IN THE

Supreme Court of New Jersey

No. A-24-24 (089243)

REVISED

HORACE COWAN,	:	ON A PETITION FOR CERTIFICATION TO THE SUPERIOR COURT, APPELLATE DIVISION, DOCKET NO. A-1131-20
Petitioner-Appellant,	:	
v.	:	
NEW JERSEY STATE PAROLE BOARD,	:	*Sat Below*: MARY GIBBONS WHIPPLE, J.A.D. CATHERINE I. ENRIGHT, J.A.D.
Respondent-Respondent.	:	ON APPEAL FROM THE NEW JERSEY STATE PAROLE BOARD.

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

JEANNE LoCICERO (024052000)
EZRA D. ROSENBERG (012671974)
REBECCA UWAKWE (906102012)
American Civil Liberties Union of New Jersey Foundation
Post Office Box 32159 Newark, New Jersey 07102 973-854-1717
jlocicero@aclu-nj.org

Of Counsel and On the Brief.

RONALD K. CHEN (027191983) JESSICA ROFÉ*
Rutgers Constitutional Rights Clinic Center for Law & Justice
123 Washington St.
Newark, New Jersey 07102 973-353-5378
ronchen@law.rutgers.edu

* *Permitted to practice law in NJ pursuant to R. 1:21-3(c)*

Attorneys for Amicus Curiae American Civil Liberties Union of New Jersey

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INTRODUCTION

The American Civil Liberties Union of New Jersey ("ACLU-NJ") respectfully submits this brief in support of Petitioner Horace Cowan in the above captioned matter.

PRELIMINARY STATEMENT

The New Jersey State Parole Board is unusual among administrative agencies in that its function is mandated directly by our state constitution, which requires that "A *system* for the granting of parole shall be provided by law." N.J. Const. Art. V, §2, ¶2 (emphasis added). The legislative history of the 1947 Constitutional Convention makes clear that the purpose of this new provision was to replace the prior ad hoc decision-making by individual prison wardens with a structure by which parole decisions would be based on uniform application of technical expertise and collective knowledge. Although true for all administrative agencies, it is therefore especially the obligation of the Parole Board to render decisions that on their face reflect the considered application of that technical expertise to adduce facts supported by substantial evidence, leading to conclusions cogently explained by the agency is a way to permit the meaningful judicial review required by the New Jersey Constitution.

In this case however, despite being presumptively eligible for parole in

2020, the Parole Board not only denied parole to Mr. Cowan, but imposed an astonishing 200 month Future Eligibility Term (FET) before he could next seek parole, i.e. an FET of almost 17 years that is more than seven times the default 27 month FET provided for in the Administrative Code, and which would theoretically require that Mr. Cowan (age 52 at the time of denial) wait until he was almost age 70 before even being permitted to renew his application for parole. The imposition of such an egregiously disproportionate FET effectively imposes the Board's revisionist assessment of the proper length of Mr. Cowan's sentence, which is well beyond the Board's authority.

Under the Parole Board's own regulations, such a dramatic departure from the presumptive FET requires a convincing demonstration that the presumptive FET is "clearly inappropriate" due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior. The record in this case, however, does not demonstrate the clarity needed to justify this remarkable departure from the norm. Rather, the decision consists of rote recitation of often ill-defined concepts. Moreover, the Board has inverted the required process of administrative decision-making, by which conclusions are based upon the factual predicates. But after the initial Board decision, favorable factual findings were subsequently deleted, and unfavorable findings that did not appear in the original Board decision were

added, with the only explanation given that this retrofitting of the facts was more consistent with the ultimate conclusion that the Board wished to reach.

The unbridled discretion that the Parole Board has been exercising in imposing FETs that are widely beyond the presumptive terms contained in the Administrative Code should prompt this court to adopt strict guidelines that guard against future abuse of discretion.

Moreover, in two particular respects the Board has failed to discharge its obligation to explain and justify the bases of its decision: the first in which it uses "lack of insight," a factor that has not been defined in any way nor adopted through the rule-making process, to deny parole and impose the extraordinary 200 month FET; and second, the lack of significant reliance on the statutorily required risk assessment scale, the LSI-R, which is recognized as providing a reliable and generally accepted indication of risk of re-offense. In particular, it is facially inexplicable to fail to take into account Mr. Cowan's age, and at least consider the "age-crime curve" that numerous studies have concluded is a significant predictive factor in assessing risk of re-offense, while at the same time making use of inchoate concepts such as "lack of insight" that have not been defined or validated by empirical data.

Although courts give deference to administrative agency determinations due to their technical expertise, that deference is dependent upon the agency's

discharging its obligations under the Administrative Procedures Act and principles of administrative due process to explain the basis of its decision in a way that will permit meaningful judicial review, and without engaging in the ad hoc rulemaking that characterizes the record in Mr. Cowan's case.

FACTS AND PROCEDURAL HISTORY[1]

On July 31, 1992, Horace Cowan was convicted of one count of manslaughter under N.J.S.A. 2C:11-4 and one count of weapons possession under N.J.S.A. 2C:39-4. Subsequently, on October 16, 1992, in connection with an escape attempt, he was convicted of aggravated assault under N.J.S.A. 2C:12-1, criminal restraint under N.J.S.A. 2C:13-2, and escape under N.J.S.A. 2C:29-5. He has been in custody since July 31, 1992. (Ra2)

Mr. Cowan first became eligible for parole on February 19, 2020. (Ra46). On January 2, 2020, a two-member panel of the New Jersey State Parole Board ("Parole Board") denied Mr. Cowan parole based on "a substantial likelihood exists that [he] would commit a new crime if released on parole at this time," and determined that a future eligibility term ("FET")

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[1] As an appeal from an administrative agency, the facts and procedural history are inextricably intertwined and these sections are therefore combined for the convenience of the Court.

within the Board's presumptive schedule of twenty-seven-months (± 9 months) may be inappropriate. (Ra55). On January 20, 2020, Mr. Cowan provided the two-member panel with a letter of mitigation along with supporting documents.

