

NEW JERSEY STATE PAROLE  
BOARD,

Plaintiff-Respondent,

v.

HORACE COWAN,

Defendant-Petitioner.

SUPREME COURT OF NEW JERSEY  
DOCKET NO. 089243

CRIMINAL ACTION

Petition for Certification from a Judgment  
of the Superior Court of New Jersey,  
Appellate Division,  
Docket No. A-001131-20

Sat Below:

Hon. Mary Gibbons Whipple, J.A.D.  
Hon. Catherine I. Enright, J.A.D.

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**BRIEF ON BEHALF OF AMICUS CURIAE ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS OF NEW JERSEY**

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## **STATEMENT OF INTEREST OF AMICUS CURIAE**

Proposed amicus curiae Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ) is a non-profit corporation organized under the laws of New Jersey to, among other purposes, “protect and insure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitutions; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good.” Founded in 1985, ACDL-NJ has more than 500 members across New Jersey. Our Courts have found that ACDL-NJ has the special interest and expertise to serve as an amicus curiae per Rule 1:13-9 in numerous cases throughout the years. See, e.g., State v. Ramirez, 246 N.J. 61 (2021); State v. Garcia, 245 N.J. 412 (2021); State v. Williams, 244 N.J. 327 (2020); State v. Andrews, 243 N.J. 447 (2020); State v. Greene, 242 N.J. 530 (2020).

Thus, ACDL-NJ has the requisite interest to participate as amicus curiae and its participation will be helpful to this Court. Accordingly, ACDL-NJ asks that its motion for leave to participate as amicus curiae be granted.

## **PRELIMINARY STATEMENT**

When the New Jersey State Parole Board (the Board) rejects a prisoner's application for parole from prison, the Board's standard procedure is to determine simultaneously that inmate's Future Eligibility Term (FET), which is the period of additional time in prison that the inmate must serve before becoming eligible again for parole consideration.

Petitioner Horace Cowan, an inmate at East Jersey State Prison, was convicted by a Camden County court of aggravated manslaughter and weapons possession offenses and sentenced in July 1992 to an aggregate term of life imprisonment, with twenty-five years parole ineligibility. Also in 1992, Cowan pled guilty to conspiracy to commit aggravated assault, criminal restraint and escape, and was sentenced to a consecutive aggregate term of ten years, with five years parole ineligibility.

On January 2, 2020, when Cowan was 52 years of age and had been confined for twenty-seven years, a two-member Parole Board Panel denied Cowan's application for parole and, pursuant to the New Jersey Administrative Code, determined that the presumptive twenty-seven month FET applicable to inmates convicted of manslaughter was "clearly inappropriate," thereby requiring a three-member Board Panel to determine Cowan's FET. In May 2020 the three-member

panel established a two-hundred-month FET (approximately 16 years, 8 months). Cowan appealed and the full Board affirmed.

The critical issue in this appeal is that no clear or manageable standards guided or constrained the two-hundred-month FET imposed on Cowan by the Parole Board. N.J.A.C. 10A:71-3.11 provides that Board panels and the Board shall consider certain factors in making parole decisions, but there is absolutely no apparent correlation between the regulatory factors and the length of the FET imposed on Cowan or on other inmates. In effect, the Parole Board's FET decisions are standardless.

A number of recent Appellate Division decisions have highlighted and addressed the validity of lengthy FET impositions by the Board without clear standards to guide the Board's determinations.

Amicus believes that the Parole Board's current practice of imposing lengthy FETs on inmates who have been denied parole is unfair, arbitrary and unsustainable, and violates New Jersey's "fundamental fairness" doctrine, which this Court in State v. Thomas recognized as an "integral part of the due process guarantee of Article I, Paragraph 1 of the New Jersey Constitution, which protects against arbitrary and unjust governmental action." The Parole Board's current practice of imposing lengthy FETs on numerous inmates who are denied parole, without any coherent

standards that guide the Board in its determinations, cannot be permitted to continue.

The Court's intervention is essential.

