FILED, Clerk of the Supreme Court, 04 Dec 2024, **089603**

FRED KRUG, Plaintiff-Petitioner v. NEW JERSEY STATE PAROLE BOARD, Defendant-Respondent.	: : : : : :	SUPREME COURT OF NEW JERSEY DOCKET NO. 089603 CIVIL ACTION On Certification Granted from a Final Judgment of the Superior Court of New Jersey, Appellate Division Docket No. A-2875-22 Sat Below: Hon. Arnold L. Natali, Jr., J.A.D. Hon. Lisa A. Puglisi, J.A.D.

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

Date Submitted: December 4, 2024

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 080
Trenton, New Jersey 08625
Attorney for Defendant-Respondent
(862) 350-5800
Christopher.Ioannou@njoag.gov

MICHAEL ZUCKERMAN
Deputy Solicitor General

JANET GREENBERG COHEN
Assistant Attorney General

Of Counsel

CHRISTOPHER IOANNOU
(ID: 429912023)
CHRISTOPHER JOSEPHSON
(ID: 014101999)
ROBERT MCGUIRE
(ID: 046361992)
Deputy Attorneys General
On the Brief

FILED, Clerk of the Supreme Court, 04 Dec 2024, **089603**

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS AND PROCEDURAL HISTORY 2

A. New Jersey's Parole Laws. 2

B. Factual Background. 5

LEGAL ARGUMENT

POINT I

THE EX POST FACTO CLAUSE TESTS WHETHER A POST-OFFENSE CHANGE IN LAW CREATES A SIGNIFICANT RISK OF LONGER DETENTION. 10

POINT II

NO EX POST FACTO VIOLATION EXISTS HERE. 15

A. The Relevant Baseline Is The 1948 Parole Act. 15

B. The Current Guidelines Raise No Significant Risk Of Prolonged Detention Relative To The 1948 Parole Act. 17

C. Even Under The 1979 Regime, Krug's Claim Fails. 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Trucking Ass'ns, Inc. v. State,
164 N.J. 183 (2000) 19

Berta v. N.J. State Parole Bd.,
473 N.J. Super. 284 (App. Div. 2022) 21

Cal. Dep't of Corr. v. Morales,
514 U.S. 499 (1995) 12, 13, 14

Calder v. Bull,
3 U.S. 386 (1798) 15

Carmell v. Texas,
529 U.S. 513 (2000) 11

Collins v. Youngblood,
497 U.S. 37 (1990) 10, 13

Doe v. Poritz,
142 N.J. 1 (1995) 10

Dyler v. Bowlen,
465 F.3d 280 (6th Cir. 2006) 13

Evans v. Gerry,
647 F.3d 30 (1st Cir. 2011) 14, 16

Garner v. Jones,
529 U.S. 244 (2000) .... passim

Gilman v. Brown,
814 F.3d 1007 (9th Cir. 2016) 13, 18

FILED, Clerk of the Supreme Court, 04 Dec 2024, **089603**

Gormley v. Wood-El,
218 N.J. 72 (2014) 19

Greenholtz v. Inmates of Nebraska Penal & Corr. Complex,
442 U.S. 1 (1979) 3, 4, 18

Holmes v. Christie,
14 F.4th 250 (3d Cir. 2021) .... passim

In re Trantino Parole Application,
89 N.J. 347 (1982) 3, 4, 17

Lynce v. Mathis,
519 U.S. 433 (1997) 11, 16

Mickens-Thomas v. Vaughn,
321 F.3d 374 (3d Cir. 2003) 16

Nolan v. Thompson,
521 F.3d 983 (8th Cir. 2008) 17

Pa. Prison Soc'y v. Cortes,
622 F.3d 215 (3d Cir. 2010) 14, 18

Peugh v. United States,
569 U.S. 530 (2013) 11, 15, 21

Randolph Town Ctr., L.P. v. Cnty. of Morris,
186 N.J. 78 (2006) 18, 19

Richardson v. Pa. Bd. of Probation and Parole,
423 F.3d 282 (3d Cir. 2005) 13

Royster v. Fauver,
775 F.2d 527 (3d Cir. 1985) 2, 3

FILED, Clerk of the Supreme Court, 04 Dec 2024, **089603**

State v. Dangcil,
248 N.J. 114 (2021) 19

Trantino v. N.J. State Parole Bd.,
154 N.J. 19 (1988) 2, 3

United States v. Molt,
758 F.2d 1198 (7th Cir. 1985) 14

Weaver v. Graham,
450 U.S. 24 (1981) 11, 15, 16

Statutes

N.J.S.A. 30:4-123.14 2

N.J.S.A. 30:4-123.53(a) (1979) 4

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

N.J.S.A. 30:4-123.56(c) (1997) 5

PRELIMINARY STATEMENT

The Ex Post Facto Clause safeguards important values, like fair notice and fundamental fairness. But there is no unfairness or lack of notice in applying to someone the same legal regime that existed when he committed his offense.