Two months after its initial determination on March 3, 2020, the two-member Board panel amended its parole denial decision. Among its amendments, it removed the mitigating factor, "positive interview noted," and added "specifically: lack of insight into criminal behavior" and "commission of current offense while incarcerated" as reasons for denial. (Ra124-26). The Board also suggested Mr. Cowan "remain infraction free", but provided no indication as to what period of time would be sufficient. (Ra123). The Board's explanation for removing the mitigating factor was simply that "it does not appear appropriate for the Board panel's interview," and that it was adding "lack of insight" because of a notation under "Other" that the panel believed that Mr. Cowan "had still not addressed his criminal behavior or thinking." (Ra125-26). Nevertheless, the Board did *not* find that he either denied his conduct or minimized his offense. (Ra123).

The two-member panel referred Mr. Cowan's case to a three-member Board panel, and on May 6, 2020, the Board issued a two-hundred-month FET,

equivalent to nearly seventeen years,[2] and over seven times the twenty-seven-month presumption. (Ra129). The three-member Board panel relied on many of the same factors discussed by the two-member Board panel, noting that Mr. Cowan "lack[ed] insight into [his] criminal behavior" and demonstrated "insufficient problem resolution". (Ra138). However, the Board did not discuss how the two-hundred-month FET related to Mr. Cowan's rehabilitation progress insofar as it bears on the determination of a substantial likelihood he will commit a crime. (Ra138).

The "specific reasons" the Parole Board presented for imposing a two-hundred-month FET included that Mr. Cowan "must develop a deeper understanding into why [he] made the choice and found it easily acceptable to act in a criminal manner" and "must conduct an introspection to understand the emotional and psychological demands of [his] criminal thinking". (Ra141-142).

Mr. Cowan submitted evidence of mitigating factors, including over fifteen certificates of completion, achievement, or appreciation from institutional programs or services. (Ra77-103). The Board noted that Mr.

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[2] In practice, due to good time and work credits, the time period will likely be shorter.

Cowan successfully completed multiple educational, religious, behavioral and substance abuse programs and counseling across the decades while incarcerated but stated Mr. Cowan had not "made adequate progress in the rehabilitative process" and "further programming will assist [him] in gaining a better understanding of [his] criminal thinking". (Ra142). The panel made no recommendations as to the types of programming or length of programming that would aid in this process. (Ra142).

Moreover, the Board included Mr. Cowan's history of infractions in its reasons for its decision, specifically discussing two incidents from 2018. (Ra140). The Board acknowledged that Mr. Cowan was attacked in his cell by multiple inmates on May 10, 2018, (Ra160) and that this attack left him significantly injured with multiple facial lacerations, slurred speech, and swelling to the nose. (Ra160, Ra174). The Board found that Mr. Cowan demonstrated "insufficient problem resolution" because he chose "to interact and lecture inmates on how they were living a negative life based upon their street gang affiliations," which is what provoked the attack. (Ra138-40). Later, on August 22, 2018, Mr. Cowan refused a work transfer order because it would have placed him in close proximity to his attackers. (Ra51,140-142).

On July 28, 2020, Mr. Cowan administratively appealed the panel's decision to impose a two-hundred-month FET to the full Board. (Ra144-253).

The Parole Board based part of its decision on Mr. Cowan's conviction of aggravated manslaughter that occurred thirty-five years before when he was twenty-two years old (Ra35, Ra123), and further cited Mr. Cowan's criminal record, including his juvenile offenses. (Ra136-37). The Board did not rely on the risk assessment instrument specifically or on any psychological evaluations in its decisions, other than to note his LSI-R score of 24. (Ra123, Ra133-142).

The full Board entered a final agency decision on November 18, 2020, affirming the denial of parole and imposition of a two-hundred-month FET. (Ra256-61). The Board included the following reasons for its decision: "insufficient problem resolution", "lack [of] insight into [his] criminal behavior", "further programming." (Ra138, 141-42). He also provided copies of his high school diploma and transcript along with his marriage certificate and letter of support from his wife (Ra77-103).

On December 12, 2023, Mr. Cowan appealed the Parole Board's decision to deny parole and imposition of a two-hundred-month FET beyond the presumptive twenty-seven-month extension. On January 25, 2024, the Appellate Division affirmed the Board's decision. *Cowan v. New Jersey State Parole Board*, No. A-1131-20 (App. Div. Jan. 25, 2024). On January 17, 2025, this Court granted certification.

LEGAL ARGUMENT

I. THE PAROLE BOARD FAILED TO DISCHARGE ITS OBLIGATION TO EXPLAIN ITS IMPOSITION OF AN ABERRANT TWO-HUNDRED-MONTH FUTURE ELIGIBILITY TERM IN A MANNER THAT WOULD PERMIT MEANINGFUL JUDICIAL REVIEW.

Unlike the federal system, where judicial review of administrative agency action is established by statute, in New Jersey the state constitution itself mandates the availability of such review under Art. VI, §5, ¶4, the action in lieu of prerogative writs clause, and thus judicial review of administrative agency determinations "has the support of a special constitutional provision . . . which largely immunizes it from legislative curbs." *In re Senior Appeals Examiners*, 60 N.J. 356, 363 (1972). *See, In re Li Volsi*, 85 N.J. 576, 594 (1981). This Court expressly invoked the "special constitutional structure" of Article VI, §5, ¶4, in order to bring the Parole Board within the judiciary's power of review in *Monks v. N.J. State Parole Bd.*, 58 N.J. 238, 242 (1971).

A corollary to the constitutional mandate of judicial review over administrative agency action is the obligation that the agency explain the reasons for its decision in a manner that permits meaningful judicial review and through procedures that comport with administrative due process. It is only through such a carefully articulated decision that the courts can discharge the historic purpose of prerogative writs to prevent arbitrary exercise of

executive power.

A. The Parole Board Was Created to Insure that Parole Decisions Are the Result of Reason and Experience, Rather than Impulse.

The constitutional provenance of the Parole Board itself reinforces its obligation to articulate the exercise of its discretion in a manner that outwardly demonstrates that it is acting pursuant to its technical expertise. The 1947 Constitution established that "[a] system for the granting of parole shall be provided by law." N.J. Const., Art. V, §2, ¶2. Prior to the 1947 Constitution, early release of prisoners was determined on an ad hoc basis by the warden of each prison. This new provision sought to separate the parole function from the power of pardon and clemency on the part of the Governor, which remains a matter of unreviewable executive grace and discretion under Art. V, §2, ¶1. *See Proceedings of the N.J. Constitutional Convention*, Vol. 5, pp.179, 188 (Committee on the Executive, Militia and Civil Officers, Jul. 1, 1947, afternoon session).