## **ARGUMENT**

### **Point I**

#### **SEVERAL RECENT APPELLATE DIVISION DECISIONS HAVE REMANDED OR QUESTIONED PAROLE BOARD FET DETERMINATIONS BECAUSE OF A LACK OF STANDARDS GUIDING THE LENGTH OF THOSE FETS.**

The most substantial discussion of the Parole Board's power to impose a lengthy FET, beyond the twenty-seven-month presumptive FET for inmates convicted of murder or manslaughter, is found in Berta v. New Jersey State Parole Board, 473 N.J. Super. 284 (App. Div. 2022). State prison inmate Eugene Berta, a 71-year-old serving a term of life with thirty years parole ineligibility for a murder committed in 1983, appealed the January 2021 decision of the Parole Board denying parole and imposing a seventy-two-month FET. His initial application for parole was denied in 2015, at which time the Board imposed an FET of one-hundred-twenty months. Id. at 289.

The Appellate Division first addressed the denial of parole and reversed the Board's decision on three separate grounds. First, the court held that the Board erred in concluding that Berta was imprisoned for committing multiple offenses, noting that his convictions for murder and possession of a weapon for an unlawful purpose



were merged at sentencing. Id. at 312. Next, the court reversed the Board's finding that Berta's record of institutional infractions had properly been considered by the Board as weighing against parole, noting that Berta had no institutional infractions either between his two parole hearings or, in fact, during the past twenty years. Id. at 313. Finally, the court remanded the matter, requiring the Board to provide an explanation for its conclusion that Berta's refusal to acknowledge his guilt of the murder charge demonstrated that he was likely to reoffend if released from prison. Id. at 317-321.

Concerning the seventy-two-month FET imposed by the Parole Board, the Panel noted that the presumptive FET for inmates convicted of murder is twenty-seven months, a limit that can be exceeded if a twenty-seven-month FET is "clearly inappropriate due to the inmate's lack of satisfactory progress in reducing the likelihood of future behavior." N.J.A.C. 10A:71-3.21. The court emphasized that it regarded the "clearly inappropriate" standard "to be a high threshold to vault," and one "not to be dispensed with for light or transient reasons." Furthermore, the court held that

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. The Board cannot simply pick a number out of thin air.

[Id. at 322-23].

Concurring with the court's disposition, Judge Geiger expressed his significant concern that the Parole Board's current practice of imposing extended FETs might have the practical effect of increasing an inmate's sentence, questioning whether a less deferential standard of review might be warranted. He noted:

The role of the Board is not to modify sentences. Similarly, the intended purpose of imposing a FET is not punishment. See State v. Parole Bd. v. Byrne, 93 N.J. 192, 205 (1983) ("Inmates serving sentences under the Code . . . have presumptively satisfied all punitive aspects of their sentences at the time they become eligible for parole.") (quoting In re Parole Appl'n of Trantino, 89 N.J. 347, 370 (1982)). Yet, for seemingly marginal reasons, the Board's actions appear to cross those boundaries. The Board rendered these decisions under a procedural framework where the inmate appears before the Board unrepresented by counsel and without the ability to cross-examine the Board's experts, present his own expert testimony, discover the contents of confidential psychological evaluations, or participate in an adversarial proceeding. See State v. Thomas, 470 N.J. Super. 167, 200 (App. Div. 2022).

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

[Id. at 327].

Judge Geiger also expressed his concern that the Board’s “unbridled discretion to impose lengthy FETs might constitute a violation of New Jersey’s ‘fundamental fairness’ doctrine,” an issue that will be addressed in Point II of this amicus brief.

In addition to the Berta decision, two other unpublished Appellate Division decisions have reversed the Parole Board’s imposition of lengthy FETs beyond the inmates presumptive FET, and remanded both cases to the Parole Board to explain the Board’s reasons for the imposition of extended FETs. In Sabatini v. New Jersey State Parole Board, appellant Kevin Sabatini appealed a March 2021 Parole Board decision denying him parole and imposing a one-hundred-eighty-month FET. Docket No. A-3676-20, 2023 WL 4055554 (App. Div. June 19, 2023).

