiff's motion appendix
Psb = plaintiff's supplemental brief
Db = defendant's respondent brief
Dsb = defendant's supplemental brief

Court, Appellate Division, the Board similarly reiterated that the governing standard of release was that set forth by the 1979 Act, (Db12), and nowhere argued that Mr. Krug could not raise his ex post facto claim because the baseline law was the 1948 Act, (Db17-21).

Now, in response to Mr. Krug's arguments in his supplemental brief that merely follow and expand upon those he repeatedly raised below, the Board argues for the first time that he makes a "critical error" by asserting that "all parties recognize he is entitled to the protections of the 1979 Parole Act." (Dsb15) (quoting Psb15 n.4). But the statement is not erroneous and accurately describes the procedure of this appeal; it is just that now the Board has changed its argument from what it said below.

It is well settled that an argument not briefed in the Appellate Division is waived for purposes of that appeal. State v. Vincenty, 237 N.J. 122, 135 (2019) ("On appeal, the State opposed [defendant's] legal arguments on the merits and did not argue harmless error. We find that the State has waived the harmless error argument -- and we decline to exercise our discretion to reach an issue not raised before the Appellate Division."); State v. Legette, 227 N.J. 460, 467 n.1 (2017) (declining to consider State's argument raised "for the first time on appeal"); Ass'n for Governmental Responsibility, Ethics & Transparency v. Borough of Mantoloking, 478 N.J. Super. 470, 483 n.8 (App. Div. 2024)

("Because [plaintiff] does not renew that argument on appeal, it is deemed waived."); see also Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2023) ("It is, of course, clear that an issue not briefed is deemed waived.").

The Board admits that it did not make "precise[ly] this argument" in the proceedings below. (Dsb19). This puts it mildly. The Board did not raise anything even resembling this argument during the extended administrative and judicial appeal procedures during the past two-plus years, and at every turn it has affirmatively acknowledged the 1979 Act as the applicable act governing this proceeding. Nor has the Board ever raised this argument before in the many cases where this issue has come up, including Trantino v. New Jersey State Parole Bd., 331 N.J. Super. 577, 602-03 (App. Div. 2000) ("Trantino V"), and Holmes v. Christie, 14 F.4th 250, 255 (3d Cir. 2021), both of which involve people who, like Mr. Krug, were sentenced prior to the 1979 Act. Instead, both the Board and our courts have continually treated pre-Code inmates as generally being afforded the protection of the 1979 Act. See, e.g., Acoli v. N.J. State Parole Bd., 250 N.J. 431, 454 (2022) (applying framework of 1979 Act in holding Board failed to meet its burden in denying pre-Code inmate parole).

In short, because the Board failed to raise this argument in either the administrative appeal or with the Appellate Division (or in or in any of the many cases where this issue has been raised before) and, to the contrary, has broadly

applied the 1979 Act at every stage of Mr. Krug's parole proceedings (and the parole proceedings of others similarly situated to Mr. Krug) since the enactment of that Act, this Court should strike the Board's respondent brief for relying solely on an improperly raised argument. It is particularly imperative because the brief does not even cite the provisions of the 1948 Act that are the entire foundation of its argument, instead baldly claiming the 1948 Act's terms are fundamentally different from the 1979 Act.

With respect to the Board's failure to ever raise this argument in any of the other related litigation on this issue, it is important to note that one of the main purposes of this appeal is to bring our law into conformity with the Court of Appeals for the Third Circuit's decision in Holmes. The Board has put forth no case in its brief affirmatively holding someone like Mr. Krug cannot raise an ex post facto claim in this circumstance. Meanwhile, Holmes expressly says that he can, as Mr. Holmes was also a pre-Code inmate.

If this Court were to accept the State's argument, we would then still be out of step with the federal law on this issue and would be affording fewer protections than the U.S. Constitution currently affords, such that inmates like Mr. Krug could simply pursue the relief he seeks here in the federal courts under Holmes. See State v. Reyes, 140 N.J. 344, 357 (1996) (explaining how this Court issued a memorandum conforming state criminal practice with Humanik v.

Breyer, 871 F.2d 432 (3d Cir. 1989), to avoid "jeopardiz[ing] State criminal trials by the threat of habeas reversals").

Thus, there should be no compunction about rejecting the Board's improper argument out of hand by striking its brief.

II. Even addressing the improper arguments on the merits, there is nothing that precludes Mr. Krug from raising an ex post facto claim against the retroactive harm done to his chances for parole.

If this Court does not strike the Board's brief, it is respectfully requested that the following be accepted as a substantive reply to the argument the Board raised for the first time in its supplemental brief, which Mr. Krug has never had the opportunity to address.

The Board's entire argument hinges on the narrow idea that, because the statute in effect at the time of Mr. Krug's offenses was the long-defunct 1948 Parole Act, he cannot raise an ex post facto claim based on the changes to the 1979 Parole Act that has long been applied to his parole proceedings. For several reasons, this argument is legally and practically untenable.

It is true that many of the cases dealing with ex post facto concerns involve applying the law in effect at the time of the offenses, but that is only because this more unique scenario has mostly not come up. There is one notable exception, of course, and that is Holmes. The Third Circuit in Holmes was fully aware that Mr. Holmes's offenses were committed under the old 1948 Act. 14

F.4th at 255 n.1. Yet nowhere in that decision does it suggest that he could not raise an argument against the constitutionality of retroactively amendments to the 1979 Act, and on the contrary, the Court found that Holmes did plausibly assert an ex post facto violation.