As Delegate Jane Barus, an early advocate for prison reform, noted: "The intent of the Section is to put the parole decisions in the hands of technical experts." *Id.*, Vol. 5, p.138; *see also id.* Vol. 5, p.477 (Recommendations of The League of Women Voters Of New Jersey) ("An adequate parole system requires special expert knowledge and should be

changed as that knowledge advances.").

> Parole is part of the system of punishment under the laws of the State, of offenders against the State, and is part of the sentence which should be determined upon by the special people who are trained to administer those institutions. They should have an orderly process set up by law, by which a man in an institution can appeal to be heard.

Id., Vol. 5, p.184 (Delegate Barus).

Thus, the legitimacy of the Board's exercise of discretion is rooted in its technical expertise. The Board's exercise of such expertise is subject to the same level of review as other administrative agencies and the standards of the Administrative Procedures Act. Accordingly, the Board's decisions must comport with the law and be reasonably based on relevant factors supported by evidence such that the conclusions of the Board are not arbitrary or capricious.

B. The Parole Board Failed to Articulate the Basis for Its Decision with Sufficient Clarity.

For even deferential judicial review to be meaningful, the agency must state its reasons for its action grounded in the factual record. *In re Authorization for Freshwater Wetlands Gen. Permits*, 372 N.J. Super. 578, 595 (App. Div. 2004). Simply adducing a factual record alone, however, is insufficient to explain an agency decision as "even the best record will be unavailing unless we can also discern the use to which it was put by the factfinder." *Drake v. Dep't of Human Servs. Div. of Youth & Family Servs.*,

186 N.J. Super. 532, 538 (App. Div. 1982). Moreover, it is not sufficient for an agency merely to state conclusions. *See N.J. Bell Tel. Co. v. Commc'n Workers of Am.*, 5 N.J. 354, 375 (1950). Rather, an agency must further explain the nexus between the evidence and its conclusions with sufficient specificity to enable the reviewing court to determine whether the basis is reasonable.

This proposition is equally true with respect to the Parole Board. In *Monks v. N.J. State Parole Bd.*, 58 N.J. 238 (1971), this Court firmly rejected the Parole Board's prior refusal to give any reasons for the denial of parole and affirmed that the requirement that administrative agencies must provide an adequate explanation for its decisions applies equally to the Parole Board. As *Monks* explained:

> When dealing with administrative agencies generally we have long pointed to the need for suitable expression of the controlling findings or reasons. Thus in *Abbotts Dairies v. Armstrong*, 14 N.J. 319 (1954), we stressed that findings were of the utmost importance "not only in insuring a responsible and just determination" by the agency but also "in affording a proper basis for effective judicial review." . . . Similarly in *Securities and Exchange Com. v. Chenery Corporation*, 318 U.S. 80 (1943), Justice Frankfurter noted that the orderly process of judicial review requires that the grounds for the administrative agency's action be clearly disclosed by it. 318 U.S. at 94. *See Davis, Administrative Law* § 16.12, p. 585 (1970 Supp.): "One of the best procedural protections against arbitrary exercise of discretionary power lies in the requirement of findings and reasons that appear to reviewing judges to be rational."

Monks, 58 N.J. at 244-45.

Moreover, the deferential standard of review may not apply where, as here, the record indicates significant modifications in the initial Board panel's findings in a way that buttresses the Board's ultimate conclusions. The original notation of a "positive interview" with Mr. Cowan was deleted as "inappropriate." The negative finding of "lacks insight" which later formed a substantial basis for the final denial decision was mysteriously not thought worthy of mention initially. As the Appellate Division noted in a case with similar facts:

> [O]ur obligation to afford substantial deference to an agency's adjudicatory decision does not force us to turn a blind eye to a post-hoc justification—that is, a reason devised to justify a decision that was already made as a fait accompli for other unstated reasons. Our task is to be neutral reviewers of agency decisions, not apologists for them, and thus nothing prevents us from piercing the veil of an unsupported decision.

Berta v. New Jersey State Parole Bd., 473 N.J. Super. 284, 303-304 (App. Div. 2022) (reversing denial of parole).

C. The Record in this Case Does Not Establish a Substantial Likelihood that Mr. Cowan Will Reoffend, and Certainly Does Not Justify a 200 Month FET.

The New Jersey parole statute "creates a protected expectation of parole in inmates who are eligible for parole." *Trantino v. N.J. State Parole Bd.*, 154 N.J. 19, 25 (1998) (*Trantino II*). Under the version of the Parole Act applicable

to Mr. Cowan, parole must be granted unless it is shown by a "preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime under the laws of this State if released on parole at such time." N.J.S.A. 30:4-123.53(a); *see In re Application of Trantino*, 89 N.J. 347, 366 (1982) (*Trantino I*). The burden on the Board to establish such a likelihood is a substantial one. As this Court noted in *Acoli v. Parole Board*, 250 N.J. 431, 455-456 (2022):

> "Likelihood" is defined as a "probability," or "the appearance of probable success," and "substantial" is defined as "considerable in amount" or "being that specified to a large degree." *Webster's Third International Dictionary* 1310, 2280 (1981). Requiring that the Board show that there is a substantial "probability" that an inmate will reoffend is a fairly high predictive bar that must be vaulted -- even though such an assessment will defy scientific rigor and involves a certain degree of subjectivity.
>
> This much we can say about the term "substantial likelihood." Assessing the risk that a parole-eligible candidate will reoffend requires a finding that is more than a mere probability and considerably less than a certainty. To be sure, the mere "potential" that an inmate if released may reoffend is not sufficient. *See State Parole Bd. v. Cestari*, 224 N.J. Super. 534, 550, 540 A.2d 1334 (1988). Only when the risk of reoffending rises to "a substantial likelihood" may a parole-eligible inmate be denied parole. *Ibid.*

In reviewing the Parole Board's decision, the Court must consider whether its findings and conclusions are sufficient to satisfy the ultimate statutory standard, as informed by the twenty-four factors contained in N.J.A.C. 10A:71-3.11(b). *See Trantino I*, 89 N.J. at 372 ("[T]he individual's likelihood

of recidivism is now the sole standard for making parole determinations"); *Trantino II*, 154 N.J, at 31 (cautioning against treating recidivism and rehabilitation as "cognate criteria," since rehabilitation is relevant "only as it bears on the likelihood that the inmate will not again resort to crime.").