Sabatini had first become eligible for parole in October 2015. In April 2016, a two-member panel denied parole and referred the case to a three-member panel to establish an FET longer than the presumptive twenty-seven-month FET for inmates convicted of murder. In September 2016 a three-member panel imposed a ninety-six-month FET, and the full Board affirmed. Id. at \*1.

The Appellate Division vacated the Board's decision because a Board member had been involved in the investigation of Sabatini's crimes years earlier and remanded the matter to the Parole Board for reconsideration without that member's participation.

On remand, the Board again denied parole, relying primarily on Sabatini's extensive criminal record and institutional disciplinary infractions, although noting as a mitigating factor Sabatini's "favorable institutional adjustment." Id. at \*2. The Board also imposed a one-hundred-eighty-month FET.

The Appellate Division affirmed the Board's denial of parole but vacated the one-hundred-eighty-month FET and remanded to the Board to "determine an appropriate FET with an adequate explanation for the Board's decision." Id. at \*4. The Panel found substantial evidence to support the Board's conclusion that the twenty-seven-month presumptive FET was clearly inappropriate but found that the Board had not provided an adequate explanation for its imposition of a one-hundred-eighty-month FET:

The Board, however, did not adequately explain why an FET of 180 months, or fifteen years, which is nearly seven times the presumptive FET, and nearly twice the FET adopted by the Board in 2017 was 'necessary and appropriate.' We understand that the FET commences on the original parole eligibility date and is reduced by commutation, work, and minimum custody credits. Thus, Sabatini will be eligible for parole far sooner than 180

months from the Board's decision. However, whatever the practical effect of the 180-month FET, the Board is obligated to explain why such a drastic departure from the presumptive FET is warranted, particularly given the ninety-six month FET was found to be appropriate before Sabatini's successful appeal. The reasoning on which the Board relied for the ninety-six month FET is practically identical to the reasoning its advanced for the 180-month FET.

While Sabatini was given a new hearing, at which he made new statements, prior to imposition of the 180-month FET, we did not see a significant deviation between those statements and the answers he gave to Board member questions prior to entry of the ninety-six month FET. In addition, Sabatini participated in institutional programs, has not committed an institutional infraction, and received a score showing a decreased risk of recidivism in the time between the first Board decision and the hearing on remand. These apparently mitigating factors are at odds with a significant increase in Sabatini's FET. We are, therefore, constrained to vacate the 180-month FET and remand for the Board to determine an appropriate FET with an adequate explanation for the Board's decision.

[Id. at \*5].

Similarly, in McLaughlin v. New Jersey State Parole Board, McLaughlin, who was incarcerated after pleading guilty to two counts of murder, had been sentenced to life with twenty-five years parole ineligibility for one murder and thirty years with fifteen years parole ineligibility for a second murder, and appealed from the Parole Board's decision denying parole and imposing a one-hundred twenty-month FET. Docket No. A-3695-20, 2023 WL 3806303 (App. Div. June 5, 2023).

The Appellate Division panel affirmed the Board's decision denying parole. Id. at \*3. Nevertheless, the Appellate Division panel vacated the one-hundred-twenty-month FET, concluding that the Board had failed to explain adequately why the presumptive FET was "clearly inappropriate," and why the FET actually imposed was necessary and appropriate. The court observed:

However, the Board must also explain why the extended FET it imposes is appropriate and necessary. While this appeal was pending, we decided Berta, 473 N.J. Super. 284. There, we reversed the Board's establishment of a seventy-two-month FET because 'the Board failed to adequately explain why it fixed an FET almost three times as long as the presumptive twenty-seven-month FET . . . ' Id. at 322. '[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. We held in 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. The Board cannot simply pick a number out of thin air.' Ibid.

Here, neither the Board panel nor the Board explained why the imposed FET was over four times the presumptive FET. While the Board adequately explained why the presumptive term was clearly inappropriate, it offered nothing to address why it believed ten years was appropriate to impose upon a sixty-year-old inmate. The Board must 'explain . . . why the FET that was actually imposed is necessary and appropriate.'