That simple principle resolves this case. Precedent teaches that a change in law raises an ex post facto problem only when it creates a significant risk of increasing a prisoner's term of incarceration, judged against the law that was in place when he committed his crime. Here, Petitioner Fred Krug argues that the Parole Board must assess his successive parole application using only new information, a limitation introduced in 1979 and removed in 1997. But Krug committed his crimes in 1973, when the Board was not so limited, and could undeniably consider an inmate's entire record, including his criminal history. So the proper ex post facto baseline is the law in 1973, not 1979, and there can thus be no risk—let alone a significant one—that the Board's current practice will prolong Krug's detention relative to the same practice that was in place in 1973, when Krug committed the murder and aggravated assault for which he was imprisoned.

In short, because the range of information the Board can consider is the same today as it was when Krug committed his crimes, the Ex Post Facto Clause poses no problem here. And finally, in any event, because the Board did

consider new information, and its decision would be the same had it been limited to new information, any ex post facto violation would be harmless. This Court should affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

The State relies on the Statement of Procedural History and Facts in its prior briefing and highlights the following.

A. New Jersey's Parole Laws.

"At the Founding, long prison sentences were unusual, and parole was almost unknown." Holmes v. Christie, 14 F.4th 250, 258 (3d Cir. 2021). Over time, States would come to "embrace[] parole regimes," ibid.; New Jersey's first parole regime was enacted in 1948. Under the Parole Act of 1948, the Parole Board could approve parole "only if it had determined that '[1] there [was] a reasonable probability that, if such prisoner is released, he [would] assume his proper and rightful place in society without violation of the law, and [2] . . . his release [was] not incompatible with the welfare of society.'" Royster v. Fauver, 775 F.2d 527, 529 (3d Cir. 1985) (quoting N.J.S.A. 30:4-123.14 (repealed) (third alteration in original)); accord Trantino v. N.J. State Parole Bd., 154 N.J. 19, 26-27 (1988) ("Trantino II"). The first determination meant that "a prisoner could be released only if the Board believed that the prisoner would not commit

[1] These sections are combined for the Court's convenience.

a crime again." Royster, 775 F.2d at 529. And the second—compatibility with society's welfare—"required the Board to find that the 'punitive aspects' of a prisoner's sentence had been accomplished; that is, that the defendant had served a period commensurate with, and demonstrated contrition appropriate to, the gravity of his crime." Ibid.

The 1948 Parole Act placed no limitations on the information the Board could rely on to make those determinations. Under that system, "the sufficiency of punishment was a highly relevant consideration . . . ." In re Trantino Parole Application, 89 N.J. 347, 368 (1982) ("Trantino I") (explaining that the Board "was required to assess whether the inmate had served enough time in prison and been sufficiently punished in terms of both society's need for adequate punishment and the inmate's individual progress toward rehabilitation"); see also Trantino II, 154 N.J. at 27 (discussing other factors the Board could consider in assessing the public welfare). Indeed, the sufficiency of punishment had been "an independent basis for denying parole on the ground that the crime itself demanded a longer incarceration." Trantino I, 89 N.J. at 370-71. And because "the seriousness of the offense is the main factor that creates the need for punishment," the Board could and often did deny parole based solely on "the gravity of the crime." Id. at 373-74. This focus accorded with parole practices across the country. See, e.g., Greenholtz v. Inmates of Nebraska Penal & Corr.

Complex, 442 U.S. 1, 15 (1979) ("The parole determination therefore must include consideration of what the entire record shows up to the time of the sentence, including the gravity of the offense in the particular case.").