The "specific reasons" the Parole Board presented for denying parole (Ra141) are amorphous and inadequate. First, the Board stated Mr. Cowan "must develop a deeper understanding into why [he] made the choice and found it easily acceptable to act in a criminal manner" and "must conduct an introspection to understand the emotional and psychological demands of [his] criminal thinking." (Ra141-142). These abstractions are so diffuse that they could be safely applied to any parole applicant who had been convicted of a serious crime, and without any realistic possibility that the Board could ever be contradicted, since the inability of an inmate to demonstrate sufficient emotional or psychological introspection on the underlying compulsions that led him to commit a crime decades earlier is effectively incapable of objective proof or disproof.

Additionally, the Board noted that Mr. Cowan successfully completed multiple educational, religious, behavioral and substance abuse programs and counseling across the decades while incarcerated, but nonetheless stated Mr. Cowan has not "made adequate progress in the rehabilitative process" and

"further programming will assist [him] in gaining a better understanding of [his] criminal thinking." (R142). However, the panel made no recommendations as to the types of programming or length of programming that would aid in this process, nor why two-hundred months is necessary to complete the programming. The justification for the panel's decision contradicts the facts of Mr. Cowan's progress while incarcerated. Given the lack of guidance, it is possible the Board expected Mr. Cowan to complete the same programs again, but this would be unlikely to foster "adequate progress in the rehabilitative process" and leaves Mr. Cowan with an unclear path forward.

The two-hundred-month FET is facially unjustified in Mr. Cowan's case and should be vacated. Since an FET that was within the normal parameters of N.J.A.C. 10A:71-3.21(a)(1) would have long since expired, this should result in the immediate consideration of Mr. Cowan's renewed parole application.

1. The Parole Board's Practice of Imposing FETs So Demonstrably Outside the Parameters of Sound Discretion Should Prompt this Court to Establish Protections Against Future Abuses of Discretion.

An inmate serving a sentence for manslaughter is presumptively assigned a twenty-seven-month future eligibility term after a denial of parole pursuant to N.J.A.C. 10A:71-3.21(a)1. In assessing an appropriate future

eligibility term, the three-member Board panel may establish a future parole eligibility date that differs from the presumptive schedule if the presumptive term is "clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior." N.J.A.C. 10A:71-3.21(d). The Board must consider the same factors enumerated in N.J.A.C. 10A:71-3.11 in making the determination that the presumptive future eligibility term is clearly inappropriate. N.J.A.C. 10A:71-3.21(d).

Here, the Parole Board's implementation of a two-hundred-month future eligibility term is arbitrary and capricious because the Board failed to adequately explain why it set an FET over seven times as long as the presumptive twenty-seven-month FET. *See Berta v. N.J. State Parole Bd.*, 473 N.J. Super. 284, 322 (App. Div. 2022). When imposing an FET longer than the presumed FET in N.J.A.C. 10A:71-3.11(b), "the Board must explain not only why the presumptive FET is clearly inappropriate, but also why the FET that was actually imposed is necessary and appropriate." *Berta*, 473 N.J. Super. at 323.

The Board cited Mr. Cowan's history of infractions, highlighting the 2018 incident where he was attacked in his cell. The Board acknowledged that Mr. Cowan was defending himself against three attackers and took action to notify corrections officers about his concern for his safety prior to the assault.

(Ra140, 142). Nonetheless, the Board disapproved that Mr. Cowan chose "to interact and lecture inmates on how they were living a negative life based upon their street gang affiliations," which in a typical setting would be considered righteous and brave behavior. (Ra140). Furthermore, it is unclear from the Board's statement of reasons how or why nearly seventeen years of introspection is necessary for Mr. Cowan's opportunity for parole to be revisited. Given these attenuated justifications by the Board, it appears it reached a two-hundred-month FET by "simply pick[ing] a number out of thin air." *Berta*, 473 N.J. at 323 (striking down a 120 month FET).

Where the FET is so wildly disproportionate from the norm contained in the regulations, as it is here, there must be a particularized explanation for why the parole board deviated so dramatically; otherwise, their decision should be deemed arbitrary and capricious. *Id.* Lacking such a nexus, it is reasonable to infer that the Parole Board's decision to impose a two-hundred-month FET is instead "a form of punishment" which is not "tied directly to the goal of reducing the likelihood of future criminal behavior." *Id.* But the role of the Parole Board is not to modify sentences, and the imposition of an FET is not meant to be punitive. *See State Parole Bd. v. Byrne*, 93 N.J. 192, 205 (1983). "[T]he 'punitive aspect' of an inmate's sentence has already been satisfied by the time he or she first becomes eligible for parole." *Id.* at 323; *Acoli*, 250 N.J.

at 457. The Board's imposition of over a sixteen-year future eligibility date for next consideration for parole effectively modified – and enlarged - Mr. Cowan's sentence, which is beyond the roles and responsibilities of the Board.

Although Amicus is unaware of published aggregate statistics on the length of FETs imposed by the Parole Board over time,[3] reference to appellate decisions indicates that the Parole Board imposes abnormally lengthy FETs with some regularity. And yet, as noted by Judge Geiger in his concurring opinion in *Berta*, "The issue largely unaddressed by our case law is the degree of discretion afforded to the Board in imposing lengthy FETs under the current framework." *Berta*, 473 N.J. Super. at 327 (Geiger, J. concurring). Judge Geiger continued to describe his concerns:

> Considering the limited rights afforded to inmates to present their case for parole to the Board and to challenge the evidence relied upon by the Board in setting an FET, coupled with our deferential standard of review based on the resulting limited record developed before the Board, one must question whether the inmate's right to due process is satisfied. This issue is particularly troublesome when the FET imposed far exceeds the ordinary twenty-seven-month FET limit for murder cases under *N.J.A.C.* 10A:71-3.21(a)(1) and is well beyond the additional nine months that may

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[3] An admittedly unscientific method of searching New Jersey cases on LEXIS revealed that there are 71 appellate decisions containing the term "120 month FET" and 4 decisions containing the term 200 month FET," including the Appellate Division below. Such a search would of course not discover imposition of FETs in which the inmate did not or could not appeal the decision to the courts.

added to an FET under *N.J.A.C.* 10A:71-3.21(d).