[Id. at 323].

## Point II

**THE AUTHORITY OF THE PAROLE BOARD TO IMPOSE FUTURE ELIGIBILITY TERMS THAT EXCEED THE PRESUMPTIVE TERMS AUTHORIZED BY THE NEW JERSEY ADMINISTRATIVE CODE SHOULD BE SUBJECT TO NEW JERSEY'S "FUNDAMENTAL FAIRNESS" DOCTRINE, WHICH PROTECTS CITIZENS AGAINST UNJUST AND ARBITRARY GOVERNMENTAL ACTION.**

The recent Appellate Division decisions discussed in Point I highlight a serious and fundamental flaw in the Parole Board's current practice of imposing FETs on inmates who have been denied parole. Although the New Jersey Administrative Code authorizes the Board to impose FETs longer than the presumptive FETs prescribed for specific crimes, no standards appear to exist to channel the discretion of Board members when they determine the length of the FET to be imposed on a specific inmate. This Court should address the absence of adequate standards by requiring the Parole Board to alter its current practice and develop standards to guide the determinations of Board members in establishing FETs for inmates who have been denied parole.

An established foundation for the requirement that the Board adopt such standards exists in New Jersey's "fundamental fairness" doctrine, which is "an integral part of the due process guarantee of Article I, Paragraph 1, of the New Jersey Constitution, which protects against arbitrary and unjust governmental action."

Thomas, 470 N.J. Super. at 200 (quoting State v. Njango, 247 N.J. 522, 537 (2021)). The doctrine serves as “an augmentation of existing constitutional protections or as an independent source of protection against state action.” Doe v. Poritz, 142 N.J. 1, 108 (1955). The common denominator in the cases applying the fundamental fairness doctrine is “a determination that someone was being subjected to potentially unfair treatment and there was no explicit statutory or constitutional procedure to be invoked.” Id. at 109. The doctrine “serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against government procedures that tend to operate arbitrarily.” Id. at 108 (emphasis in original). See generally Bruce D. Greenberg, New Jersey’s “Fairness and Rightness Doctrine”, 15 Rutgers L. J. 927 (1984).

Both the United States and New Jersey Supreme Courts have recognized that, despite the deference usually accorded to Parole Board determinations, those determinations cannot be accepted and enforced unless they respect the rights of inmates and parolees to due process and fundamental fairness. In Morrissey v. Brewer, 408 U.S. 471 (1972), the United States Supreme Court considered appeals by two parolees whose parole had been revoked and whose habeas corpus petitions had been denied by District Courts and the Eighth Circuit Court of Appeals. The issue before the court was whether the parole revocation process was consistent with



the parolees' due process rights. Concerning petitioner Morrissey, he was rearrested based on his Parole Officer's report revealing that he had purchased a car and obtained credit under an assumed name, gave false statements to police after a minor accident, and failed to provide his place of residence to his parole officer. Id. at 473. Similarly, petitioner Booher had obtained a driver's license under an assumed name, operated a motor vehicle without permission, and failed to maintain gainful employment. Ibid. The Iowa Parole Board revoked the parole of both petitioners without a hearing, based on the recommendation of their parole officers.

In response to habeas corpus petitions filed by both petitioners, the District Courts held that the Parole Board's failure to hold a hearing did not violate due process. The Eighth Circuit affirmed, expressing the view that "prison officials must have large discretion in making revocation determinations, and that courts should retain their traditional reluctance to interfere with disciplinary matters properly under the control of state prison authorities." Id. at 472-75.

The Supreme Court framed the issue as whether the requirements of due process in general apply to parole revocations. In describing the interest of a parolee in his continued liberty, the Court noted that

[t]he liberty of a parolee enables him to do a wide range of things open to persons who never have been convicted of any crimes. . . . Subject to the conditions of his parole, he can be gainfully employed and is free to be with family

and friends and to form the other enduring attachments of normal life.

[Id. at 482].

The Court added that “society has a further interest in treating the parolee with basic fairness; fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.” Id. at 484.