This makes sense since, although fair notice for penalties at the time of offense is certainly one big part of ex post facto concerns, "[e]ven where these concerns are not directly implicated," the Ex Post Facto Clause "also safeguards 'a fundamental fairness interest.'" Peugh v. United States, 569 U.S. 530, 543 (2013) (quoting Carmell v. Texas, 529 U.S. 513, 533 (2000)). The primary concern of the Ex Post Facto clause is to prevent legislatures from retroactively applying laws that serve to increase the amount of time an inmate spends in prison. Collins v. Youngblood, 497 U.S. 37, 43 (1990). This includes retroactive changes to parole laws. Holmes, 14 F.4th at 258.

To that end, "two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. 24, 29 (1981). When evaluating that second prong with respect to changes in parole laws, the critical inquiry is whether a retroactive change provides a sufficient risk of prolonging an inmate's time in prison. California Dep't of Corr. v. Morales, 514 U.S. 499, 509 (1995). Clearly,

the analysis under this framework is the same whether an inmate's offenses occurred before or after the enactment of the 1979 Act. Because the 1979 Act supplemented the 1948 Act, in either instance, the 1997 amendments are both retroactive and significantly harmful.

In this vein, it is worth emphasizing the unique circumstances under which the 1979 Act took over for the 1948 Act. Once the 1979 Parole Act was implemented along with our modern 2C Criminal Code, it completely displaced the 1948 Act. All inmates were then evaluated under the "substantial likelihood" standard, given future eligibility terms ("FETs") according to the new system, and had commutation credits applied to their FETs in accordance with the new Act.

Crucially, the Board has continued to afford these pre-Code inmates most protections from the 1979 Act even though they were discontinued with the 1997 Act: the inmates continue to receive the benefit of the substantial-likelihood standard, and they continue to have commutation credits applied to reduce their FETs. In the current checklist form for parole decisions, there are three boxes: two that deal with categories for denial under the 1997 Act, and one for denials under the substantial-likelihood standard of the 1979 Act; there is no separate evaluation standard for inmates who committed offenses prior to the 1979 Act. (Pa51); see also N.J.A.C. 10A:71-3.10(a) (applying 1979 Act standard to all

"inmate[s] serving a sentence for an offense committed prior to August 19, 1997" without further distinguishing individuals convicted prior to the enactment of the 1979 Act).

The Board has never sought to discontinue the application of the substantial-likelihood standard or the application of FET credits for pre-1979 inmates by saying they are not entitled to them because their offenses were committed earlier. In other words, after the enactment of the 1979 Act, and even after the 1997 Act, inmates who committed offenses prior to 1979 have always been treated as though they fall squarely within the framework of the 1979 Act.

This also comports with how our courts have treated these inmates. Again, the Board has virtually never argued that any pre-Code inmate was not entitled to the protections of the 1979 Act in their parole appeals, and the courts have almost always treated pre-Code inmates as able to raise their parole issues based on the 1979 Act. See, e.g., Acoli, 250 N.J. at 458 (broadly applying framework of 1979 Act in finding Board had not met its burden for denying parole for person whose offense occurred in 1973); Trantino v. New Jersey State Parole Bd., 166 N.J. 113, 197 (2001) (same for person whose offense occurred in 1963); see also Holmes, 14 F.4th at 255 n.1.

Ironically, when pre-Code inmates raise ex post facto claims seeking to maintain the framework of the 1948 Parole Act against the subsequently-

imposed regime of the 1979 Act, those claims are rejected, and the courts routinely permit the 1979 Act to displace the 1948 Act. See, e.g., Royster v. Fauver, 775 F.2d 527, 533-35 (3d Cir. 1985). But now that inmates seek the protection of the version of the Act that has been foisted on them for over forty-five years (the 1979 Act), the Board insists that the applicable law is actually an almost eighty-year-old statute that has been legally and practically defunct for half a century (the 1948 Act).

The Board's shifting position essentially asserts that it gets to pick and choose which Parole Act applies to a pre-Code inmate based on whichever Act makes it easiest to deny parole. Such a result would only enhance the Kafkaesque nightmare for the elderly inmates with pre-1979 offenses who seek only to have the proper law applied to their proceedings. The argument is especially improper in this instance because, again, the Board is making claims about what is contained in the 1948 Act without even citing to or producing that Act.

It has already been noted that one of the primary focuses of the ex post facto clauses is concern for fundamental fairness. Peugh, 569 U.S. at 543. To be sure, it is fundamentally unfair to deprive inmates who are almost all in their seventies or older from invoking the protection of the Act that the Board and the courts have treated them as falling within for almost fifty years based on an

argument that the Board has never raised in the twenty-five years since the passing of the 1997 amendments. It is a result so egregious that certainly the due process clauses and their adjacent fundamental fairness concerns would also necessarily come into play to prevent it. U.S. Const. amend. V, XIV; N.J. Const. art. I, ¶ 1; Rochin v. California, 342 U.S. 165, 173-74 (1952); State v. Melvin, 248 N.J. 321, 347-48 (2021).

In closing, this Court should not accept the Board's last-ditch effort to avoid complying with the law. It should do what virtually every case in the last thirty years has done—including Holmes—and treat all inmates who committed offenses before 1997 as if they are entitled to the full protections of the 1979 Act, because they are.

Respectfully Submitted,

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