Id. Judge Geiger then respectfully suggested that this Court "examine the Board's largely unbridled discretion to impose extended FETs, whether inmates should be afforded greater procedural rights before extended FETs are imposed, and whether the imposition of extended FETs warrants closer scrutiny under a less deferential standard of review." Absent such protections, Judge Geiger was concerned that the imposition of an abnormal FET might violate the principles of "fundamental fairness" subsumed within the due process guarantee of Art, I, ¶ of the New Jersey Constitution.

Amicus agrees that this Court should take this opportunity to establish clear guidelines limiting the exercise of unbridled discretion by the Board in imposing abnormal FETs. It is important to note that the expiry of an FET does not in itself cause the release of an inmate, but merely sets the time for the next consideration by the Board on whether parole should be granted. It is therefore difficult to comprehend what public interest is served by imposing an FET outside of the normal parameters established by regulation. The only cost would appear to be one of convenience in lessening the workload of the Parole Board in considering successive parole applications, but that administrative convenience can hardly justify the prolonged detention of an inmate presumptively entitled to parole from being able to apply for release, and

certainly not for such an inordinate length of time.

While Amicus would not oppose additional procedural protections when the Board seeks to impose an abnormal FET, it has difficulty identifying the protections that might address this situation, beyond those that which already exist and which have thus far been inadequate, or that would call for the dedication of resources for legal counsel that would require legislative action. Amicus therefore respectfully suggests that this Court can and should establish that imposition of an FET outside of the 27-month (± 9 months) schedule of N.J.A.C. 10A:71–3.21(d) is presumptively an abuse of discretion. While it might be tempting to consider an "extraordinary circumstances" exception if the Board overcame a strong burden of proof that a longer FET is necessary to protect the public interest, it is again difficult to comprehend how merely considering a new parole application under a normal FET could ever seriously undermine that interest, and we have already seen in these cases how a purported exception easily swallows the rule.

II. THE PAROLE BOARD ENGAGED IN IMPROPER AD HOC RULEMAKING IN USING "LACK OF INSIGHT" AS THE BASIS FOR DENYING PAROLE AND IMPOSING A 200 MONTH FET.

In deciding whether to grant parole, the Board shall consider the factors enumerated in N.J.A.C. 10A:71–3.11, which are the same factors used to

determine the length of an FET. N.J.A.C. 10A:71–3.21(d).[4] The factor that figured prominently in the Parole Board's decision to deny Mr. Cowan parole is its conclusion that he had "insufficient problem resolution," i.e. he lacked "insight" into the motivations underlying his crime committed 32 years ago. (Ra138-40). A "lack of insight" was not indicated in Mr. Cowan's initial Notice of Decision denying parole but was added two months later in an amended Notice of Decision prior to the issuance of the two-hundred month FET. *Compare* Ra55 *with* Ra123-25.

The Parole Board's focus on this issue therefore begs the question: what is "insight" and what is its relevance in determining the ultimate statutory question of whether there is a substantial likelihood that Mr. Cowan would commit a crime if released? The Board has never been required to explain this criterion because it has never proposed by rulemaking the addition of "lack of insight," and therefore been subject to the scrutiny that the notice and comment process provides.

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[4] This case does not present the issue of whether the regulation is reasonable in uncritically equating the factors relevant to parole with those relevant to establishing the FET. But the two decisions are based on different inquiries: parole is determined by whether there is a substantial likelihood of re-offense, while FET determinations are properly focused on the amount of time needed for additional programming to mke the inmate ready for release.

As this Court has held, "Where the subject matter of the inquiry reaches concerns that transcend those of the individual litigants and implicate matters of general administrative policy, rulemaking procedures should be invoked." *Metromedia, Inc. v. Dir., Div. of Taxation*, 97 N.J. 313, 331 (1984) (citations omitted). The Court further explained the importance of the rulemaking procedure under the APA:

> The procedural requirements for the passage of rules are related to the underlying need for general fairness and decisional soundness that should surround the ultimate agency determination. These procedures call for public notice of the anticipated action, broad participation of interested persons, presentation of the views of the public, the receipt of general relevant information, the admission of evidence without regard to conventional rules of evidential admissibility, and the opportunity for continuing comment on the proposed agency action before a final determination.

Id. The rule-making process mandated in the Administrative Procedures Act is therefore one way by which the Legislature is discharging the constitutional obligation to publish, and thereby gives the public meaningful notice, of administrative rules and regulations.

Metromedia requires that if an agency has in effect adopted an administrative rule, then it must promulgate that rule through the prescribed rulemaking procedures. *Metromedia* outlined six factors that inform the conclusion that an agency has engaged in *de facto* rulemaking:

1. is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group;

2. is intended to be applied generally and uniformly to all similarly situated persons;

3. is designed to operate in future cases, that is, prospectively;

4. prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization;

5. reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and

6. reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

Id. at 331-32. "The pertinent evaluation focuses on the importance and weight of each factor and is not based on a quantitative compilation of the number of factors which weigh for or against labeling the agency determination as a rule." *In re Provision of Basic Generation Serv. for Period Beginning June 1 2008*, 205 N.J. 339, 343 (2011). Each of these *Metromedia* factors, however, weighs in favor of finding that the use of "lack of insight" in determining parole eligibility should have been promulgated and vetted through the rule-making process required by the APA.