The Court determined that the minimum requirements of due process essential in parole revocation proceedings include the following:

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

[Id. at 489].

In Monks v. New Jersey State Parole Board, 58 N.J. 238 (1971), appellant Monks sought review of the denial by the Board of his request for a statement of reasons explaining why his parole application was denied. Monks had been adjudicated a juvenile delinquent in 1957 for offenses which, if committed by an adult, would have constituted first degree murder, robbery and atrocious assault and

battery. He was sentenced to an indeterminate term at the Bordentown Reformatory, to be released when his parole was authorized. In 1967 Monks was transferred to New Jersey State Prison for disciplinary reasons. Id. at 239-240.

Monks' application for parole was denied by the Parole Board in 1967, and again in September 1969, with a rehearing scheduled for 1971. No reasons for the denials were provided to Monks by the Board. In October 1969 Monks wrote to the Board requesting reasons for the most recent denial of parole, explaining that he would be willing to alter his behavior if he could be informed why the Board did not yet believe he qualified for parole, noting that he had arranged for both employment and a place to live if he were paroled. The Board's reply stated that their decision remained unchanged, again without a statement of reasons. Id. at 240.

Thereafter, counsel for Monks wrote to the Board's Chairman, again requesting "some explanation of the considerations that moved the Board to deny him parole, observing that he could not properly counsel Monks without understanding why parole had been denied." The Chairman's response to Monks' counsel explained that the Board, for policy reasons, does not provide explanations for parole denials, but advising counsel that a meeting could be arranged to discuss the matter further. After the meeting, at which no explanation for the Board's decision was offered, Monks' counsel filed a notice of appeal to the Appellate

Division, appealing not from the denial of parole but from the Board's refusal to provide reasons for the denial. The Appellate Division erroneously dismissed the appeal as untimely, but the Supreme Court granted certification on the issue of the Parole Board's refusal to explain its denial of parole. Id. at 241-42.

Emphasizing the importance of "fairness" in the parole process, Justice Jacobs, writing for a unanimous Court, took note of the increasing number of parole boards from other states that have adopted the practice of explaining to inmates the reasons for denial of their requests for parole:

The need for fairness is as urgent in the parole process as elsewhere in the law and it is evident to us that, as a general matter, the furnishing of reasons for denial would be the much fairer course; not only much fairer but much better designed towards the goal of rehabilitation. The Corrections Task Force has pointed out that well conducted parole hearings tend desirably to increase "the involvement of inmates in the decisions which affect them and to confront them more directly with the information upon which a decision is being made." Favorable reference is made to the increasing number of parole boards, including, among others, those in Minnesota and Iowa, which have adopted "the practice of calling inmates back after a hearing to discuss the decision on their cases." Professor Dawson reports that in Michigan and Wisconsin "the parole boards are careful to explain to the inmate the reason for the decision reached" and "to suggest what, if anything, the inmate can do to improve his chances for parole later." He also reports that statements of the reasons are placed in the inmates' files and that although the statements are quite brief, "the necessity for making

them requires some reflection on the grounds for the decision.”

[Id. at 246 (internal citations omitted)].

The Court concluded that “fairness and rightness clearly dictate the granting of the prisoner’s request for a statement of reasons.” Id. at 249. Accordingly, the Court invalidated and nullified the Parole Board’s rule barring the revelation of reasons for denial of parole, directed the Board to adopt a new compliant rule consistent with the Court’s opinion, and ordered the Board to comply with Petitioner Monks’ request for an explanation of its denial of his application for parole. Id. at 249-250.

Similarly, in State v. Kunz, 55 N.J. 128 (1969), the issue was whether defense counsel improperly had been denied the right to see defendant’s presentence report prior to sentencing. Defendant had been convicted of having purchased a stolen automobile. At sentencing, defense counsel requested an opportunity to see the presentence report, which the trial court denied, and defendant was sentenced to “not less than one year nor more than two years in New Jersey State Prison.” The Appellate Division affirmed, and the Supreme Court granted certification. Id. at 129.

The Court unanimously held—not on the basis of the State Constitution but as a matter of fundamental fairness—that in all future sentencing proceedings defendant will be entitled to advance disclosure of their presentence report.