The substance and procedure of New Jersey parole decisions changed with the 1979 Parole Act. Substantively, what had been two separate determinations needed to grant parole—both a reasonable probability that the parolee would not break the law and compatibility with societal welfare—became one: whether there was "a substantial likelihood that the inmate will commit a crime under the Laws of this State if released." N.J.S.A. 30:4-123.53(a) (1979); see also Trantino I, 89 N.J. at 367 (deeming this the "single and exclusive standard for parole entitlement"). And procedurally, the Legislature placed a specific evidentiary limitation on successive, although not initial, parole hearings: to assess the likelihood that the inmate would reoffend if released, the Parole Board was limited to "new information." N.J.S.A. 30:4-123.56(c) (1979). These changes "applie[d] to all persons currently incarcerated in the State prison system upon their parole eligibility dates," including those who had committed their crimes before the 1979 law's enactment. Trantino I, 89 N.J. at 367.

In 1997, the parole laws changed once again. The 1997 Parole Act set a new substantive standard for release: whether "the inmate has failed to cooperate in his or her own rehabilitation or that there is a reasonable

expectation that the inmate will violate conditions of parole." N.J.S.A. 30:4-123.56(c) (1997). And critically here, it removed the new-information provision for successive hearings. See ibid. (requiring "information"—not new information—bearing on the substantive standard). In other words, for both initial and successive hearings, the Board may now "consult any information it deems relevant, including an inmate's criminal history." Holmes, 14 F.4th at 255. Just as under the parole regime governing from 1948 to 1979, "[u]nder the new regime, the Board enjoys free rein to revisit an inmate's criminal history during successive hearings." Id. at 256.

B. Factual Background.

Krug is currently serving a life sentence stemming from two crimes, both committed in 1973. First, in September of that year, Krug killed a woman who had rejected his advances at a local bar. (Ppa2; Ppa4).[2] The woman had been found floating in the Raritan River, naked, hands tied behind her back. (Ppa2). She "sustained head injuries that would have been fatal, but she died of asphyxiation caused by drowning." Ibid. Krug would eventually be found guilty of the murder and sentenced to life imprisonment in 1974. (Ppa3; Pa44).

[2] Psb = Petitioner's supplemental brief
Ppa = Petitioner's petition appendix
Pa = Plaintiff's appellate brief appendix

Second, in December 1973, Krug attacked another woman in the laundry room of her apartment building. Ibid. He bound her and dragged her to the back of the building, while assaulting her and threatening to kill her. Ibid. The woman "sustained extensive swelling on her face and bruising under her eyes and above her wrist and ankle." Ibid. Krug fled the scene and was later stopped by police, at which point he punched an officer in the eye. Ibid. He pleaded guilty to assault with intent to kidnap, threatening to take a life, and assault and battery on a police officer. Ibid. He was sentenced in 1975 to twenty-three years' imprisonment, to be served consecutively to the life sentence. Ibid.; (Pa44-45). Krug committed both the September and December 1973 offenses while on parole, having previously been convicted of rape, aggravated assault, disorderly conduct, and larceny. (Pa44-45) (noting that Krug had violated parole twice before and probation once before).

While in prison, Krug committed thirty disciplinary infractions, including twelve "asterisk," i.e. serious, ones. (Pa46). During that span he lost 710 days' commutation time compared to 180 days restored. Ibid. He committed his most recent infraction—for the serious offense of refusing to submit to a search, in 2017—after his fourth parole hearing in 2016, and before the fifth parole hearing at issue here. (Pa44; Pa46).

At that January 2023 hearing, which followed an in-depth psychological evaluation, a two-member panel of the Board denied parole. (Ppa3-5) (discussing the psychologist's findings, including a "medium risk of recidivism"). The panel's cited reasons for denial included:

- The facts and circumstances of the offenses, namely murder;
- An extensive and repetitive prior offense record;
- An increasingly more serious criminal record;
- The fact that the offenses were committed while on parole, meaning that parole failed to deter criminal behavior;
- The commission of institutional disciplinary infractions, including the serious 2017 infraction which occurred since the last hearing;
- Insufficient problem resolution, specifically a "lack of insight into criminal behavior" and "minimiz[ing] conduct";
- The lack of an adequate parole plan to assist in successful community reintegration; and
- The results of an objective risk assessment indicating a medium risk of recidivism.

(Pa51).