First, the use of "insight" as used by the Parole Board in parole applications is intended and has continued to encompass a large segment of the

public, *i.e.* all incarcerated people in New Jersey Department of Corrections custody seeking parole. As mandated by N.J.S.A. § 30:4-123.53(a), every one of these individuals is entitled to parole upon parole eligibility unless the Board proves otherwise. As these individuals apply for their statutory right to parole, their applications are assessed according to factors the Parole Board has promulgated under its own regulation, under which they utilize "insight" into prior criminal history. Indeed, this Court has reviewed many Parole Board decisions in which "insight" has been used as a factor, including most recently in *Acoli v. N.J. State Parole Bd.*, 250 N.J. 431 (2022).

Second, the use of "insight" is not applied to a specific group of parole eligible prisoners. Parole hearing officers uniformly assess each applicant for whether they possess "insight" into their prior criminal history. Perhaps the most obvious evidence of the generality of the use of insight as a factor in parole determinations is the fact that the Parole Board has now included it as part of the standard checklist in the preprinted Notice of Decision form that is presumably used in *every* parole determination. (See, e.g. Ra123).

Third, these same facts show that the use of "insight" is a prescribed legal standard that is being used both presently by the Parole Board, and prospectively for future parole determinations, *i.e.* it not a specialized finding that applied only to Mr. Cowan but not for future parole applicants.

Fourth, lack of "insight" is clearly a legal standard that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization. N.J.S.A. 30:4-123.53(a) establishes the ultimate legal standard as whether there is "a substantial likelihood an inmate will commit another crime if released." There is no obvious, or even non- obvious, inferential chain leading from the ultimate statutory standard and a finding of "lack of insight," in large measure because it is not known or knowable to the reasonably informed person what is meant by lack of "insight."

Fifth, the use of "insight" was not previously expressed in any official and explicit agency determination, adjudication or rule, *i.e.*, this is not a situation of a non-substantive restatement of a previous policy that had already been vetted through the rule-making process required by the APA.

Finally, the use of "insight" as a significant factor in determining parole eligibility clearly reflects a decision by the Parole Board in the nature of the interpretation of law or general policy. Lack of "insight" is being used as an interpretation by the Parole Board of its statutory responsibility to determine whether a "substantial likelihood exists [that] the inmate will commit another crime." "Insight" has now acquired an importance in parole determinations that equals, if not exceeds, that of any of the 23 factors that are contained explicitly in the parole regulation, N.J.A.C. 10A:71-3.11(b), which have been

vetted through the rulemaking process. The APA requires that it be validated through that same process.

All these factors highlight the fatal defect in using the lack of "insight" in parole determinations without having been first vetted through the rule-making process to determine whether it has any relevance to the ultimate statutory standard. Of foremost concern, of course, is the definitional question: what is "insight" or lack thereof? While the term "insight" apparently is a technical term of art in the fields of psychology and psychoanalysis,[5] it has not been established that this is the meaning that the Parole Board intends.

Even if the definitional question were resolved, there remains the ultimate question of whether lack of "insight," however defined, has bearing on the sole statutory issue before the Parole Board, *i.e.* the likelihood that the applicant will commit another crime? Establishing this nexus is exactly what the rulemaking process would achieve, and therefore its absence is all the more erroneous under the *Metromedia* standards. "Agencies should act through rulemaking procedures when the action is intended to have a 'widespread,

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[5] The concept of "insight" in particular stems from the Gestalt school of psychology. *See generally*, Janet Davidson & Robert Sternberg, eds., THE NATURE OF INSIGHT (MIT Press 1996) (ISBN 9780262691871). Whether it has general acceptance in the scientific community is one question that would have been vetted in the notice and comment process.

continuing, and prospective effect,' deals with policy issues, materially changes existing laws, or when the action will benefit from rulemaking's flexible fact-finding procedures." *In re Provision of Basic Generation Serv. for Period Beginning June 1, 2008*, 205 N.J. at 349-50. Acceptance of such an amorphous term as "lack of insight," without the definitional clarity that the rulemaking process would hopefully bring, therefore injects unbridled administrative discretion into the parole process.

The vesting of unfettered discretion in the officers of the Parole Board to meld the undefined concept of "lack of insight" into whatever conclusion they wish to reach (almost inevitably the denial of parole), fatally undermines the validity of the Board's ultimate conclusion. "Lack of insight" is becoming an all too convenient method of explaining parole denial in the absence of any other reasons more susceptible to contradiction or review.

Here, the descriptions by the Board on how Mr. Cowan "lacks insight" do not engender confidence that the term has any more definite meaning. Telling Mr. Cowan that he "must develop a deeper understanding into why [he] made the choice and found it easily acceptable to act in a criminal manner," that he must "develop a better understanding to the dynamics of your personality defects that impelled you to criminal behavior," and "must conduct an introspection to understand the emotional and psychological

demands of [his] criminal thinking," is, to a typical inmate, language that is meaningless and made virtually unintelligible by use of abstruse technical terms from psychology.

It is important to note that the Board did *not* find that Mr. Cowan had engaged in "denial of offense(s)" or "minimizes conduct," which are separately delineated factors. "Lack of insight" does not refer to lack of remorse or refusal to accept responsibility for *what* he did, but rather apparently attempts to discern the inmate's understanding of *why* he committed the crime, apart from the immediate motives that underlie virtually all criminal activity, which are usually self-evident from the nature of the offense. Asking Mr. Cowan to articulate to the satisfaction of the Board members a sufficiently convincing self-diagnosis of the underlying sociological, emotional, environmental and cultural factors that may have led him to commit an act that took place almost 30 years earlier is a test that no reasonable person could pass, assuming that they are able to understand the question.

If the Parole Board is not held accountable for its invention, without intervening public notice and comment, of the conclusory term "lack of insight," then the concept of deference to the Parole Board's decisions will have crossed the line to unquestioning judicial acquiescence to the Parole Board's determinations. Judicial acquiescence would necessarily be

unquestioning precisely because there would be no basis for the courts to examine the validity of the conclusion, nor any way for prisoners to adduce evidence to rebut the claim. "Lack of insight" would become the "one size fits all" expression of agency discretion that could explain any result, without fear of contradiction. In the absence of such rulemaking procedures, the Parole Board's ad hoc adoption of insight as an indicator of whether Mr. Stout and other parole applicants are likely to commit a crime in the future should be rejected as an exercise in ad hoc rulemaking forbidden by the APA. It constitutes a *per se* abuse of discretion.