Furthermore, we take this occasion to announce that in all future sentencing proceedings, defendants will be entitled to disclosure of the presentence report with fair opportunity to be heard on any adverse matters relevant to the sentencing. Although persuasive constitutional arguments have been advanced this step is not being taken as a matter of constitutional compulsion for the Supreme Court holdings to date do not dictate it and we are not now prepared to find that it is of constitutional dimension under our State Constitution. It is being taken as a matter of rudimentary fairness and though it may entail some administrative difficulties they can readily be minimized by proper handling.

[Id. at 144 (internal citations omitted)].

And in Jamgochian v. New Jersey State Parole Board, 196 N.J. 222 (2008), the issue concerned the claim of defendant, a twice-convicted sex offender subject to Megan’s Law and to Community Supervision for life, that he was entitled to notice and an adversarial hearing before the Parole Board could impose on him a sixteen-month curfew confining him to home between the hours of 8:00 p.m. and 7:00 a.m. Id. at 228.

Appellant Jamgochian had twice been convicted of sexually assaulting young women after inducing them to visit his “photography studio” with offers of modeling

work. The basis for imposition of a curfew by his District Parole Supervisor was that Jamgochian had contacted a young woman (Sarah), invited her to meet him to discuss short-term employment that would pay her a large sum of money. Based on that information, the Parole Supervisor imposed the curfew and prohibited Jamgochian from having further contact with Sarah, and ordered Jamgochian to “participate in, and successfully complete an appropriate mental health-counseling program” for sex offenders. A two-member Parole Board panel affirmed the conditions imposed by the Parole Supervisor. Id. at 231.

Jamgochian appealed to the full Parole Board, contending that the conditions imposed on him without notice and a hearing violated his federal and state constitutional rights. The full Parole Board affirmed the imposition of the conditions. Id. at 232.

The Appellate Division reversed the Parole Board, Jamgochian v. New Jersey State Parole Board, 394 N.J. Super. 517 (App. Div. 2007), holding on Due Process grounds that Jamgochian was entitled to an evidentiary hearing before the curfew and other conditions could be imposed. Id. at 543-45. The appellate court said that its conclusion also was “compelled by considerations of fundamental fairness,” which the court described as a doctrine that

serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental procedures that tend to operate arbitrarily.

[Id. at 545. (quoting Doe v. Poritz, 142 N.J. at 108) (emphasis in original)].

The Supreme Court modified and affirmed the Appellate Division decision, holding on due process grounds that before Jamgochian could be subjected to a curfew “a supervised offender must be given reasonable notice and an opportunity to be heard.” Jamgochian, 196 N.J. at 246-51.

### Point III

**THE FREQUENCY WITH WHICH THE NEW JERSEY STATE PAROLE BOARD IMPOSES LENGTHY AND STANDARDLESS FETS WHICH FAR EXCEED THE PRESUMPTIVE FETS FOR PRISONERS SHOULD PERSUADE THIS COURT TO IMPOSE A FUNDAMENTAL FAIRNESS STANDARD ON THE BOARD’S POWERS IN ORDER TO RESTRAIN THE BOARD FROM THE ARBITRARY IMPOSITION OF FETS.**

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Amicus attaches to this Brief as Exhibit A the February 3, 2020 Certification of Joseph J. Russo, Esq., then the Deputy Public Defender in charge of management of the statewide Office of the Public Defender (OPD), Appellate Section, and currently Assistant Public Defender for the OPD, Parole Revocation and Resentencing Unit. Attorney Russo certified that on January 14, 2020, he filed an



OPRA request with the New Jersey State Parole Board that sought, among other information, the following:

For all denials of parole from January 1, 2012 through December 31, 2019 for inmates sentenced to at least life in prison, the length of the parole ‘hit’ (future eligibility term) for each inmate.

[(Russo Cert. ¶ 3)].