As for insufficient problem resolution, the panel elaborated that Krug "shows no signs of remorse for victims," "downplays his criminal behavior," "has not fully addressed criminal sexual behavior," "has no adequate parole

plan," and emphasized that his "criminal thinking and behavior are [of] concern by failing to comply with previous supervision." Ibid. Nor were these concerns outweighed by mitigating factors like Krug's participation in institutional programs, minimal custody status, reports indicating favorable institutional adjustment, or restoration of commutation time. Ibid. The panel set a thirty-six-month future eligibility term. Ibid.

The Board rejected Krug's administrative appeal of the panel's decision. (Pa64-69). It emphasized that it "is no longer restricted" by the 1979 Parole Act "to considering only new information," meaning that "[a]t each time of parole consideration, the Board may consider the entire record and therefore, if deemed appropriate, may cite some of the same or different reasons for parole denial," so long as those reasons are "deemed relevant." (Pa66). The Board acknowledged that "[m]ost of the information in [Krug's] case remains the same, for example, [his] prior criminal history, substance abuse history, and employment history," but explained that "other information pertaining to [his] institutional adjustment has changed to reflect [his] institutional developments since [his] last Board panel hearing, such as [his] institutional disciplinary record and program participation." Ibid.; see also (Pa68-69) ("[T]he Board finds that the . . . panel appropriately considered [Krug's] institutional disciplinary charges," including the one "serious[] institutional infraction … since [Krug's]

last Board panel hearing."). And the Board defended its determination, based on Krug's "interview" and his file, that he does "not demonstrate the insight necessary in order to be a viable candidate for parole release." (Pa66). Ultimately, the Board agreed with the panel "that a preponderance of the evidence indicates that there is a substantial likelihood that [Krug] will commit a new crime if released on parole at this time." (Pa69).

Krug challenged the Board's decision in the Appellate Division, which affirmed. He claimed, among other things, that the Board violated his right against ex post facto laws by considering information that was not new, as well as his equal protection rights by considering his poverty. (Ppa12-13). The Appellate Division rejected both claims. As for Krug's ex post facto argument, the panel explained that its "review of the Board's decision makes evident that new information gleaned from Krug's parole interview and in-depth psychological evaluation figured prominently in the Board's decision." (Ppa16-17). So the court was "satisfied application of the 1997 amendment in this case did not create a significant risk of increasing Krug's punishment so as to violate the Ex Post Facto Clauses in the federal and state constitutions." (Ppa17 (citing Garner v. Jones, 529 U.S. 244, 255 (2000)). The Appellate Division also found no equal protection violation because "Krug's argument the Board denied him

parole based on his poverty and inability to secure housing . . . is belied by the record." Ibid.

Krug petitioned this Court for certification on both claims. This Court granted the petition in part, limited to the ex post facto question.

LEGAL ARGUMENT

POINT I

THE EX POST FACTO CLAUSE TESTS WHETHER A POST-OFFENSE CHANGE IN LAW CREATES A SIGNIFICANT RISK OF LONGER DETENTION.

The United States and New Jersey Constitutions each prohibit the "pass[ing]" of "any . . . ex post facto law." U.S. Const. art. I, § 10, cl. 1; N.J. Const. art. IV, § 7, ¶ 3; see also Doe v. Poritz, 142 N.J. 1, 42 & n.10 (1995) (explaining that the two clauses are coextensive). Precedent makes clear that this language imposes a particular kind of bar: "Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." Collins v. Youngblood, 497 U.S. 37, 43 (1990). Thus, "[a]lthough the Latin phrase 'ex post facto' literally encompasses any law passed 'after the fact,' it has long been recognized . . . that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them." Id. at 41.

That understanding accords with the Clause's underlying purposes. The Clause is concerned not with "an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." Weaver v. Graham, 450 U.S. 24, 30 (1981); see also Lynce v. Mathis, 519 U.S. 433, 441 (1997) (describing these as the Clause's "central concerns"). Put differently, "in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life," the Clause protects both "reliance interests" and a "fundamental fairness interest." Peugh v. United States, 569 U.S. 530, 544-46, 550 & n.6 (2013) (quoting Carmell v. Texas, 529 U.S. 513, 533 (2000)).