III. THE BOARD MUST CONSIDER ALL FACTORS UNDER N.J.A.C. 10A: 71-311(B) IN ESTABLISHING A FUTURE PAROLE ELIGIBILITY DATE OUTSIDE THE PRESUMPTIVE GUIDELINES.

A. The Board Must Consider "the Results of the Objective Risk Assessment Instrument" in Establishing an Outsize FET.

The Administrative Code provides that a three-member Board panel may establish a FET outside the presumptive guidelines where the presumption would be "clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future criminal behavior." N.J.A.C. 10A: 71-3.21(d). In determining the propriety of a FET outside the presumptive guidelines, the three-member Board panel "shall consider" factors enumerated at N.J.A.C. 10A: 71-3.11, including factor 23, "[t]he results of the objective

risk assessment instrument," which identifies both risk of recidivism and criminogenic need.

Risk and needs assessment tools have long been used by the New Jersey State Parole Board. The parole statute was amended in 1997 to require that each parole candidate undergo an objective risk assessment prior to their parole eligibility hearing. N.J S.A. 30:4-123.52. The risk assessment tool was added to ensure an objective evaluation of an individual's risk of recidivism that would aid the Parole Board in making informed decisions regarding release on parole and supervision levels. N.J. Assemb. Comm. Statement, Assemb. 207-23 (1997). Its primacy as an assessment tool for evaluating risk of recidivism is evident in its inclusion as among the factors a hearing officer, Board panel or the Board "shall consider" in rendering both parole decisions and determining a future parole eligibility date. *See* N.J.A.C. 10A: 71-3.11(a)-(b); 10A: 71-3.21(d).

Social science research suggests that risk assessment tools are a "cornerstone of a more effective, efficient, and just system." Richard M. Labrecque et al., *The Importance of Reassessment: How Changes in the LSI-R Risk Score Can Improve the Prediction of Recidivism*, 53 J. OF OFFENDER REHAB 116, 125 (2014). They emerge from decades of study on effective correctional intervention premised on three theoretical principles: risk (target

"high risk" offenders), needs (target criminogenic needs to reduce recidivism), and responsivity (provide treatment in a style and mode tailored to an offender's learning needs). *See* D.A. Andrews and James Bonta, *Rehabilitating Criminal Justice Policy and Practice*, 16 PSYCH., PUB. POL'Y, & L 39, 44-45 (2010). Their efficacy is derived from "theoretically based and empirically valid criminogenic predictors that are measured via a standardized, objective, and dynamic instrument" and are thus evidenced to be "far more accurate than are unstructured clinical assessments of the same factors." Anthony Flores et al., *Predicting Outcome with the Level of Service Inventory-Revised: The Importance of Implementation Integrity*, 34 J. OF CRIM. JUST. 523, 524 (2006). Advocates suggest that these tools serve "both a predictive and practical function" in that they not only predict recidivism, but "point to treatment strategies that can reduce an offender's risk" of reoffending. *The Importance of Reassessment* at 125. Since 2005, the Board has utilized the "Level of Service Inventory-Revised" or "LSI-R" risk and needs assessment tool. *See* State Parole Board Annual Report at 21-22 (2006). The LSI-R identifies the individual risks and needs of criminal offenders and classifies offenders into groups based on their degree of risk of re-offending (e.g., low-risk, moderate-risk, or high-risk). *The Importance of Reassessment* at 118. It is comprised of a "fifty-four item additive scale that covers ten criminogenic domains,"

including criminal history, education and employment, financial, family and marital relationships, accommodation, leisure and recreation, companions, alcohol and drug use, emotional health, and attitude and orientation. *Predicting Outcome with the Level of Service Inventory-Revised* at 524. The LSI-R was implemented to promote "standardized and objective" decision making, allowing different assessors to produce similar LSI-R ratings when evaluating the same offender. *Id.* It has been shown to be a useful instrument for risk assessment. *See e.g.* Klaus-Peter Dahle, *Strengths and Limitations of Actuarial Prediction of Criminal Reoffense in a German Prison Sample: A Comparative Study of LSI-R, HCR-20 and PCL-R*, 29 Int'l J. L. & Psychiatry 431, 441 (2006); Bryan Hendricks, et al., *Recidivism Among Spousal Abusers: Predictions and Program Evaluation*, 21 J. INTERPERSONAL VIOLENCE 703, 715 (2006) (finding the LSI-R's predictive accuracy "significantly better than chance").

Despite the presence of the "objective risk assessment instrument" as among the factors that a Board panel "shall consider" in deciding to establish an outsize FET, the Board failed to consider the risk and needs assessment in determining the length of Mr. Cowan's FET beyond a cursory reference to his LSI-R score of 24. (Ra133-42; Ra260-61). Based on empirical evidence of the

LSI-R's utility for predicting recidivism rates, the Board neglected a key factor in establishing a FET for Mr. Cowan.

Failure to incorporate the risk assessment instrument in a FET determination has cascading consequences. As detailed, the risk assessment instrument not only points to recidivism risk but serves the practical function of identifying treatment strategies. *The Importance of Reassessment* at 125; *see also* EDWARD J. LATESSA, ET AL. WHAT WORKS (AND DOESN'T) IN REDUCING RECIDIVISM 33 (Routledge, 2d ed. 2020) ("The risk principle involves predicting future criminal behavior and matching interventions and supervision to the risk level of the person"); Catherine C. McVey et al., Modernizing Parole Statutes: Guidance from Evidence-Based Practice, ROBINA INSTITUTE OF CRIMINAL LAW & CRIMINAL JUSTICE, 2018 at 6 (issues identified through risk and needs assessment "should be addressed through appropriate programs to prepare the person for release"); James Austin, *How Much Risk Can We Take? The Misuse of Risk Assessment in Corrections*, 70 FED. PROB. 97, 102-03 (2006) (noting the import of providing the proper intervention consistent with the risk).