Attorney Russo further certified that on January 31, 2020, he “received an Excel spreadsheet with two worksheets, to wit ‘Decisions to deny parole’ and ‘Decisions to grant parole’.” (Russo Cert. ¶ 5). He further certified that “he saved the two worksheets as pdf documents to prevent the data from being corrupted, and retained copies of the original Excel file,” and attached to his certification “true copies of the pdfs made from the Excel worksheets provided from the New Jersey State Parole Board in response to [his] January 14, 2020 OPRA request.” (Russo Cert. ¶¶ 6-8).

Amicus has analyzed the data contained in the worksheets furnished by the Parole Board to Attorney Russo in order to determine the frequency with which the Parole Board imposes “lengthy” FETs far in excess of the presumptive FETs authorized by the New Jersey Administrative Code. The Parole Board data identified 478 inmates whose parole applications were denied during the January 1, 2012 to December 31, 2019 timeframe encompassed by the OPRA request.

Arbitrarily selecting a ten-year FET as an example of an excessively lengthy FET, counsel identified 125 out of a total of 478 inmates who received FETs of ten years or more, or 26.2% of the total number of inmates listed. In addition, seven of those inmates were given FETs of twenty years or more.

The significance of the Parole Board's data is clear and compelling. During the eight-year period covered by the data, an average of at least fifteen inmates in each of those years received standardless FETs in excess of ten years, and it is reasonable to infer that FETs in excess of ten years have continued to be imposed by the Board in the ensuing years.

As the caselaw cited in Point II illustrates, our courts consistently have demonstrated a refusal to allow administrative agencies, including the New Jersey Parole Board, to make agency decisions that are unfair, arbitrary and lacking in coherent standards. And with specific reference to the Board's imposition of FETs in excess of the Administrative Code's presumptive FET of twenty-seven months for inmates convicted of murder, the court in Berta, noted that the "clearly inappropriate" standard that must be satisfied if an FET beyond the presumptive term is imposed, constitutes a "high threshold to vault" and requires the Board to "overcome the presumption by explaining why a twenty-seven-month FET is clearly

inappropriate.” 473 N.J. Super. at 322-23. The Berta court admonished the Board that it “cannot simply pick a number out of thin air.” Id. at 323.

But as the data sent by the Parole Board to the OPD demonstrates, the Board is doing just that on a regular basis, in approximately 26% of the cases in which parole was denied from 2012-2019.

As this Court has clearly stated, “the need for fairness is as urgent in the parole process as elsewhere in the law. . . .” Monks, 58 N.J. at 246.

In the matter before the Court, Petitioner Cowan, who had been incarcerated for over twenty-seven years when his parole request was last denied, was given a two-hundred-month FET, more than seven times as long as the presumptive twenty-seven-month FET prescribed for inmates convicted of murder. If this Court closely examines the decision of the three member Panel that imposed the two-hundred-month FET, (Ra244-253), or the Parole Board’s six-page decision affirming that determination, it will find no explanation, standards or criteria that purport to correlate the Panel’s or the Board’s concerns about Cowan’s rehabilitative efforts with the two-hundred-month FET imposed by the Panel and affirmed by the Board. There is no correlation whatsoever. The closest attempt at an explanation of the two-hundred-month FET consists of this excerpt from the three-member Panel decision:

The three member Board panel believes that a two hundred (200) month future eligibility term (which commences on

your parole eligibility date and which is reduced by applicable credits) is necessary in order to address the issues detailed herein.

[(Ra252)].

That standardless explanation by the three-member Panel is unfair, arbitrary, and unsustainable. It clearly violates New Jersey's "fundamental fairness" doctrine, which "protects against arbitrary and unjust governmental action." See Thomas, 470 N.J. Super. at 200 (quoting Njango, 247 N.J. at 533-537).

### **CONCLUSION**

This Court should reverse the Appellate Division decision and remand the matter to the Parole Board to set a new FET for Petitioner Cowan, supported by adequate standards that are consistent with New Jersey's fundamental fairness doctrine.

Respectfully submitted,

Pashman Stein Walder Hayden, PC

By: /s/Raymond M. Brown  
Ramond M. Brown

Dated: April 1, 2025