Consistent with this longstanding recognition, modern "ex post facto analysis . . . is concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred." Weaver, 450 U.S. at 29 n.13. As the U.S. Supreme Court has explained, "[r]etroactive changes in laws governing parole of prisoners, in some instances, may be violative of this precept." Garner v. Jones, 529 U.S. 244, 250 (2000); see also Lynce, 519 U.S. at 445 (acknowledging that the "retroactive alteration of parole" may "implicate[] the Ex Post Facto Clause"). But the Court has cautioned that the Clause's

FILED, Clerk of the Supreme Court, 04 Dec 2024, **089603**

application to the parole context presents "question[s] of particular difficulty when the discretion vested in a parole board is taken into account," as the "States must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release." Garner, 529 U.S. at 250, 252; see also id. at 252 ("[T]he Ex Post Facto Clause should not be employed for 'the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures.'" (quoting Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 508 (1995)). So while "[t]he presence of discretion does not displace the protections of the Ex Post Facto Clause," id. at 253, "not every retroactive procedural change creating a risk of affecting an inmate's terms or conditions of confinement is prohibited," id. at 250.

In the parole context, then, the "controlling inquiry" is whether the retroactive parole law "creates a significant risk of prolonging [one's] incarceration." Id. at 250-52 (emphasis added). Such a risk may be "inherent" in the law's "framework," such that the law is disadvantageous on its face. Id. at 251. But when the law "does not by its own terms show a significant risk," a challenger "must show that as applied to his own sentence the law created a significant risk of increasing his punishment." Id. at 255. That is, he "must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will

result in a longer period of incarceration than under the earlier rule." Id. at 255; see also ibid. (explaining that "the general operation of the [State's] parole system may produce relevant evidence and inform further analysis on the point").

Under the significant-risk test, "conjectural effects are insufficient" to prove an ex post facto violation. Morales, 514 U.S. at 509. In other words, it is not enough for a change in parole laws to "create some speculative, attenuated risk of affecting a prisoner's actual term of confinement by making it more difficult for him to make a persuasive case for early release." Id. at 508-09. Rather, "proving a significant risk of prolonged incarceration in parole cases requires exacting evidence." Gilman v. Brown, 814 F.3d 1007, 1016 (9th Cir. 2016); see also Dyler v. Bowlen, 465 F.3d 280, 285-86 (6th Cir. 2006) (courts "must determine whether [challengers] ha[ve] produced specific evidence of a sufficient risk of increased punishment"). Ultimately, "the evidentiary requirement of the [significant-risk] jurisprudence must be honored." Richardson v. Pa. Bd. of Probation and Parole, 423 F.3d 282, 292 (3d Cir. 2005).

To be sure, procedural changes to parole laws are still subject to the significant-risk test. After all, "by simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause." Youngblood, 497 U.S. at 46. Yet while "the prohibitions against ex

post facto laws cannot be evaded just by calling a change in law procedural," United States v. Molt, 758 F.2d 1198, 1201 (7th Cir. 1985), there is nevertheless a "presumption . . . against construing a procedural change as an ex post facto law"—and that presumption "must carry the day in the absence of a stronger showing" that "the [procedural] change works an increase in punishment," Pa. Prison Soc'y v. Cortes, 622 F.3d 215, 247 (3d Cir. 2010) (quoting Molt, 758 F.2d at 1201). That is because procedural changes, by their nature, are often the kinds of "mechanical changes that might produce some remote risk of impact on a prisoner's expected term of confinement" that the Ex Post Facto Clause does not prohibit. Morales, 514 U.S. at 508-09. For good reason: were it otherwise, "any legislative change in procedural or evidentiary law that turned out incidentally to work against a defendant would be condemned." Evans v. Gerry, 647 F.3d 30, 34-35 (1st Cir. 2011). "The 'significant risk' test works to avoid this outcome . . . ." Ibid.; see also Morales, 514 U.S. at 508-09 (rejecting an "expansive" approach under which "the judiciary would be charged . . . with the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures").

FILED, Clerk of the Supreme Court, 04 Dec 2024, **089603**

POINT II

NO EX POST FACTO VIOLATION EXISTS HERE.

Krug agrees with much of the above analysis. See (Psb12-15). But in applying that analysis to the facts of his own case, he makes a critical error: although he asserts that "all parties recognize he is entitled to the protections of the 1979 Parole Act," (Psb15 n.4), the proper baseline for the constitutional ex post facto analysis is the law actually in place when he committed his crime. And that law—the Parole Act of 1948—placed no limitation on the information the Parole Board could consider at successive parole hearings. So there is no risk, let alone a significant one, that removing the new-information limitation would increase Krug's punishment relative to the law in place when he committed his crimes.