If the Board implements the results of the objective risks and needs assessment in its reasoning, the Board can provide more accurate

recommendations for rehabilitation. Consequently, a more realistic FET prescription could be assigned that advances the goal of lowering an individual's risk of recidivism. For example, if the results of the LSI-R indicate a specific inmate has an antisocial attitude then the Board can prescribe a specific program that emphasizes building problem-solving, anger management, and coping skills. *See* James Bonta & D. A. Andrews, *The Recent Past and Near Future of Risk and/or Need Assessment*, 52 CRIME & DELINQ., 7 (2006). If the program requires two months to complete, that time period can be added to the calculation of the FET, thus establishing a nexus between lowering the risk of recidivism and the FET determination. Indeed, studies show that while the longer someone is in treatment, the greater the effect, "the effects of treatment tend to diminish if treatment lasts *too long*." *Understanding Risks and Needs* at 37 (emphasis added). Incorporating tailored recommendations for FETs based on the risk and needs assessment, therefore, can lower the risk of recidivism and increase an individual's opportunity for parole approval.

Here, the Board recommended that Mr. Cowan remain infraction free, gain further introspection, and complete more programming. (Ra142). However, the panel made no further recommendations on what type of programming Mr. Cowan needed or how long it should be. *Id.* Social science

counsels that this was in error: appropriate treatment must be tethered to the risk of recidivism.

B. The Board Must Consider "Subsequent Growth and Increased Maturity of the Inmate During Incarceration," which Includes the Age/Crime Curve, in Establishing an Outsize FET.

The Administrative Code requires the Board to consider "subsequent growth and increased maturity of the inmate during incarceration" in its parole determinations. N.J.A.C. 10A: 71-3.11(b)(24). This provision expressly contemplates that the Board recognize both the immaturity and attributes of youth at the time of commission of a criminal act, and the maturity developed by an offender over the course of their incarceration, factors the Board asserted were "taken into consideration by Board members in the assessment of an offender for parole release" prior to the filing of a petition for rulemaking on this issue on January 31, 2020 and the factor's formal adoption into § 10A: 71-3.11(b) in February 2021. 52 N.J.R. 1159(a) (June 1, 2020); 2021 N.J. Reg. Text 555847.

The age-crime curve is a well-established criminological phenomenon, showing that criminal activity sharply increases in adolescence, peaks during late adolescence to early adulthood (around 18–26), and then steadily declines thereafter, reaching significantly lower levels by middle age. Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552,

568 (1983); John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 50 (2001). Most individuals who engage in violent crime begin to desist from offending by their late twenties or early thirties, and rates of violent crime drop sharply thereafter. *Id.*; *see also Age and the Explanation of Crime* at 565; Gary Sweeten, et al., *Age and the Explanation of Crime, Revisited*, 42 J. Youth & Adolescence 921, 922-35 (2013). Even when people actively commit crimes over the course of their lifetime, the rate decreases as they get older. *Understanding Desistance from Crime* at 17.

Age-crime curve results are consistent regardless of the type of offense. An analysis that pooled results from hundreds of individual studies into an overall estimate found that age was a constant and important predictor of recidivism. *See* Paul Gendreau et al., *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!*, 34 CRIMINOLOGY 575,575 (1996). While this is a nationwide trend, New Jersey Department of Corrections recidivism reports further evidence that older parolees are much less likely to be rearrested: a three-year follow-up on people released from state prisons in 2015 reveals that over 60% of individuals who are younger than 30 years of age when released are rearrested within three years, compared to less than 20% of individuals who are 60 or older when released. *See* STATE OF N.J. DEP'T OF

CORRECTIONS, 2015 RELEASE COHORT OUTCOME REPORT: A THREE-YEAR FOLLOW UP , at 19 (2015). https://www.state.nj.us/corrections/pdf/offender_statistics/2015_Release_Recidivism_Report.pdf.

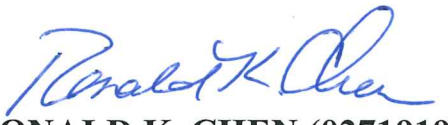
The age-crime curve is implicated by factor 24 of § 10A: 71-3.11(b), which requires consideration of "growth and increased maturity" over the course of an individual's incarceration. An FET determination, thus, must consider the fact that people who are released when they are older are much less likely to recidivate, making an inmate's age especially relevant. *See generally* National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND Consequences at 155 (Jeremy Travis et al. eds., 2014). Despite overwhelming empirical evidence dating back decades regarding the relationship between age and crime, the Board did not appear to give any meaningful attention to Mr. Cowan's age at the time of commission of the criminal acts, his current age, or the age he would be after a two-hundred-month FET. The Board stated, "Cowan's age was a matter of record and was considered by the Board but noted that an offender's age is not dispositive of suitability for parole release." (Ra258). Mr. Cowan was convicted at the age of

twenty-two and has been incarcerated most of his adult life. He is now fifty-seven and the age crime curve indicates that his risk of recidivism is lower because of his age. Furthermore, the imposition of the two-hundred-month FET is antithetical to the age crime curve, as Mr. Cowan will be almost in his sixties by the time he is eligible for parole. Given the import of the age-crime curve—as evidenced by the weight of social science research and the Board's own adoption of factor 24—the Board erred by failing to give meaningful weight to Mr. Cowan's age at the time of commission of the offense and his growth over the subsequent three decades.

CONCLUSION

For the reasons expressed herein, Amicus respectfully urges this Court to vacate the two-hundred month FET imposed on Mr. Cowan and remand the matter to the Parole Board for immediate reconsideration of Mr. Cowan's parole application consistent with the recommendations set forth in this Brief.

Respectfully submitted,



RONALD K. CHEN (027191983)
JESSICA ROFÉ*
Rutgers Constitutional Rights Clinic
Center for Law & Justice
123 Washington St.
Newark, New Jersey 07102
973-353-5378
ronchen@law.rutgers.edu

* *Permitted to practice law in NJ pursuant to R. 1:21-3(c)*

Attorneys for Amicus Curiae American Civil Liberties Union of New Jersey

JEANNE LoCICERO (024052000)
EZRA ROSENBERG (012671974)
REBECCA UWAKWE (906102012)
American Civil Liberties Union of New Jersey Foundation
Post Office Box 32159
Newark, New Jersey 07102
973-854-1717
jlocicero@aclu-nj.org
erosenberg@aclu-nj.org

Of Counsel and On the Brief.

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