A. The Relevant Baseline Is The 1948 Parole Act.

As Krug himself notes, a change in parole laws violates the Ex Post Facto Clause only when the retroactively applied law is "more onerous than the law in effect on the date of the offense." (Psb13 (quoting Weaver, 450 U.S. at 29-31) (emphasis added)). That understanding has remained constant for centuries. See Peugh, 569 U.S. at 539 (assessing the risk of increased punishment relative to "when [the defendant's] crimes were completed"); Calder v. Bull, 3 U.S. 386, 390 (1798) (opinion of Chase, J.) (noting the prohibition of "[e]very law that

FILED, Clerk of the Supreme Court, 04 Dec 2024, **089603**

changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed"). That makes sense: the "central concerns" of the Ex Post Facto Clause are "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." Lynce, 519 U.S. at 441 (quoting Weaver, 450 U.S. at 30). Fair notice and fundamental fairness, in short, create a "constitutional expectation" that "the parole criteria in effect at the time of the crime will be applied." Mickens-Thomas v. Vaughn, 321 F.3d 374, 391-92 (3d Cir. 2003) (emphasis added).

While Krug quotes this language, (Psb13-14), he fails to recognize its import. He committed his crimes—including murder—in 1973, half a decade before the new-information limitation's enactment in the Parole Act of 1979. (Ppa2-3); see also (Psb15 n.4) ("Mr. Krug's offenses were committed under the old [1948 parole] scheme."). So his assertion that "he is entitled to the protections of the 1979 Parole Act," (Psb15 n.4), is misguided. Whether the Legislature decided to apply the 1979 Act retroactively to inmates like Krug is irrelevant: because the "usual perspective from which Ex Post Facto analysis views statutory changes is that of the time of the criminal act," Evans, 647 F.3d at 35, in assessing significant risk courts "must compare [the State]'s current parole laws with those that were in effect at the time of [the inmate's] offense,"

e.g., Nolan v. Thompson, 521 F.3d 983, 987 (8th Cir. 2008). The law in effect at the time of Krug's offense was plainly the Parole Act of 1948. (Psb15-16).[3]

B. The Current Guidelines Raise No Significant Risk Of Prolonged Detention Relative To The 1948 Parole Act.

Under this governing framework, Krug's claim cannot succeed. Krug makes no effort to explain how the current regime—under which "the Board may consult any information it deems relevant, including an inmate's criminal history," Holmes, 14 F.4th at 255—poses a significant risk of increased punishment to him relative to the 1948 Parole Act. Nor could he: as he himself acknowledges, "[p]ursuant to the old 1948 Act, whether an inmate had been rehabilitated and whether an inmate had been sufficiently punished underscored the Board's assessment." (Psb15-16). And "since the seriousness of the offense is the main factor that creates the need for punishment," the 1948 framework clearly entailed examining "the gravity of the crime." Trantino I, 89 N.J. at 373-74. In other words, under the 1948 Act just as now, a parole decision is based on the "entire record," which necessarily includes "the gravity of the offense in

[3] Krug would not be able to avoid this conclusion by relying on other constitutional provisions, such as the Due Process Clause, and does not attempt to do so. "Neither the Due Process Clause's procedural component nor its substantive one announces an anti-retroactivity principle," and courts "have not found . . . any case invalidating the retroactive application of a new rule on due process grounds." Holmes, 14 F.4th at 267-68 (declining to "transform the Due Process Clause into an end-run around the Ex Post Facto Clause").

the particular case." Greenholtz, 442 U.S. at 15; see also Holmes, 14 F.4th at 267 ("[A]n inmate's criminal history represents a common component of parole decisions."). Krug's complaint that the Board improperly considered his "criminal history," (Psb5-9), thus falls flat; it was entitled to do so in 1973, when Krug committed his crime, just as it was entitled to do so now.

The 1979 Parole Act introduced an evidentiary limitation—the new-information provision for successive hearings—that is present in neither the 1948 Parole Act that governed when Krug committed his crimes nor the 1997 law that applies to him today. In that regard, the continuity between the two relevant regimes for ex post facto purposes means that there is no "retroactive procedural change" at all, let alone a change that "creates a significant risk of prolonging [Krug's] incarceration." Garner, 529 U.S. at 250-51 (emphasis added). Under these circumstances, it is a matter of simple logic that Krug cannot offer "exacting evidence" of a significant risk of prolonged incarceration, Gilman, 814 F.3d at 1016—which alone suffices to dispose of his challenge to this procedural rule (governing consideration of all relevant information), see Cortes, 622 F.3d at 247.[4]

[4] As a result, this Court need not and should not consider whether a significant risk exists for prisoners who—unlike Krug—committed their crimes between the 1979 Act's passage of the new-information provision and the 1997 law's removal of that provision. See, e.g., Randolph Town Ctr., L.P. v. Cnty. of

C. Even Under The 1979 Regime, Krug's Claim Fails.

While the parties agree on much of the above analysis, and of course agree that Krug committed his crimes (and indeed was sentenced) years before the 1979 act, the clearest problem with Krug's ex post facto theory that flows from those points—that the relevant baseline for Krug is, in fact, the 1948 Parole Act—was not put before the panel below. This Court should nevertheless address that obvious ex post facto implication, as "the limitation on the scope of appellate review is not absolute," especially when "the issue is an important one of public concern and ought be considered." State v. Dangcil, 248 N.J. 114, 132 n.4 (2021) (citations omitted); cf. Gormley v. Wood-El, 218 N.J. 72, 95 n.8 (2014) (deeming a state constitutional claim "to have lapsed" where the claimant failed to "advance or develop her claim" even "in her brief to [and] oral argument before this Court"). The meaning of the Ex Post Facto Clause is undisputedly an "important" issue "of public concern," Dangcil, 248 N.J. at 132 n.4, and the State has consistently opposed Krug's ex post facto claim on the merits—the fact that it did not make this precise argument cannot change the

---

Morris, 186 N.J. 78, 80 (2006) ("Courts should not reach a constitutional question unless its resolution is imperative to the disposition of litigation."); Am. Trucking Ass'ns, Inc. v. State, 164 N.J. 183, 183 (2000) ("[W]hen ultimate constitutional issues are especially fact-sensitive the Court should await, before decision, the presentation of a well-developed record.").

Clause's meaning or the correctness of the judgment line below, see supra at 10-18.

In any event, even if this Court were inclined to overlook that clear problem with Krug's constitutional theory and, moreover, to limit the Board to new information under the 1979 Rule, the judgment below should still be affirmed, as the Board did consider new information when denying Krug's parole application. See (Ppa16-17) (Appellate Division so finding). For one, the Board cited Krug's "serious[] institutional infraction . . . since [his] last Board panel hearing," (Pa68-69), satisfying even his narrow view of the new-information provision (with which the State disagrees) that would require the parole applicant to have committed an "institutional infraction[] . . . since his or her last review," (Psb17).[5] For another, the Board's determination of "insufficient problem resolution" was "based on [Krug's] responses to questions posed by the Board panel at the time of the hearing," and the Board further "considered [his] risk assessment evaluation . . . which indicate[d] a medium risk of recidivism." (Pa65). Such evidence is patently new information. See Holmes, 14 F.4th at 266 n.15 ("[W]e assume that the [risk] assessments

[5] This new infraction and the Board's consideration of it also belies Krug's claim that "an inmate who has a new infraction so severe it undisputably dispels any reasonable possibility of parole is an extreme outlier situation." Contra (Psb29).

constitute 'new information' under the pre-1997 rule."); cf. Berta v. N.J. State Parole Bd., 473 N.J. Super. 284, 317 n.16 (App. Div. 2022) (treating an applicant's "continuing refusal to admit his guilt" as "new information," where Board's "conclusion that [the applicant] demonstrated insufficient problem resolution was based on his present (i.e., post-initial hearing) denial of guilt").

Thus, because "the record makes clear" the Board "would have imposed the same" decision even if it had been limited to new information, any "ex post facto error" would "be harmless" even if the proper constitutional baseline were the 1979 regime. See Peugh, 569 U.S. at 550 n.8. But as discussed in detail above, because Krug committed his crimes in 1973, the proper ex post facto baseline is the 1948 regime, which was reinstated in relevant part by the 1997 amendment that Krug now claims was improperly applied. For that reason, as Krug is subject to the same rule that was in force when he committed his crimes, no ex post facto problem can exist in this case, and this Court can and should simply reject his claim on that independently sufficient basis.

CONCLUSION

This Court should affirm.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Christopher J. Ioannou
Christopher J. Ioannou (429912023)
Deputy Attorney General

December 4, 2024